Fordham International Law Journal

Volume 4, *Issue* 2 1980 *Article* 1

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Abstract

The analysis contained in this article is divided into four parts. Part I will analyze the validity of the agreements under the law of treaties. Part II will discuss the power of the President to conclude these agreements. Part III will explore the various constitutional problems raised by requiring American claimants to seek binding third-party arbitration in the International Arbitral Tribunal and by banning the prosecution of claims against Iran hostages. Part IV will discuss the constitutional issues raised by freezing the assets of the estate of the Shah and his family.

FORDHAM
INTERNATIONAL
LAW JOURNAL

VOLUME 4 1980-81 NUMBER 2

THE IRANIAN HOSTAGE AGREEMENTS: A LEGAL ANALYSIS*

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INTRODUCTION

It seems that every year a new issue appears which taxes the energy and stamina of the corporate bar. In 1977 and 1978, it was the issue of questionable foreign payments abroad and the Foreign Corrupt Practices Act.[1] After that it was the near bankruptcy of the Chrysler Corporation. In 1979 and 1980 it was the freezing of Iranian assets in the United States.[2] In 1981 it will undoubtedly be the issues raised by the recent accords with Iran.

On January 19, 1981, the United States and the government of Iran entered into a complicated series of agreements which effectuated the release of the fifty-two American hostages held in Iran.[3]

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* This Article is based on an earlier Article by the authors entitled *Hostage Agreement: 1,001 Nightmares*, published in the New York Law Journal. *See* N.Y.L.J., Feb. 10, 1981, at 1, col. 2.

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1. Pub. L. No. 95-213, 91 Stat. 1494-98 (1977) (codified at 15 U.S.C. §§ 78a note, 78m, 78dd-1, 78dd-2, 78ff (Supp. III 1979)).

2. Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979).

3. For a text of the Agreements between Iran and the United States to resolve the hostage situation, see 20 INT'L LEGAL MATS. 224 (1981) [hereinafter cited as Agreements]; N.Y. Times, Jan. 20, 1981, at A4, col. 1. President Carter implemented the Agreements via Executive Orders Nos. 12,276-85 on January 19, 1981. *See* Direction Relating to Establishment of Escrow Accounts, Exec. Order No. 12,276, 46 Fed. Reg. 7,913 (1981); Direction to Transfer Iranian Government Assets, Exec. Order No. 12,277, 46 Fed. Reg. 7,915 (1981); Direction to Transfer Iranian Government Assets

At the outset, the salient points of those agreements will be summarized:

1. Iran released the fifty-two American hostages held in Teheran.

2. By executive order, the President of the United States nullified existing attachments of Iranian assets in the United States and ordered the immediate transfer to an escrow account in the Bank of England of almost 8 billion dollars of Iranian assets held in the United States and in foreign branches of United States banks. The United States further agreed to bring about, within six months of the date of the Agreements, the transfer abroad of approximately 4 billion dollars of additional Iranian assets, mostly assets held in domestic branches of United States banks.

3. Iran agreed to repay all syndicated bank loans, in which a United States bank was a party, with approximately 3.7 billion dollars of the initial 8 billion dollars transferred abroad. Another 1.4 billion dollars of that initial 8 billion dollars was placed in a fund to be used to repay non-syndicated bank loans and to settle any disputes over interest owing the banks.

4. Non-bank American claimants, whether corporations or individuals, were required to submit their claims against Iran to an International Arbitral Tribunal if they failed to reach a settlement with Iran within six months of the entry into force of the Agreements. Iran agreed to the establishment of a 1 billion dollar security fund out of which these claims would be paid. The initial source of the fund would be the 4 billion dollars of Iranian assets still to be transferred abroad. Iran agreed to replenish this fund whenever it sinks below 500 million dollars.

5. The United States agreed to bar and preclude the prosecution against Iran of any claims by American nationals arising out of

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Overseas, Exec. Order No. 12,278, 46 Fed. Reg. 7,917 (1981); Direction to Transfer Iranian Government Assets Held by Domestic Banks, Exec. Order No. 12,279, 46 Fed. Reg. 7,919 (1981); Direction to Transfer Iranian Government Financial Assets Held by Non-Banking Institutions, Exec. Order No. 12,280, 46 Fed. Reg. 7,921 (1981); Direction to Transfer Certain Iranian Government Assets, Exec. Order No. 12,281, 46 Fed. Reg. 7,923 (1981); Revocation of Prohibitions Against Transactions Involving Iran, Exec. Order No. 12,282, 46 Fed. Reg. 7,925 (1981); Non-Prosecution of Claims of Hostages and for Actions at the United States Embassy and Elsewhere, Exec. Order No. 12,283, 46 Fed. Reg. 7,927 (1981); Restriction on the Transfer of Property of the Former Shah of Iran, Exec. Order No. 12,284, 46 Fed. Reg. 7,929 (1981); President's Commission on Hostage Compensation, Exec. Order No. 12,285, 46 Fed. Reg. 7,931 (1981). President Reagan ratified President Carter's executive orders on February 24, 1981, Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981).

any occurrence relating to the seizure of the hostages in Teheran. President Carter, however, established a Presidential Commission on Hostage Compensation to consider the general question of whether the United States should provide financial compensation to United States citizens held captive by a foreign government. The Commission was asked to make specific recommendations with respect to the fifty-two hostages held in Teheran.

6. The United States agreed to assist Iran in locating and recovering the assets of the Shah and his family in the United States to which Iran may be entitled.

7. The United States further agreed to revoke trade sanctions against Iran and pledged not to intervene directly or indirectly in Iran's internal affairs.

8. On February 24, 1981, President Reagan issued an executive order ratifying President Carter's earlier executive orders. All claims which could be presented to the Arbitral Tribunal were suspended except insofar as they may be presented to the Tribunal. During the period of suspension, the claims were to have no effect in American courts. This suspension, however, terminates upon a determination by the Tribunal that it does not have jurisdiction over the claim. By its terms, however, the executive order does not apply to any claim covering the validity or payment of a standby letter of credit, performance or payment bond or other similar instrument. President Reagan's order did not refer to the hostages' claims since these claims were already technically barred from United States court jurisdiction by the earlier executive orders of President Carter.

In this Article, the authors will make a tentative appraisal of some of the many and difficult issues raised by these Agreements. The primary emphasis will be on questions of international and constitutional law. At the outset two caveats should be stated:

1. Certain elements of these agreements are still secret and confusion exists as to how other elements, particularly with respect to the transfer of the 4 billion dollars of assets left in the United States, are to be implemented. Writing in such a fluid situation is not ideal for any author. Subsequent events will almost necessarily require a reappraisal and refinement of the analysis.

2. Many of the issues discussed touch on fundamental and difficult policy and legal questions. The need to compress the analysis into limited space has required us to give summary treatment to issues that deserve richer and more detailed discussion.

The analysis contained in this Article is divided into four parts. Part I will analyze the validity of the agreements under the law of treaties. Part II will discuss the power of the President to conclude these agreements. This part will also focus on the degree of congressional authorization which existed to support the President in his actions. Part III will explore the various constitutional problems raised by requiring American claimants to seek binding third-party arbitration in the International Arbitral Tribunal and by banning the prosecution of claims against Iran by the hostages. Part IV will discuss the constitutional issues raised by freezing the assets of the estate of the Shah and his family.

I. *VALIDITY OF THE AGREEMENTS UNDER THE LAW OF TREATIES*

The validity of an international agreement is determined on an international plane by international law, whereas within a municipal legal system it is governed by municipal law. An agreement may be valid internationally and yet be incapable of implementation because it violates the municipal law of one of the parties. In such case there is a breach of the agreement and the party constrained by the impediments of its own legal system becomes internationally responsible to the other party for the breach. Whatever the status of the Iranian Agreements under United States law, article 27 of the 1969 Vienna Convention on the Law of Treaties[4] declares that a state cannot use internal law prohibitions to justify failure to perform an agreement. Only when the violation of internal law regarding competence to conclude agreements is "manifest," that is, easily and objectively evident to other states, and concerned with a rule of internal law of fundamental importance, may the agreement be invalidated. It becomes obvious, even from the discussion in the second part of this Article, that the provisions of the United States Constitution concerning the competence of the President to conclude international agreements are far from clear and their alleged violation would be far from "manifest."

While violation of the United States Constitution would not qualify as grounds for invalidating the Agreements, there are three

4. U.N. Doc. A/Conf. 39/27, (1969), *reprinted in* 63 AM. J. INT'L L. 875 (1969); 8 INT'L LEGAL MATS. 679 (1969) [hereinafter cited as Vienna Convention]. Although not ratified by the United States, the Vienna Convention would provide a legal basis for a United States decision regarding compliance with the Agreements, since by and large the convention embodies the international law of treaties.

other provisions in the Vienna Convention that might do so. According to article 49, "[i]f a state has been induced to conclude a treaty by the fraudulent conduct of another negotiating state, the state may invoke the fraud as invalidating its consent to be bound by the treaty."[5] The fraud provision, article 49, like other provisions of the Vienna Convention, is based on the International Law Commission's draft. According to the Commission's commentary on that article, one invoking fraud as a ground for invalidating a treaty must prove that the misrepresentation was an essential element in inducing the conclusion of the agreement. The commentary states, "[t]his expression [*i.e.*, fraudulent conduct] is designed to include any false statements, misrepresentations or other deceitful proceedings by which a state is induced to give consent to a treaty which it *would not otherwise have given.*"[6]

The Iranians' misrepresentation consisted in their repeated statements, as reported in the press, that the hostages were well and had not been mistreated. It is doubtful whether the knowledge that this was not true would have prevented the United States from concluding the Agreements. Moreover, it is very likely that, prior to signing the Agreements, the United States government knew that the hostages had been mistreated and subjected to abuse.

Article 51 proclaims that "[t]he expression of a state's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect."[7] After a superficial reading, this provision would seem to provide grounds for the invalidation of the Agreements. The principle underlying article 51 has a long history, going back to 1526, when the King of France agreed to cede the province of Burgundy while he was in Spanish captivity.[8] Article 51, however, would not be applicable here, because the imprisoned United States Embassy personnel were not representing the United States in the conclusion of these Agreements.

The most likely ground for invalidation is article 52, which deals with coercion of the state itself. Article 52 declares that "[a]

5. Vienna Convention, *supra* note 4, art. 49.

6. Report of the International Law Commission on the Work of its Eighteenth Session, Geneva, May 4-July 19, 1966, *reprinted in* 61 AM. J. INT'L L. 253, 404 (1967) (emphasis added).

7. Vienna Convention, *supra* note 4, art. 51.

8. 1 C. ROUSSEAU, DROIT INTERNATIONAL PUBLIC 148 (1970).

treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations."[9] This principle is of newer vintage and reflects the post-war trend to ban the use of force in relations between states. The type and amount of coercion envisaged here are such as would violate the prohibitions contained in article 2, paragraph 4 of the UN Charter, which states, "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."[10] The mistreatment of American citizens by Iran may not appear to pose a threat to the territorial integrity and political independence of the much more powerful United States. Under customary international law, however, using force against a state's citizens, not even diplomatic agents, is considered sufficient provocation to justify use of force in self-defense.[11] The coercion which might trigger a measure of self-defense should be powerful enough to qualify for invalidation of an international agreement under article 52.

Paragraph 4 of article 2, however, was not the only principle of the Charter violated by the imprisonment of United States Embassy personnel in Teheran. The imprisonment also violated paragraph 3 of article 2, on the duty to settle international disputes by peaceful means, as well as the ban on forceful reprisals. This ban is not actually contained in the Charter, but forceful reprisals are explicitly prohibited in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Amongst States,[12] which is the General Assembly's interpretation of the

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9. Vienna Convention, *supra* note 4, art. 52. For an expository analysis and critique of the International Law Commission's work on this provision, beginning in 1952 and ending with its final draft proposal of 1966, see Stone, *De Victoribus Victis: The International Law Commission and Imposed Treaties of Peace*, 8 VA. J. INT'L L. 356 (1968). Another fine analysis, found in Malawer, *A New Concept of Consent and World Public Order: Coerced Treaties and the Convention on the Law of Treaties*, 4 VAND. INT'L 1 (1970), emphasizes developments beginning with the presentation of the Final Draft Articles to the General Assembly of the United Nations in 1966 and including the adoption of article 52 by the Vienna Conference of 1968-1969. For a debate on whether the Iranian Agreements are legally binding in light of art. 52, see Gordon & Malawer, *Iranian Hostage Agreements: A Debate*, Nat'l L.J., Apr. 20, 1981, at 13.

10. U.N. CHARTER art. 2, para. 4.

11. D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 91-94, 184-86 (1958).

12. G.A. Res. 2625 (XXV), 13 U.N. GAOR, Supp. (No. 18) 337, U.N. Doc. A/8018, *reprinted in* 9 INT'L LEGAL MATS. 1292 (1970).

Charter. The fact that the Agreements may be invalidated does not of course mean that they ought to be. Although the Vienna Convention declares agreements procured by force to be void, this extreme penalty should probably be reserved for agreements procured by the threat of armed attack on the territory of a state. In ratifying President Carter's actions, President Reagan has obviously decided to reject using this argument to justify invalidating the Agreements.

II. *POWER OF THE PRESIDENT TO CONCLUDE THE AGREEMENTS*

Although the United States can not invoke constitutional limitations on the power of the President for the purpose of invalidating the Iranian Agreements on an international plane, it may yet be unable to carry out the Agreements' provisions because the transgression of these constitutional limitations could render the Agreements invalid internally. Under the Vienna Convention, Iran was clearly entitled to accept the President's claim to possess sufficient power to conclude these Agreements. Article 7, paragraph 2(a), of the Vienna Convention assumes the competence of heads of state to conclude international agreements. According to article 27, this can only be rebutted if it is a manifest violation of the United States Constitution.

In the United States, both the executive and the legislative branches play a role in the conduct of foreign affairs in general and in the conclusion of international agreements in particular. How this broad power is distributed between the two branches is not clearly delimited, however. Some functions "belong to the President, some to Congress, some to the President-and-Senate; some can be exercised by either the President or the Congress, some require the joint authority of both."[13] To determine whether the President had the constitutional power to conclude the Iranian Agreements requires an analysis of the respective powers of the President and Congress in the field of foreign relations. In his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,[14] Justice Jackson described three ways in which presidential and congressional power can interact.

1. "When the President takes measures incompatible with the

13. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 32 (1972).
14. 343 U.S. 579 (1952).

expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[15]

This was the situation presented in the *Youngstown* case, but it is not the situation presented by the Iranian Agreements. Congress, neither expressly nor impliedly, forbade the President to transfer Iranian assets, nullify attachments, create an Arbitral Tribunal or extinguish claims of American citizens. The court in *Electronic Data Systems Corp. of Iran v. Social Security Organization of the Government of Iran*,[16] however, reached a different conclusion. According to the court, by ordering Iranian assets transferred, the President was exercising a power expressly denied him by Congress. As will be more fully developed below, it is the authors' opinion that the court was not correct in its assessment of congressional intent.

Even if the court were correct, however, this would not necessarily conclude the analysis. Justice Jackson recognized that the President might have his own constitutional power to act even in situations where Congress had acted inconsistently. *United States v. Guy W. Capps, Inc.*[17] focused on an executive agreement which contradicted a prior congressional statute regulating commerce with foreign nations. Since "the power to regulate interstate and foreign commerce is not among the powers incident to the Presidential office, but is expressly vested by the Constitution in the Congress,"[18] the executive agreement could not override congressional legislation. In *Capps*, of course, the President could not point to an "inherent constitutional power"[19] which authorized him to conclude the particular executive agreement.

The President's constitutional power to "receive ambassadors,"[20] however, might provide the necessary implied authority to conclude the Iranian Agreements. As an incident of this power, the President may or may not recognize a foreign government.[21] If the President has the power to recognize a foreign government, arguendo, he has the power to do what is necessary to stabilize that recognition. The Iranian Agreements arguably did just that.

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15. *Id.* at 637.
16. No. CA3-79-0218-F (N.D. Tex. Feb. 12, 1981).
17. 204 F.2d 655 (4th Cir.), *aff'd*, 348 U.S. 296 (1955).
18. *Id.* at 659.
19. *Id.*
20. U.S. CONST. art. II, § 3.
21. *See* L. HENKIN, *supra* note 13, at 47-48.

2. "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[22]

Goldwater v. Carter[23] may have presented one such "twilight zone" issue. The case centered on whether the President had the power to abrogate a treaty in the absence of express congressional authorization. The resolution of such issues seems deceptively simple. The Restatement (Second) of the Foreign Relations Law of the United States provides that an international agreement made as an executive agreement without reference to a treaty or act of Congress may deal with issues which fall within the President's independent constitutional power.[24] The central problem, however, is to define the scope of the President's independent constitutional power to act in foreign affairs, particularly in situations where Congress has not acted. One view would give the President wide scope in the exercise of foreign affairs power, *i.e.*, plenary power. The leading case espousing this broad view of presidential power is *United States v. Curtiss-Wright Export Corp.*[25] Here Justice Sutherland states:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provision of the Constitution.[26]

In *United States v. Pink*,[27] and *United States v. Belmont*,[28] the Supreme Court reiterated this broad view of presidential power, in

22. 343 U.S. at 637.

23. 444 U.S. 996 (1979). For a discussion of the President's power to terminate treaties and the political question doctrine, see Comment, *Termination of Treaties as a Political Question: The Role of Congress after Goldwater v. Carter*, 4 FORDHAM INT'L L.J. 81 (1980).

24. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 121 (1965).

25. 299 U.S. 304 (1936).

26. *Id.* at 319-20.

27. 315 U.S. 203 (1942).

28. 301 U.S. 324 (1937).

upholding the President's power to conclude executive agreements with foreign governments relating to the establishment and stabilization of relations between governments.

> That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government.[29]

The authors contend, however, that the Iranian Agreements do not require any analysis of the scope of the President's foreign affairs power. The Agreements were not a case where the President acted in the absence of congressional authorization but rather a case of the President acting with congressional authorization.

3. "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[30] President Carter based his authority to conclude the Iranian Agreements not only on his independent power as President but also on congressional authorization. If he were correct in this assessment, whether the Constitution assigns a particular power to the President or the Congress becomes academic.[31] By cooperating, the President and Congress can exercise the full foreign affairs power of the national government.

President Carter's reliance on congressional authorization, however, bears careful scrutiny. The exact degree of congressional cooperation may vary with respect to different points of the Agreements.

The President relied on several statutes as authorizing his actions under the Agreements. By far the broadest delegation of congressional authority is contained in chapter 23 of title 22 of the United States Code.[32] Section 1732 states that the President can

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29. *Id.* at 330.

30. 343 U.S. at 635 (footnote omitted). The recent case of *Chas. T. Main Int'l, Inc. v. Reagan*, Civ. No. 81-315-C (D. Mass. Mar. 17, 1981), cited this language approvingly in upholding the constitutionality of the Iranian accords. Slip op. at 9.

31. *See* Executive Orders Nos. 12,276-85, *supra* note 3.

32. 22 U.S.C. § 1732 (1976). That section reads in its entirety:

"use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release . . . [of any United States citizen] unjustly deprived of his liberty by or under the authority of any foreign government."[33] On the face of the statute, there would seem to be a clear and broad authorization to negotiate the release of the hostages and do whatever else is reasonable and necessary for that purpose. Applying *McCulloch v. Maryland*[34] principles to this authorization, the President could nullify the attachments, channel claims of Americans into arbitration and even prohibit the hostages from prosecuting their claims.[35] Section 1732, however, was originally part of a law enacted in 1868. The congressional debates preceding passage of this act mainly focused on the plight of naturalized American citizens who were harassed by the governments of their former countries.[36]

Release of citizens imprisoned by foreign governments

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

33. *Id.*

34. 17 U.S. (4 Wheat.) 315 (1819).

35. In *McCulloch*, Chief Justice Marshall spoke not only of a required nexus between means and ends, but also of a requirement that Congress not abuse its authority by enacting laws beyond its constitutionally entrusted powers "under the pretext" of exercising powers actually granted to it. In subsequent years, however, the Supreme Court has ordinarily refused to inquire into a statute's "real" purposes or its drafters' "true" motives when inquiring into Congress' affirmative authority to enact the statute—so long as it can rationally be thought to promote legitimate ends that Congress might have been pursuing. If one legislative end is proper, the fact that other ends not within the enumerated powers of Congress might also be achieved through the legislation does not invalidate the derivative exercise of an enumerated power. Motive is frequently of greater relevance in assessing whether legislation or administrative action that is concededly within the affirmative reach of government's power transgresses some prohibition on how such power is to be exercised.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW 229 (1978) (footnotes omitted).

36. *See, e.g.*, CONG. GLOBE, 40th Cong., 2d Sess. 4232, 4356-57 (1868). For example, one of the main objectives of the statute, as mentioned in the congressional debate, was to deal with "the action of England in respect to our naturalized citizens from Ireland." *Id.* at 4232.

Although the legislative history is not totally clear, the seeming purpose of the act was to guarantee the right of expatriation and provide the President with means of protecting naturalized Americans when they traveled abroad. Thus, while the precise language of the act covered the release of any United States citizen held abroad, the purpose of the law may have been more limited, *i.e.*, to cover only expatriated or naturalized United States citizens. On the other hand, the original House bill indicated specific retaliatory methods which the President could use to effectuate the release of Americans held abroad.[37] The President was empowered to detain foreign nationals in the United States or suspend commercial relations with a foreign power. The language of the statute as passed, however, did not include these specific methods; rather it gave the President power to use any means short of war to effectuate their release. This could be considered as evidence that, in attempting to obtain the release of American hostages, Congress wanted to grant the President a wide choice of options. The court in *Electronic Data Systems*,[38] however, read this statute more narrowly, stating that in *Worthy v. Herter*,[39] "the Court indicated that the instrumentalities which the President must use to fulfill this congressional mandate are 'diplomatic or foreign-service consular.' "[40] The *Worthy* case, upon which *Electronic Data Systems* relies, cites no authority for limiting the President's options to "diplomatic or foreign-service consular" methods. Moreover, the legislative history of the statute does not seem to support such a narrow restriction on the President's choice of options.[41] As has been mentioned, the original House bill would have authorized the President to detain aliens or enact commercial measures to retaliate for the taking of American hostages. Thus, the legislative history of 22 U.S.C. section 1732 seems to support a wide choice of presidential options to release hostages but perhaps only hostages who are expatriated or naturalized Americans.

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37. *See* CONG. GLOBE, 40th Cong., 2d Sess. 1798, 4204-05 (1868).

38. No. CA3-79-0218-F (N.D. Tex. Feb. 12, 1981).

39. 270 F.2d 905 (D.C. Cir. 1959).

40. No. CA3-79-0218-F, slip op. at 24 (N.D. Tex. Feb. 12, 1981).

41. Nor does the history of events prior to 1866 support such a narrow restriction. In 1854, the President ordered Graytown, Nicaragua bombarded when the local authorities did not make reparations for an attack by a mob on the United States Consul. See the language of the court in *Durand v. Hollins*, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4,186) with respect to this incident. *See also* Sorensen, *Law: The Most Powerful Alternative to War*, 4 FORDHAM INT'L L.J. 13, 14 n.3 (1980).

The President also pointed to the National Emergencies Act[42] and the International Emergency Economic Powers Act (IEEPA)[43] as additional evidence of congressional authorization. Prior to 1977, the Trading With the Enemy Act[44] delegated the President wide powers during war or national emergency to deal with foreign assets in the United States. These powers were interpreted broadly.[45] In 1977, however, the Trading With the Enemy Act was amended to restrict its coverage to wartime situations. With respect to future national emergencies, the President was now required to comply with the National Emergency Act and IEEPA. IEEPA represented an attempt by Congress to "revise and delimit the President's authority to regulate international economic transactions during . . . national emergencies."[46] Under IEEPA, the President was denied four powers which had been delegated to him in the older Trading With the Enemy Act. They were: "1) the power to vest, *i.e.*, to take title to foreign property; 2) the power to regulate a purely domestic transaction; 3) the power to regulate gold or bullion; and 4) the power to seize records."[47]

But to say that IEEPA is not as far reaching a mandate as the Trading With the Enemy Act is not to say that IEEPA did not authorize each of the President's actions with respect to the Iranian Agreements. For example, in the Agreements the President transferred approximately 8 billion dollars of Iranian assets abroad and ordered American banks to transfer 4 billion dollars more of Iranian assets to the Federal Reserve Bank of New York within several months of the agreement. The language of 50 U.S.C. section 1702(a)(1)(B) empowering the President to "direct and compel . . . any . . . transfer [or] withdrawal" of assets would seem to be a precise delegation of authority to transfer the Iranian assets abroad. The court in *Electronic Data Systems*, however, characterized the President's order to transfer Iranian assets as an attempt "to vest custody and control of the assets in the Executive. This is a power which Congress declined to grant to the President with the enact-

42. 50 U.S.C. §§ 1601, 1621-22, 1631, 1641, 1651 (1976).

43. *Id.* §§ 1701-1706 (Supp. III 1979) [hereinafter cited as IEEPA].

44. 50 App. U.S.C. § 5(b) (1976).

45. *See, e.g.*, Sardino v. Federal Reserve Bank of N.Y., 361 F.2d 106 (2d Cir. 1966).

46. S. REP. NO. 466, 95th Cong., 1st Sess., *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 4540, 4541.

47. H.R. REP. NO. 459, 95th Cong., 1st Sess. 15 (1977).

ment of IEEPA in 1977."[48] It is true that Congress in IEEPA denied the President the power to vest in the United States title to foreign assets. The executive had routinely issued vesting orders under the Trading With the Enemy Act.[49] It would seem that President Carter by transferring Iranian assets merely moved the situs of the assets and left title to those assets in Iran. If Congress wished to deny the President the power to vest "custody and control" of foreign assets, what significance would the words "transfer [or] withdrawal" have in section 1702(a)(1)(B)? Any transfer of assets necessarily requires some degree of custody and control. The denial of the power to vest must mean the denial of the power of the President to take title to the assets in the name of the United States. The additional language of this subsection, giving the President the power to "nullify, [or] void . . . [the] exercising [of] any right, power, or privilege"[50] with respect to foreign assets would seem to be a similarly precise delegation to nullify preliminary attachments.

As for the channeling of claims into international arbitration and barring the hostages' claims against Iran, it could be argued that here, too, the President acted pursuant to a precise delegation of congressional authority. According to the language of IEEPA already cited, the President may "regulate . . . void . . . or prohibit . . . [the] exercising [of] any right, power, or privilege with respect to . . . any property in which any foreign country . . . has any interest . . . by any person . . . subject to the jurisdiction of the United States."[51] If this language does not explicitly authorize the President to affect claims of United States citizens, the authority to do so is at least a reasonable inference from the text.

The Iranian Agreements also require the President to freeze and prohibit the transfer of assets "within the control of the estate of the former Shah or any close relative of the former Shah served as a defendant in U.S. litigation brought by Iran to recover such property and assets as belonging to Iran."[52] IEEPA authorizes the President to "prohibit, any . . . transfer" of property in which "any foreign country or a national thereof has any interest."[53] The estate

48. No. CA3-79-0218-F, slip op. at 22 (N.D. Tex. Feb. 12, 1981).
49. *See, e.g.*, McGrath v. Dravo Corp., 183 F.2d 709 (3d Cir. 1950).
50. 50 U.S.C. § 1702(a)(1)(B) (Supp. III 1979).
51. *Id.*; *see* note 43 *supra* and accompanying text.
52. Agreements, *supra* note 3, § 12.
53. 50 U.S.C. § 1702(a)(1)(B) (Supp. III 1979).

and relatives of the Shah are presumably nationals of a foreign country and thus under IEEPA, the President can freeze any of their assets in the United States. According to the Agreements, however, the freeze of the Shah's assets will begin only when Iran provides proof that the estate of the Shah or one of his close relatives has been served as a defendant in a United States lawsuit. By executive order and by subsequent regulations, the President has also required United States citizens, under the pain of civil or criminal penalty, to report to the Treasury Department all information concerning the property of the Shah or his family.[54] Congress has delegated to the President the authority to issue regulations as may be necessary for the exercise of his power under IEEPA.[55] Congress had made willful violations of these regulations a criminal offense.[56] The President as long as he is acting reasonably to carry out his delegated powers seems to have the authority to mandate reporting by United States citizens and even to require United States citizens to produce documents. But it must be recalled that Congress in IEEPA specifically denied the President the power to seize records in carrying out his powers.[57]

Thus even though IEEPA is to be considered a limitation on prior presidential power in the international economic area, the precise points agreed to by the President with Iran seem within the scope of congressional authorization under IEEPA.[58] In essence then the Iranian settlement seems to be an international agreement, negotiated by the President with specific congressional authorization to deal with each of the separate issues covered by the agreement.

Even if it were not accepted that Congress delegated such wide authority to the President, obtaining judicial review of the President's power and authority to conclude these Agreements might be difficult, since courts may invoke the "political question doctrine" and refuse to rule on the validity of the President's actions. In

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54. *See* Exec. Order No. 12,284, 46 Fed. Reg. 7,929 (1981); and proposed regulations, 46 Fed. Reg. 14,330 (1981).

55. 50 U.S.C. § 1704 (Supp. III 1979).

56. *Id.* § 1705(b).

57. *See* note 47 *supra* and accompanying text.

58. The recent case of *Chas. T. Main Int'l, Inc. v. Reagan*, Civ. No. 81-315-C (D. Mass. Mar. 17, 1981), agreed with this conclusion, stating that the executive orders were "squarely within the authority vested in the President by IEEPA." Slip op. at 8.

Baker v. Carr,[59] Justice Brennan sketched a definition of the "political question doctrine":

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[60]

A court could rely on several of the factors listed by Justice Brennan and abstain from ruling on objections to the constitutionality of the President's actions. First of all, a court might conclude based on *Curtiss-Wright*[61] that the Constitution has committed decisions concerning matters covered by the Iranian Agreements to the autonomous power of the President, or to the power of the President and Congress acting together. The extent of any congressional delegation of authority or the President's use of that delegated authority are matters for the political branches of government to resolve between themselves. Second, a court could conclude that in this case there is "an unusual need for unquestioning adherence to a political decision already made" by a coordinate branch of government.[62] Thus, as a matter of prudence, a court could abstain from hearing a challenge to the President's authority. In the recent case of *Goldwater v. Carter*, four members of the Supreme Court categorized the issue of treaty termination as a political question. This plurality opinion emphasized that applying the political question doctrine in *Goldwater* was more compelling than in other cases "because it involves foreign relations . . . ."[63] Of course, in *Baker v. Carr*, Justice Brennan (who did not join the plurality opinion in *Goldwater*) stated: "Yet it is in

59. 369 U.S. 186 (1962).

60. *Id.* at 217.

61. 299 U.S. 304 (1936); *see* notes 25-26 *supra* and accompanying text.

62. 369 U.S. at 217.

63. 444 U.S. at 1003 (1979). *See also* Orlando v. Laird, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); Berk v. Laird, 429 F.2d 302 (2d Cir. 1970); note 24 *supra* and accompanying text.

error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[64] Thus the political question doctrine poses a major obstacle for those seeking judicial review of the President's actions, although, if Justice Brennan is correct, not an unsurmountable obstacle.

This doctrine might preclude review not only of "power distribution" questions between President and Congress but also any "power distribution" questions between Presidents Carter and Reagan. In *Electronic Data Systems*, the plaintiff pointed out that although President Carter's executive orders were "effective immediately," they were "expressly contingent upon the occurrence of an event which did not transpire during Mr. Carter's term of office: certification by Algeria that the fifty-two American hostages had 'safely departed from Iran.' "[65] This certification did not take place until after noon on January 20, 1981 when Ronald Reagan was already President of the United States. The court seemed persuaded by plaintiff's challenge to the due promulgation of the executive orders during President Carter's term of office. The court noted, however, that President Carter's executive order "has never been signed by Ronald Reagan . . . ."[66] Although true as of the date of the decision in *Electronic Data Systems* (February 12, 1981), President Reagan subsequently signed an executive order on February 24, 1981 ratifying President Carter's earlier executive orders. Thus, whatever technical objections to due promulgation may have existed, President Reagan's ratification of President Carter's actions seems to end any lingering doubts with respect to these matters. A court, if it wished, could avoid the question of due promulgation and subsequent ratification by ruling that any issue of the exercise of authority between two Presidents is a "political question," the resolution of which is to be determined by the executive branch.

III. *CONSTITUTIONAL OBJECTIONS RELATING TO BINDING INTERNATIONAL ARBITRATION AND THE BAN ON THE CLAIMS OF THE HOSTAGES*

The power of the President and Congress in the field of foreign affairs, though extensive, is not unlimited.[67] Various prohibi-

64. 369 U.S. at 211.
65. No. CA3-79-0218-F, slip op. at 19 (N.D. Tex. Feb. 12, 1981).
66. *Id.* at 18.
67. *See, e.g.*, Reid v. Covert, 354 U.S. 1 (1957).

tions contained in Article I, Section 9 of the United States Constitution, the due process clause of the fifth amendment, and fundamental notions of separation of powers act as restraints on the exercise of this federal power. Although questions of the distribution of power between the President and Congress may present a nonjusticiable political question, whether the President or Congress violated an individual's constitutional rights would not be a political question.[68]

A. *Article I, Section 9 Objections*

Article I, Section 9 of the United States Constitution contains various prohibitions on the exercise of federal power. One of these is the prohibition against enacting a bill of attainder. A bill of attainder is classically defined as a legislative punishment inflicted on an individual or upon easily identifiable members of a class.[69] Would American citizens required by the government to give up their attachments and submit to arbitration have any colorable bill of attainder claim? Before reaching the substantive bill of attainder issue, two threshold questions must be considered. First, does the bill of attainder prohibition restrict executive as well as legislative action? There is some authority that the prohibition was designed to restrict both the President and Congress.[70] Whether or not this

68. In *Orlando v. Laird*, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971), the Second Circuit invoked the political question doctrine to bar review of a soldier's orders to report for transfer to Vietnam. Orlando alleged that the Secretary of Defense and others exceeded their constitutional authority by ordering him to participate in a war not properly authorized by Congress. Orlando, however, did not also allege that the Secretary of Defense's order somehow violated due process or equal protection. In this regard, see Moore, *The Justiciability of Challenges to the Use of Military Forces Abroad*, 10 VA. J. INT'L L. 85 (1969):

> [S]ince these constitutional claims are intended to resolve a dispute about the relative role of Congress and the Executive and not to apply some constitutional prohibition limiting *total government power to act, such as the Bill of Rights*, if there are institutional checks other than judicial determination which each branch exercises on the other it is certainly relevant to the abstention decision.

Id. at 95 (emphasis added). *But see* O'Brien v. Brown, 409 U.S. 1 (1972) (per curiam). In his dissenting opinion, Justice Marshall seems to argue that the majority's decision to abstain is wrong because the political question doctrine should not be invoked in this case since the Bill of Rights is implicated. "The Illinois challenge requires the Court to determine whether certain rules adopted by the National Party for the selection of delegates violate the First and Fourteenth Amendment rights of Illinois voters . . . ." *Id.* at 12.

69. *See, e.g.*, United States v. Lovett, 328 U.S. 303, 315 (1946).

70. *See* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) (Black, J., concurring). *See also* L. TRIBE, *supra* note 35, at 499-500.

view is correct, however, is not important in the case at hand. In concluding the Iranian Agreements, the President acted pursuant to IEEPA, thus implicating Congress. Second, does the bill of attainder prohibition apply to corporations as well as individuals? Many of the claimants are obviously corporations. The answer seems to be yes. In *South Louisiana Grain Services Inc. v. Bergland*,[71] the court seemed to assume a corporation could raise a bill of attainder challenge. In that particular case the court rejected the bill of attainder argument but not because it was made by a corporation.[72] Assuming these initial questions are clarified, a United States claimant would now have to prove that the President's action forcing him into arbitration violated the bill of attainder clause. To constitute a bill of attainder, the President's actions must first be a "punishment" and second be aimed at a specifically designated class. It seems unlikely that United States claimants forced to submit to arbitration could meet the "punishment" requirement. First of all, bills of attainder usually evidence some punitive intent or judgment of blameworthiness, elements not present here. Second, while confiscation of property might be considered, under some circumstances, a sufficient "punishment" for the purposes of a bill of attainder,[73] the President acting pursuant to legislative authorization may not have confiscated any property interest by nullifying attachments of Iranian assets and channeling claims into arbitration. As will be discussed in more detail below,[74] the preliminary attachments of Iran's assets existed only because licensed by the Secretary of the Treasury. These licenses were revocable at will and were in fact revoked by President Carter pursuant to executive order. Because based on revocable licenses, the preliminary attachments did not seem to create a property interest in the Iranian assets.[75] Thus the nullification of the at-

71. 463 F. Supp. 783 (D.D.C.), *aff'd*, 590 F.2d 1204 (D.C. Cir. 1978).

72. *See also* Wisconsin Bingo Supply & Equip. Co. v. Wisconsin Bingo Control Bd., 88 Wis. 2d 293, 276 N.W.2d 716 (1979).

73. *See* Nixon v. Adm'r Gen. Serv., 433 U.S. 425, 474 (1977).

74. *See* notes 138-41 *infra* and accompanying text.

75. *See* Orvis v. Brownell, 345 U.S. 183 (1953). *See also* J. POWELL, REAL PROPERTY 585 (abr. ed. 1979) where the author remarks: "The ephemeral character of a license precludes any protections of the licensee as against interferences with his use by the licensor." With respect to these issues, however, see the Supreme Court decisions in Zittman v. McGrath, 341 U.S. 446 (1951), and 341 U.S. 471 (1951).

Claimants are arguing before the Second Circuit Court of Appeals that the preliminary attachments created property interests in Iranian assets that cannot be

tachments could not be characterized as a confiscation of *property* and hence not a punishment for the purpose of the bill of attainder clause. Similarly by forcing claimants into mandatory arbitration, the President's actions have not extinguished their claims, only changed the forum in which to seek enforcement.[76]

Finally, the specificity requirement would pose a problem for American claimants but perhaps it would not be an unsurmountable one. In *United States v. Brown*,[77] the Supreme Court declared unconstitutional a provision of the Labor-Management Reporting Disclosure Act of 1959 which made it a crime for a member of the Communist Party to serve as an officer or employee of a labor union. The Court remarked:

> The Solicitor General urges us to distinguish *Lovett* on the ground that the statute struck down there "singled out three identified individuals." It is of course true that § 504 does not contain the words "Archie Brown," and that it inflicts its deprivation upon more than three people. However . . . [i]t was not uncommon for English acts of attainder to inflict their deprivations upon *relatively large groups of people*, sometimes by description rather than name. Moreover, the statutes voided in *Cummings* and *Garland* were of this nature. We cannot agree that the fact that § 504 inflicts its deprivation upon the membership of the Communist Party rather than upon a list of named individuals takes it out of the category of bills of attainder.[78]

Thus, the claimants could argue, that by singling out a group who possess a particular characteristic, *i.e.*, claims against Iran, the President's actions meet the specificity of designation required to trigger the bill of attainder prohibition.

B. *Fifth Amendment Due Process Objections*

1. Impairment of the Obligation of Contracts

The Constitution provides that "No State shall . . . pass any

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taken without just compensation. N.Y.L.J., Mar. 31, 1981, at 1, col. 4. Oral statements by inferior Treasury officials that the licenses granted to claimants by the government were not revocable could not change expressly revocable licenses into irrevocable licenses. *See* Chas. T. Main Int'l, v. Reagan, Civ. No. 81-315-C, slip op. at 9 (D. Mass. Mar. 17, 1981).

76. *See* Meade v. United States, 2 Ct. Cl. 224 (1866), *aff'd*, 76 U.S. (9 Wall.) 691 (1869).

77. 381 U.S. 437 (1965).

78. *Id.* at 461 (footnotes omitted) (emphasis added).

. . . Law impairing the Obligation of Contracts . . . ."[79] Although technically a limitation on state power, it has been observed that the fifth amendment due process clause has essentially the same effect with respect to federal government action.[80] Can United States claimants forced to submit their contract claims against Iran to arbitration argue that the President's action violated their due process rights by impairing the obligations of these contracts? One easy, but perhaps less than satisfying response, would be to argue that the President's action did not impair any substantial obligation of claimants' contracts but rather impaired only procedural remedies for enforcing breaches of those contracts. Under the Agreements, satisfaction must now be sought, not in a United States court, but in an international arbitral tribunal. The substantive contractual obligation remains intact; the remedy to enforce these contractual obligations also exists, the only impairment of the contract is that the normal enforcement mechanism, suit in an American court, has been denied. Even if the prohibition against the impairment of contracts covers the impairment of remedies as well as substantive rights, then *Home Building & Loan Ass'n v. Blaisdell*[81] may justify the President's actions. In upholding a state mortgage moratorium law, the *Blaisdell* court found five factors significant:[82] a) "[T]he state legislature had declared in the Act itself that an emergency need for the protection of homeowners existed."[83] The President in his executive orders of January 19, 1981, referred to "the continuing unusual and extraordinary threat to the national security, foreign policy and economy of the United States upon which [he] based [his] declarations of national emergency" on November 14, 1979 and April 17, 1980.[84] b) "[T]he state law was enacted to protect a basic societal interest, not a favored group."[85] Here the President's actions were aimed at resolving a crisis that had national security and foreign policy implications. It would

79. U.S. CONST. art. I, § 10, cl. 1.

80. *See* Lynch v. United States, 292 U.S. 571 (1934); Amalgamated Meat Cutters & Butcher Workmen v. Connally, 337 F. Supp. 737, 763 (D.D.C. 1971); L. TRIBE, *supra* note 35, at 465 n.1.

81. 290 U.S. 398 (1934).

82. *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (construing Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934)).

83. 438 U.S. at 242.

84. Exec. Orders Nos. 12,276-85, 46 Fed. Reg. 7913-31 (1981). *See also* Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981).

85. 438 U.S. at 242.

seem a bit shortsighted to argue that the Iranian agreements were concluded solely to protect "a favored group," the hostages. c) "[T]he relief was appropriately tailored to the emergency that it was designed to meet."[86] Since Iran demanded the return of its assets in the United States in exchange for the hostages, requiring claimants to give up their attachments and seek redress in the Arbitral Tribunal seems reasonably tailored to meeting Iran's demands and resolving the national emergency. d) "[T]he imposed conditions were reasonable."[87] The President's actions did not impair any substantive contractual rights against Iran. Whatever rights claimants had to receive compensation for breach of contract remained intact. The President's actions required claimants to forego a United States forum and seek redress in the International Arbitral Tribunal. The nature of the impairment does not appear as drastic, severe or unreasonable given the circumstances. e) "[T]he legislation was limited to the duration of the emergency."[88] The President's action requiring United States claimants to seek arbitration does not seem to meet this final element. The Iranian agreements do not temporarily suspend redress in American courts; they permanently required claimants to seek satisfaction in the Arbitral Tribunal. In 1978, the Supreme Court in *Allied Structural Steel Co. v. Spannaus* again mentioned this time factor as important in ruling on questions of impairment of contract.[89] Whether failing to meet this single element of the *Blaisdell* test could result in a violation of the contracts clause is an open issue. President Reagan's Executive Order of February 24, 1981, however, somewhat mitigated the ban against proceeding in an American court, at least for some. Although he permanently suspended actions in United States courts, President Reagan stated that the suspension would terminate upon a determination by the Tribunal that it does not have jurisdiction over a claim.

2. Equal Protection

Equal protection principles are, of course, restraints imposed on the exercise of federal power through the fifth amendment due process clause.[90] The Agreements with Iran require non-bank

86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. Bolling v. Sharpe, 347 U.S. 497 (1954).

American claimants, whether corporations or individuals, either to settle their claims with Iran or seek recourse in the International Arbitral Tribunal. By separate agreement, bank loans are to be fully repaid by Iran. The effect of these agreements is to place a more difficult burden on non-bank claimants. Does acceptance by the United States of this unequal treatment raise equal protection objections to the Iranian Agreements?

First, the United States government did not impose unequal treatment on American claimants. Iran seemingly proposed to repay outstanding bank loans. The United States merely acquiesced in Iran's disparate treatment of American claimants. Second, even assuming acquiescence can be equated with affirmative classification of claimants, not every classification would violate equal protection principles, only unreasonable classifications. It may not be unreasonable to treat in one way those with loans, which are more susceptible to precise valuation, and treat in another way those with contract or expropriation claims, which are less susceptible to easy valuation. Third, when dealing with foreign affairs issues, the Supreme Court may exercise "a narrow standard of review of decisions made by the Congress or the President."[91] For example, in the area of immigration and naturalization, Congress may be able to make rules with respect to aliens living in the United States that might not otherwise comport with equal protection notions.[92] Of course, in this situation Congress and the President are applying unequal treatment to United States nationals. But perhaps even here the Supreme Court might apply a narrower standard of review because the Agreements implicate our relations with foreign powers.

3. Access to Adjudication in a United States Court

Prior to the 1950's the federal government, adopting a broad view of foreign sovereign immunity, blocked suit in United States courts against a foreign state without its consent.[93] In the early 1950's, the federal government switched to the restrictive theory of sovereign immunity. This meant that a foreign state was now entitled to claim jurisdictional immunity only when the suit involved

91. Mathews v. Diaz, 426 U.S. 67, 82 (1976).

92. L. TRIBE, *supra* note 35, at 281.

93. For a general discussion of access to adjudication in American courts, see Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day In Court*, 46 FORDHAM L. REV. 543 (1977).

its public acts but was not entitled to claim jurisdictional immunity when the suit involved its private acts. Even when private or commercial activities of a foreign state were involved, however, the restrictive theory did not assure that an American claimant could sue and recover against a foreign state in a United States court. First, the State Department, in response to diplomatic pressure or in return for concessions from the foreign state, might suggest that the suit be dismissed. Courts were wont to accept these "suggestions." Second, even though the restrictive theory denied jurisdictional immunity to a foreign state in commercial suits, the United States still maintained an absolute bar against all post-judgment execution against the foreign state. If the foreign state refused to pay the judgment, its assets in the United States could not be levied upon to enforce the judgment.

Under these circumstances, an American plaintiff had to be content to take whatever relief the government provided against the foreign state. The settlement of international claims was routinely handled by treaty or executive agreement with little or no challenge to the terms of these agreements. For example, the agreement of July, 1948 with Yugoslavia accepted 17 million dollars in full settlement of United States nationals' claims against Yugoslavia.[94] To recover on any claim, the American plaintiff had then to seek redress in the International Claims Commission of the United States established by the International Claims Settlement Act of 1949.[95] In 1958, the International Claims Commission was abolished and its functions transferred to the Foreign Claims Settlement Commission.[96]

Since 1976, however, with the enactment of the Foreign Sovereign Immunities Act,[97] an American claimant can not only sue but also effect post-judgment execution in an American court

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94. Agreement Regarding Pecuniary Claims, July 19, 1948, United States-Yugoslavia, 62 Stat. 2658, T.I.A.S. No. 1803, 89 U.N.T.S. 43. *See also* Settlement of Claims, signed May 11, 1979, United States-Peoples Republic of China, T.I.A.S. No. 9306, ___ U.S.T. ___, *reprinted in* 18 INT'L LEGAL MATS. 551 (1979). For a discussion of these agreements, see Comment, *The Blocked Chinese Assets—United States Claims Problem: The Lump-Sum Settlement Solution*, 3 FORDHAM INT'L L.F. 51, 63 (1979).

95. 22 U.S.C. §§ 1621-1643 (1976).

96. The President's Reorganization Plan No. 1 of 1954, 68 Stat. 1279 (codified at 22 U.S.C. § 1622 (1976)) established the Foreign Claims Settlement Commission (FCSC) abolishing the International Claims Commission.

97. 28 U.S.C. §§ 1601-1607 (1976).

against a foreign government. If originally there was a general rule that a claimant could not sue a foreign state in an American court and if the Foreign Sovereign Immunities Act carved out exceptions to this rule, then the Iranian Agreements could be viewed as an exception to those exceptions, thereby reinstating the general rule with respect to these claimants. If the United States government had the power originally to block suit in an American court, it would seem that it has the power to reinstate that rule for these claimants. By blocking suits against foreign governments at one time and relaxing that ban at another, the President and the Congress followed the changing rules of general international law. In our legal system, however, international law ranks below the Constitution. It is perhaps on a par with federal statutes. As a result, adherence to rules of international law cannot abrogate the right to adjudicate a claim in a United States court if that right is protected by fifth amendment due process. That is the issue now to be considered.

One might object to this analysis by arguing that the Foreign Sovereign Immunities Act was passed to make the courts, not the President or the State Department, the decision-maker with respect to foreign sovereign immunity questions. The President's actions in reimposing absolute immunity from suit seem inconsistent with the expressed will of Congress in the Foreign Sovereign Immunities Act. It must be recognized that the Foreign Sovereign Immunities Act was enacted in 1976 and IEEPA in 1977. A later expression of congressional policy controls over an earlier expression of policy. By enacting IEEPA, it could be argued, Congress wished to return to the President power to decide questions of foreign sovereign immunity in times of national emergency.

Articles I and II of the Settlement of Claims Agreement between the United States and Iran require both governments to promote the settlement of commercial claims between their nationals and the other government.[98] Claims not settled within six months from the date of entry into force of the Agreements shall be submitted to binding third-party arbitration. This six month period, however, may be extended for an additional three month pe-

98. The text of the Settlement of Claims Agreement is reprinted in the N.Y. Times, Jan. 20, 1981, at A4, col. 3 [hereinafter cited as Claims Agreement]. *See* note 3 *supra*. Iran has agreed to begin negotiations with American claimants whose claims exceed $250,000. *See* N.Y. Times, Apr. 28, 1981, at A6, cols. 5-6.

riod at the request of either Iran or the United States. For those claimants who fail to settle their claims within the applicable time period and who must seek arbitration, the International Arbitral Tribunal will have one-third representation of each of the two countries. The final third will be appointed by "mutual agreement" of the two countries. Certain American claims, however, those which arise under a binding contract specifically providing for dispute resolution solely in a competent Iranian court, will not have access to arbitration. As for the hostages, they are prohibited from prosecuting claims against Iran either in a United States court or in the International Arbitral Tribunal.

To carry out the Settlement of Claims Agreement, President Reagan on February 24, 1981 issued an executive order suspending all claims pending in American courts which may be presented to the International Arbitral Tribunal.[99] This suspension terminates upon a determination that the International Arbitral Tribunal does not have jurisdiction over the claim.

To analyze potential due process objections to the Agreements and executive orders, we will first consider the American claimants who do have access to the Tribunal, then those claimants who do not have such access, and finally the hostages.

a. *claimants who have access to the arbitral tribunal*

There does not seem to be a constitutional right that an American plaintiff have access to a court *for the resolution of a debt claim.* In *United States v. Kras*,[100] plaintiff, an indigent debtor, challenged bankruptcy fee requirements on the ground that he had a right of access to a court in order to effectuate a discharge in bankruptcy of debts owed his creditors. In rejecting his constitutional claim, the Supreme Court said:

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99. Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981). The order, however, did not apply to any claim concerning the validity or payment of a standby letter of credit, performance or payment bond or other similar instrument. The complex questions involving standby letters of credit issued by American banks in favor of Iranian banks is a subject beyond the scope of this Article. For a discussion of these issues, see Note, *Letters of Credit: Exploring the Boundaries of Injunction Against Honor*, 4 FORDHAM INT'L L.J. 161 (1980). These issues are the focus of extensive and ongoing litigation. *See, e.g.*, KMW Int'l v. Chase Manhattan Bank, N.A., 606 F.2d 10 (2d Cir. 1979); American Bell Int'l, Inc. v. Islamic Republic of Iran, 474 F. Supp. 420 (S.D.N.Y. 1979).

100. 409 U.S. 434 (1973).

> Nor is the Government's control over the establishment, enforcement, or dissolution of debts nearly so exclusive as Connecticut's control over the marriage relationship in *Boddie* . . . . However unrealistic the remedy may be in a particular situation, a debtor, in theory, and often in actuality, may adjust his debts by negotiated agreement with his creditors. At times the happy passage of the applicable limitation period, or other acceptable creditor arrangement, will provide the answer.[101]

In the case of the Iranian settlement, it is plaintiff creditors who argue that they have a right of access to a court to compel the payment of a claim. But the United States has provided alternative claim resolution mechanisms, either voluntary settlement or arbitration. Resort to a court is thus not the only avenue for resolution of their claims. Claimants have access to a forum effectively empowered to settle their disputes. The claimants may argue, however, that although they do not have a due process right of access to a court, they do have a due process right of access to a United States forum, in this case, the Arbitral Tribunal is not totally American controlled. But in forum non conveniens cases brought in federal courts, American judges have remarked that an American plaintiff has *no absolute right, under all circumstances*, to have his case heard in a United States forum.[102] The courts permit cases to be transferred to a foreign forum if a balance of factors strongly favors the transfer.

If the claimants cannot clearly demonstrate a constitutional right of access to an American forum, they may argue that it is a violation of due process to relegate them to an international forum when the security provided them in the international forum is not equal to what had been obtained by attachment in the American forum. In *Swift & Co. Packers v. Compania Columbiana Del Caribe, S.A.*,[103] Justice Frankfurter remarked that it was improper to remit an American plaintiff to a foreign court without assuring that the foreign defendant would give security equal to what had been obtained by attachment in the United States court.[104]

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101. *Id.* at 445. The case referred to by the Court is *Boddie v. Connecticut*, 401 U.S. 371 (1971).

102. *See* Olympic Corp. v. Societe Generale, 462 F.2d 376, 378 (2d Cir. 1972); DeSairigne v. Gould, 83 F. Supp. 270 (S.D.N.Y. 1949).

103. 339 U.S. 684 (1950).

104. *Id.* at 697-98.

But has equal security been provided in the international forum? The amount of Iranian property attached in the United States exceeded 1 billion dollars. Iran has agreed to provide a 1 billion dollar escrow fund from which claim judgments in the Tribunal will be paid and to replenish the fund whenever it sinks below $500 million. There is no guarantee, however, that Iran will live up to this obligation; consequently, security equal to the American attachments may not have been provided. Of course, it must be realized that the defenses of foreign sovereign immunity and act of state are not available to Iran in the Tribunal. But this is not necessarily an advantage gained by American claimants because, prior to the Agreements, these defenses might have been equally unavailable to Iran in an American court.[105] At best, the Iranian Agreements relieve claimants of having to defeat potentially complex act of state and sovereign immunity defenses. Thus, in an American court there might have been greater dollar security through attachment but more difficulty in countering possible defenses of Iran. In the Tribunal, there seems to be less dollar security but no difficulty in dealing with these possible defenses of Iran. Whether the American claimants may be viewed as better off with this arrangement is debatable. Thus, even if Justice Frankfurter's words could be construed as dealing with the overall stance of an American plaintiff, perhaps there are some serious due process problems involved with relegating claimants to the International Arbitral Tribunal.

Assuming that a court would reject a challenge that mandatory arbitration in an International Arbitral Tribunal violates due process, would an American claimant who submits to arbitration but whose claim is not satisfied because Iran refuses to replenish the security fund have any due process claim against *the United States*?

Based on *Meade v. United States*,[106] where a claims commission has been established to resolve claims against a foreign state,

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105. *See* 22 U.S.C. § 2370(e)(2) (1976). This so-called Hickenlooper amendment has been interpreted narrowly. *See, e.g.*, Menendez v. Saks & Co., 485 F.2d 1355, 1371-73 (2d Cir. 1973). In a case where the Hickenlooper amendment did not apply, Alfred Dunhill of London v. Republic of Cuba, 425 U.S. 682 (1976), four members of the Supreme Court argued that a foreign sovereign cannot avail itself of the Act of State defense with respect to a claim arising out of its purely commercial acts. *Id.* at 705-06. If this view were adopted by a lower court, Iran might not be able to assert this defense in many actions where the Hickenlooper amendment was held inapplicable.

106. 2 Ct. Cl. 224 (1866), *aff'd*, 76 U.S. (9 Wall.) 691 (1869).

settlements for less than full value do not give rise to any claim of fifth amendment taking by the United States. But as will be discussed in more detail with respect to the claims of the hostages, the rule against holding the United States liable for releasing or compromising claims against a foreign state may be due for judicial reconsideration.

b. *claimants who do not have access to the arbitral tribunal*

In the Claims Settlement Agreement with Iran, American claimants who have signed a "binding contract . . . specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts"[107] are denied access to the International Arbitral Tribunal. Whether a claimant fits within this exception to the Tribunal's jurisdiction presumably will be decided by the Tribunal itself. Article IV, section 4 of the Claims Settlement Agreement states that any question concerning the interpretation or application of the Agreement shall be decided by the Tribunal.[108]

Hopefully, the Tribunal will construe this exception narrowly, thereby maximizing the number of claimants permitted access to the Tribunal. For example, if a contract has a choice of law clause making Iranian law applicable to a dispute, this clause should not bar a claimant from access to the Tribunal. If there is a clear choice of forum clause granting sole jurisdiction over disputes to an Iranian court, the Tribunal could adopt the view that the present political climate in Iran makes performance of this term of the contract impossible or impracticable for an American claimant. As a result, the contractual term should not be considered "binding" and thus the claimant would come within the Tribunal's jurisdiction. Of course, with two-thirds non-American representation, there is no assurance that the Tribunal will read this exception to its jurisdiction so narrowly.

No matter how narrowly the exception to jurisdiction is construed, however, there will undoubtedly be situations where the Tribunal will decide that it has no jurisdiction over a claim. The Claims Settlement Agreement does not state in so many words that one denied access to the Tribunal must then seek redress in the Iranian courts. In his executive order of February 24, 1981, Presi-

107. Claims Agreement, *supra* note 98, art. II.
108. *Id.* art. IV, § 4.

dent Reagan ordered that upon a finding of a lack of jurisdiction by the Tribunal, the suspension of suit in an American court terminates. Presumably the claimant whose contract has a "binding" choice of forum clause will first present his claim to the Tribunal and obtain a ruling of no jurisdiction. After such a ruling, it would seem that such a claimant may then proceed with his action in the United States. This seems consistent with the Supreme Court's decision in *The Bremen v. Zapata Off-Shore Co.*[109] In that case, the Supreme Court recognized that a negotiated international choice of forum clause requiring suit in a neutral foreign jurisdiction should be enforced unless one of the parties to the contract could demonstrate that enforcement would be "unreasonable and unjust."[110] Under present circumstances, forcing an American claimant to sue in an Iranian court would seem "unreasonable and unjust." By permitting suit to proceed in an American court in cases where the Tribunal denies jurisdiction, President Reagan's action seems to be a recognition of the practicalities of the present international climate between the United States and Iran. But if these claimants are permitted to proceed by action in an American court, how will they enforce any judgment won? If by that time, all remaining assets of Iran are transferred abroad, enforcement would seem difficult, if not impossible.[111]

c. *the hostages' claims*

The Agreements seem to foreclose any adjudication of the former hostages' claims. President Carter's executive order creating a Commission on Hostage Compensation holds out only a hope that the United States will voluntarily award them some relief.[112] As far as access to United States courts is concerned, the Agreements merely follow the Foreign Sovereign Immunities Act in continuing foreign states immunity for torts committed outside the

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109. 407 U.S. 1 (1972).

110. *Id.* at 15.

111. Could these claimants with an American court judgment, now seek access to the escrow fund established to pay claims brought before the Tribunal? If the Tribunal ruled that it did not have jurisdiction over their claims in the first instance, it would seem unlikely that the Tribunal would now permit American court judgments obtained by these claimants to be paid out of the escrow fund.

112. Exec. Order No. 12,285, 46 Fed. Reg. 7,931 (1981). *See also* the Proposed Rules issued under the Hostage Relief Act of 1980, Pub. L. No. 96-449, 94 Stat. 1967. 46 Fed. Reg. 6,358 (1981). These rules would extend various benefits to hostages and their family members.

United States. Moreover it may be argued that in foreclosing access to the International Arbitral Tribunal, the Agreements conform to the doctrine that a state has discretion in settling claims against foreign states on an international plane since after "espousal" they become invested with national character.[113] In this case, the hostages presumably did not ask the United States government to "espouse" their claims but, according to one commentator, E. Borchard, a government may "espouse" claims of its nationals without their consent.[114]

Although the United States might have total discretion to release the hostages' claims against Iran, must the United States compensate the hostages for releasing their claims? The fifth amendment prohibits the federal government from taking private property for public use without just compensation. A strong argument in favor of compensation can be made. First of all, it seems that the hostages' claims against Iran can be characterized as property rights.[115] Second, when the United States released the claims of the hostages, there seems to have been a "taking" of these property rights. There may be a "taking" if the United States makes it possible for Iran to obtain the benefit of not having to defend and pay the claims. Third, the taking was for a public purpose in the stabilization of our relations with Iran. Although the argument is appealing, it has not as yet been accepted. First of all, the traditional doctrine of "espousal" states that once a government presents a claim to another government, the claim becomes in essence the claim of the government. If the United States then releases the claim, how can it be liable for "taking" its own claim? If there were any "taking" involved, the taking would be by the foreign government which refused to recognize the claim of the hostages. Second, no American court has definitively ruled that the releasing by the United States of a claim of one of its citizens was a compensable taking. In *Meade v. United States*, the court agreed that the release by the United States to a foreign government of a debt due an American citizen was a taking of property for public use. But the court then went on to rule that (a) since the United States had

113. Espousal means the assertion of the claim of an individual by the state to which he owes allegiance. Mavrommatis Palestine Concessions, [1924] P.C.I.J., ser. A, No. 2. *See* E. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 365 (1915).

114. *Id.* at 371.

115. *See* Gray v. United States, 21 Ct. Cl. 340, 343 (1886).

set up a claims commission to adjudicate all claims of American citizens and (b) because of procedural problems, the claims commission had denied Meade's claim, the decision of the commission was final.[116] In *Gray v. United States*,[117] the Court of Claims again accepted the fifth amendment "taking" argument but since the court in this case had jurisdiction only in an advisory capacity, the decision had no precedential value. It should be mentioned, however, that when Congress ultimately did agree to pay the type of claim at issue in *Gray*, the Supreme Court later referred to such payments as gratuities and not payments as of right, seemingly disagreeing with the fifth amendment "taking" argument.[118] In *Aris Gloves, Inc. v. United States*,[119] plaintiff owned a glove factory in East Germany. Russia dismantled the factory and removed the industrial equipment from East Germany. Plaintiff sued the *United States* for taking its property without just compensation. "Plaintiff argues that the signing of the Potsdam Treaty, relinquishing control of the territory containing plaintiff's glove manufacturing plant, and the failure of the United States to press for compensation for the loss of property belonging to American citizens, in essence, amounted to a licensing of the Russian government to dismantle and carry away plaintiff's property without having to pay compensation."[120] The court, however, denied the fifth amendment claim on the narrow ground that American property in enemy territory becomes enemy property regardless of the status of the owner.[121] Thus there was no need to pay compensation for the taking. In *Seery v. United States*,[122] the court did uphold the right of an American citizen to sue the United States when American soldiers "took" her villa in Austria (a non-war zone) at the end of World War II. In this case, however, the taking by the United States was of *tangible* property, not a claim against a foreign state. Thus, because of various technicalities and factual distinctions, the United States has never been found liable for releasing a *claim* of one of its citizens. It must be recognized that the Iranian Agreements pose a

116. *See* Meade v. United States, 2 Ct. Cl. 224 (1866), *aff'd*, 76 U.S. (9 Wall.) 691 (1869).

117. 21 Ct. Cl. 340, 343 (1886).

118. Blogge v. Balch, 162 U.S. 439, 457 (1896).

119. 420 F.2d 1386 (Ct. Cl. 1970).

120. *Id.* at 1390.

121. *Id.* at 1391-92.

122. 127 F. Supp. 601 (Ct. Cl. 1955).

situation where compensation may be required. *Aris Gloves* recognized that there is a taking when the United States permits another government to obtain the benefit of property. *Gray* recognized that a claim is property.[123] *Seery* recognized that the United States can be liable for "takings" in non-war zones. Thus the traditional doctrine of "espousal" which barred compensation for released claims may be due for reconsideration.

One final aspect of the problem must be reviewed, however. Can the Iranian Agreements (executive agreements) be considered a withdrawal of consent of the United States to be sued for any "taking"? In *United States v. Pink*, the Supreme Court upheld what amounted to an expropriation of the claims of foreign creditors pursuant to an executive agreement but it did not consider whether an executive agreement could take a claim of American citizens without compensation.[124] In *Seery*, the court found that a "sole" executive agreement which released claims of American citizens cannot withdraw the consent of the United States to be sued for "takings." *Seery*, however, left open the question of whether a formally ratified treaty or possibly a congressional executive agreement may constitute such a withdrawal of consent to be sued. The Iranian Agreements seem to be executive agreements entered into pursuant to congressional authorization. In *Seery*, the court noted: "It is probably still the law that Congress could effectively destroy a citizen's constitutional right such as, for example, the right to just compensation upon a taking of his property by the Government, by a statute withdrawing the Government's consent to be sued."[125] The Iranian Agreements do not explicitly withdraw the consent of the United States for suits arising out of its implementation. If they were considered to be an implied withdrawal of consent of the United States to be sued for unconstitutional "takings," a court would be faced with a difficult constitutional question of the interplay of the fifth amendment and sovereign immunity.[126]

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123. 21 Ct. Cl. at 343.

124. 315 U.S. 203 (1941).

125. 127 F. Supp. at 607.

126. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1370-71 (1953), *reprinted in* P. BATOR, P. MISKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM 335-36 (2d ed. 1973) [hereinafter cited as BATOR & MISKIN].

C. *Separation of Powers Objections*

Apart from any due process objections, the Iranian Agreements raise other more difficult questions of separation of powers. (i) May the President and/or Congress suspend the prosecution of suits in American courts,[127] and (ii) May the President nullify rights in Iranian assets which derived from attachments, injunctions or like judicial process?

(i) In his executive order of February 24, 1981, President Reagan suspended the prosecution of claims against Iran in American courts. In *National Airmotive v. Government & State of Iran*,[128] the United States requested the court to stay all proceedings in the action for an indefinite period. The district court responded to the suggestion of the government in this fashion:

> It is clear that were the Court to accept the government's interpretation, the gravest constitutional difficulties would arise. A bar on judicial consideration of plaintiff's claim on the basis proposed by the government would legitimize an attempt on the part of the Executive Branch, through Treasury regulations, to limit the jurisdiction of the federal courts. Whether Congress itself could restrict federal court jurisdiction by statute remains an unanswered question of the type that the courts are reluctant to explore "absent the clearest indication that such was the intent of Congress." DeMagno v. United States, [636 F.2d 714, 727 (D.C. Cir. 1980)] Whatever may be the authority of the Congress in this regard, it has rarely, if ever, been suggested that an Executive agency may, by regulation, bar the courts from operating with respect to particular subject matters. The constitutional difficulties that would be raised by an attempt to impose such a bar are too numerous to catalogue or explore here.[129]

The extent of control over the federal judiciary which can be exercised by Congress is a difficult question. To be sure, the President

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127. The recent case of Chas. T. Main Int'l, Inc. v. Reagan, Civ. No. 81-315-C (D. Mass. Mar. 17, 1981) answered the following question in the affirmative:

> [M]ay the President of the United States in the course of negotiating a hostage release agreement with a foreign government require by Executive Order that certain causes of action pending in United States District Courts, at and prior to the date of the Order, be removed from those United States District Courts and presented for adjudication before an international arbitration tribunal established by the negotiated agreement[?]

Slip op. at 5.

128. 499 F. Supp. 401 (D.D.C. 1980).

129. *Id.* at 405.

is not given direct control over federal jurisdiction by the Constitution, but President Reagan's suspension of suits in federal court is partly based on delegated authority under IEEPA. Two problems emerge—first, does IEEPA contain a sufficient delegation of authority to the President to affect federal court jurisdiction, and, second, if it does, can Congress itself act to suspend the jurisdiction of the federal courts over certain suits? The simplest answer to the delegation question is to cite *Curtiss-Wright*.[130] In that case, the Court argued that in the area of foreign affairs, Congress can delegate the President authority in broad terms.[131] IEEPA delegates to the President power in national emergencies to nullify and void any right or privilege with respect to any foreign property; this broad power could justify the President's actions to control federal court jurisdiction with respect to Iranian assets. But because any delegation of power over federal court jurisdiction is unusual, a court could reasonably conclude that any such congressional delegation would have to be thereby more express. Admittedly IEEPA does not contain language expressly delegating to the President power to control federal court jurisdiction. The second problem is as difficult. Congress has consistently regulated federal court jurisdiction without challenge under its constitutional power to create tribunals inferior to the Supreme Court. For example, Congress has imposed a monetary requirement for diversity cases in federal court even though the Constitution itself does not mention such a requirement for diversity suits.[132] There are, however, limits to Congress' power to restrict the jurisdiction of federal courts. For example, in the Portal-to-Portal Act of 1947,[133] Congress first extinguished employers' liabilities for failure to compensate employees for certain preliminary and incidental activities in connection with their work. Then, Congress withdrew jurisdiction from federal and state courts to hear actions which sought to enforce such claims. Despite the withdrawal of jurisdiction, the courts of appeal, and the majority of district courts, took jurisdiction to decide whether the abrogation by Congress of employers' liabilities destroyed vested rights in violation of fifth amendment

130. 299 U.S. 304 (1936); *see* notes 25-26 *supra* and accompanying text.
131. *Id.* at 319-22.
132. 28 U.S.C. § 1332(a) (1976).
133. Pub. L. No. 49, 61 Stat. 84 (codified at 29 U.S.C. §§ 216, 251-262 (1976)).

due process.[134] For example, in *Battaglia v. General Motors Corp.*,[135] the Second Circuit stated:

> [W]hile Congress had the undoubted power to give, withhold, and restrict the jurisdiction of the courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.[136]

Thus, Congress may not be able to manipulate jurisdiction so as to violate or destroy constitutional rights. As a result, the answer to the question of whether Congress can withdraw federal court jurisdiction over claims against Iran may hinge on claimant's ability to show that the effect of the withdrawal of jurisdiction constitutes a "taking." If the claims channelled to the Arbitral Tribunal are not fully satisfied because Iran refuses to replenish the security fund, this still may not constitute a "taking" under the authority of *Meade v. United States*.[137] The hostages, however, because they are excluded both from federal courts and the Tribunal may have the strongest claim that the withdrawal of jurisdiction effectively "takes" their claim.

(ii) Assuming, for the sake of argument, that Congress (and the President as its delegate) can validly withhold federal court jurisdiction over claims against Iran, does Congress or the President have the additional power to affect rights in Iranian assets derived from attachments? To say that Congress can restrict federal jurisdiction is not to say that Congress can perform a judicial act in an existing lawsuit.

By executive order the President "nullified" all rights in Iranian assets which derived from any attachment, injunction or like judicial process. No judicial dissolution of these attachments was formally sought with respect to assets transferred on January 19, 1981. The government filed a statement of interest in various proceedings on January 21, explaining the power of the President to transfer assets subject to attachment.[138] The government's argument was simple. Attachment of Iranian assets was possible only

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134. *See* BATOR & MISHKIN, *supra* note 126, at 323.

135. 169 F.2d 254 (2d Cir. 1948).

136. *Id.* at 257 (footnote omitted).

137. 2 Ct. Cl. 224, 275 (1866), *aff'd*, 76 U.S. (9 Wall.) 691 (1869).

138. For the text of the Statement of Interest, see N.Y.L.J., Jan. 22, 1981, at 24, cols. 1-3.

because licensed by the Secretary of the Treasury.[139] This license (which was revocable at will)[140] was a necessary precondition for the judicial attachment. By revoking the license, the President withdrew the underlying predicate of the court's attachment. There is no need to seek formal dissolution of a court order once the law changes so as to moot its application. On this latter point, the government cited the 19th century case of *Pennsylvania v. Wheeling & Belmont Bridge Co.*,[141] a case where a party, without seeking formal dissolution of a court injunction, was allowed to follow a course of action permitted by an act of Congress even though that action was prohibited by the terms of the injunction.

Deference of one branch of the federal government for another might have dictated that the Government seek formal dissolution of the attachments. In *McGrath v. Potash*,[142] even though an act of Congress changed the law so as to moot a court ordered injunction, the Government still formally moved the court to set aside the injunction, perhaps a wise and prudential practice given the separation of powers principles of our Constitution. But, in this situation, the Government contended that even a short delay in transferring the assets might have seriously jeopardized the agreement. The question posed is easy to state, but difficult to answer. In response to exigent circumstances, how far can the President intrude on the judicial process through an exercise of his foreign affairs power?

Judge Gesell, in Washington, D.C., seemingly found the President's foreign affairs power sufficient to justify the transfer of assets, a conclusion which, at least inferentially, rejects any separa-

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139. Under the Foreign Sovereign Immunities Act, preliminary attachments of the assets of a foreign state are permissible only if that state has explicitly waived its immunity from such attachments. 28 U.S.C. § 1611(d)(1) (1976). According to Judge Duffy's analysis in New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co., 502 F. Supp. 120 (S.D.N.Y. 1980), explicit consent for preliminary attachments was not given by Iran. *Id.* at 126-27. *But see* Behring Int'l, Inc. v. Imperial Iranian Air Force, 475 F. Supp. 383, 392-94 (D.N.J. 1979).

President Carter's freeze of the Iranian assets on November 14, 1979 constituted a suspension of Iran's immunity from preliminary attachment. 502 F. Supp. at 130-31. Thus the preliminary attachments of Iran's assets were permissible only because of the freeze and could be conditioned on whatever grounds the President wished.

140. *See* 31 C.F.R. 535.805 (1980). *See also* the discussion of *Chas. T. Main*, *supra* note 75.

141. 59 U.S. (18 How.) 421 (1855).

142. 199 F.2d 166 (D.C. Cir. 1952).

tion of powers challenge to the President's actions.[143] But, there are some limits to the way in which the President, or even Congress can affect the judicial process. Assuming that Congress may regulate the jurisdiction of federal courts, Congress may not be able to compel a federal judge to read evidence in a particular manner desired by Congress.[144] If judicial action was needed for the attachment, arguably judicial action may be needed to dissolve the attachment. If viewed in this way, the President's nullification of court attachments may trench upon his performing a judicial act. The *Wheeling & Belmont Bridge* case does support the President's view that a court injunction mooted by a change in the law need not be formally dissolved. But *Wheeling & Belmont Bridge* is an old case and contains a welter of views on several issues. As such, it may not be the most persuasive precedent.

D. *Federalism Objections*

In his executive order, President Reagan suspended the prosecution of claims against Iran in state as well as federal courts.[145] Does the President have the power under IEEPA to affect the jurisdiction of state courts? Again Congress has not specifically delegated the President this power but in the field of foreign affairs Congress has tended to delegate the President power in broad terms. Assuming this power can be inferred from IEEPA, the fundamental question is whether the Congress and the President have the power to regulate state court jurisdiction if they deem it necessary to conduct foreign affairs.

Foreign affairs has consistently been viewed as an area in which the national government has preemptive power. With respect to foreign affairs, inconsistent state legislation must give way to assertions of federal government power.[146] But in this case, there is no inconsistent state legislation at issue: it is rather a case where the federal government wishes to preempt a state forum from hearing a particular type of case. Congress has the power to require suits dealing with certain federal statutes to be heard exclusively in federal courts.[147] The President's order banning claims from state courts could be viewed as an exercise of the national

143. *See* N.Y. Times, Jan. 22, 1981, at A11, col. 1.
144. *See* United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).
145. *See* Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981).
146. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52 (1941).
147. *See, e.g.*, 15 U.S.C. §§ 15, 78aa (1976).

government's power to designate the forum in which certain cases will be heard. That forum will not be a federal forum (as in the usual case) but rather an international tribunal. In this sense, the Iranian agreements do represent a rare situation where Congress and the President select a forum that is neither state nor federal. The recent case of *National League of Cities v. Usery*[148] suggests that there are limits on the power of Congress under the commerce clause to regulate the conduct of certain state government functions.[149] But *Usery* did not involve the foreign affairs power of Congress[150] nor can a strong argument be made that in prohibiting a state court from hearing certain foreign affairs cases, Congress is tampering with the integral operation of state governments.

E. *Extraterritorial Jurisdiction Objections*

Although not technically a constitutional objection, the Iranian Agreements do raise a serious problem concerning the extraterritorial application of United States law. Under the Settlement of Claims Agreement, claims of United States nationals include claims that are owned indirectly by United States corporations "through ownership of capital stock or other proprietary interests in juridical persons, provided that the ownership interests . . . collectively, were sufficient at the time the claim arose to control the corporation or other entity . . . ."[151] Thus the claim of a wholly-owned foreign subsidiary of a United States corporation would seem to be treated as a claim of a United States national and thus must be submitted to the International Arbitral Tribunal for adjudication. President Reagan's executive order suspends all claims which may be presented to the Tribunal and states that all such claims shall have no legal effect in any action in a United States court. What of a claim of a foreign subsidiary now pending in a foreign court? The claim of the foreign subsidiary seems to be covered by the Agreements and President Reagan's order suspends all claims covered by

148. 426 U.S. 833 (1976).

149. *Id.* at 840-52; *see* Comment, *National League of Cities and the Parker Doctrine: The Status of State Sovereignty Under the Commerce Clause*, 8 FORDHAM URB. L.J. 300 (1980); Note, *The Essential Governmental Function After National League of Cities: Impact of an Essentiality Test on Commuter Rail Transportation*, 9 FORDHAM URB. L.J. 149 (1980).

150. 426 U.S. at 852 n.17.

151. *See* Claims Agreement, *supra* note 98, art. VII. The Settlement of Claims Agreement does not define how much of an ownership interest will be deemed sufficient "to control" a corporation.

the Agreements. The executive order, however, does not state (as obviously it could not) that such suspended claims will have no effect in a foreign court. The United States is attempting to assert jurisdiction over the claim of a foreign subsidiary through the nationality of the parent corporation. Such assertions of jurisdiction, of course, raise serious diplomatic and legal questions which are beyond the scope of this Article.[152]

IV. *THE CONSTITUTIONALITY OF THE SEIZURE OF THE ASSETS OF THE ESTATE OF THE SHAH AND OF HIS FAMILY*

Under the Iranian Agreements, the United States has contracted to freeze "assets in the United States within the control of the estate of the former Shah or any close relative of the former Shah served as a defendant in United States litigation brought by Iran to recover such property and assets belonging to Iran."[153] This language requires the United States to freeze assets of the estate of the Shah or his family only after Iran notifies the United States that the estate of the Shah or one of his family has been served as a defendant in a legal action.[154] In essence, the Agreements give Iran little more than it could have achieved through normal court attachment procedures. Under fifth amendment due process, however, the federal government may not deprive a "person" of property without due process of law. For the purpose of this amendment, an alien resident in the United States is considered a "person."[155]

Let us assume the following hypothesis. Iran sues a family member of the Shah resident in the United States to recover property, and formally notifies the United States that the action has been commenced. At this point, the Agreements require the United States to freeze and inventory the assets at issue in the litigation. Exactly how the freeze is to be accomplished is not specified in the Agreements, however.

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152. For a discussion of these considerations, see Judgement of May 22, 1965, Cour d'appel, Paris [1965] La Gazette du Palais, Paris II 86-90, *reprinted in* 5 INT'L LEGAL MATS. 476 (1966).

153. *See* Agreements, *supra* note 2, § 12.

154. By Treasury Regulation, the United States will be notified through the Office of Foreign Assets Control. *See* 31 C.F.R. § 535.802 (1980).

155. Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953); Wong Wing v. United States, 163 U.S. 228, 238 (1895).

In *Fuentes v. Shevin*,[156] the Supreme Court ruled that even a temporary seizure of property requires procedural due process. The defendant may have to be given notice prior to seizure and an opportunity to contest the need for the attachment. As an alternative to pre-seizure notice and hearing, the procedure used would have to comport with the strict requirements of *Mitchell v. W.T. Grant Co.*,[157] requiring, among other things, a security bond to protect the interests of the defendant.

The United States, however, might try to justify seizing the assets without a prior hearing or without the procedural safeguards of *Mitchell* on the ground that it was an "extraordinary situation." *Fuentes* recognizes this possibility, but in order to justify the "extraordinary situation" exception, the government would have to meet three conditions:

> First . . . the seizure has been directly necessary to secure an important governmental or general public interest. Second there has been a special need for very prompt action. Third [the government] has kept a strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining under standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.[158]

Under the circumstances, the government might have difficulty in proving the need for prompt action.[159] Of course, the government may be able to argue successfully that since the issue involves the application of fifth amendment due process to aliens, a less stringent standard should be applied because of the federal government's power over immigration and naturalization.[160]

CONCLUSION

This Article has reviewed the major international and constitutional law issues raised by the Iranian hostage Agreements. As of the date of writing, two federal district courts have ruled on the constitutionality of the Agreements, one upholding the Agreements and one questioning their validity. Because of the importance of

156. 407 U.S. 67 (1972).
157. 416 U.S. 600 (1974).
158. 407 U.S. 67, 90-93 (1972).
159. *But see* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).
160. *See* Nyquist v. Mauclet, 432 U.S. 1, 7 n.8 (1977).

the issues involved, the Supreme Court will undoubtedly be asked to rule on the validity of the Agreements. Since the final 4 billion dollars of Iranian assets must be transferred out of the United States on or before July 19, 1981, it is hoped that the Supreme Court will expedite its review and rule on these questions before that date.