

4-1-1981

Reflections on *Dames & Moore v. Regan* and the Miami Conference

Alan C. Swan

University of Miami School of Law

Follow this and additional works at: <http://repository.law.miami.edu/umialr>



Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Alan C. Swan, *Reflections on Dames & Moore v. Regan and the Miami Conference*, 13 U. Miami Inter-Am. L. Rev. i (1981)

Available at: <http://repository.law.miami.edu/umialr/vol13/iss1/2>

This Foreword is brought to you for free and open access by University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

PREFACE

Reflections on *Dames & Moore v. Regan* and the Miami Conference.

ALAN C. SWAN*

In negotiating for the release of America's fifty-two hostages from Iran, President Carter made a number of unprecedented commitments regarding the settlement of American claims against that country. He abjured the traditional lump-sum settlement, which in the past had typically resulted in immediate but only partial, pro-rata recovery by all citizens with meritorious claims. He obtained instead a settlement which denied all recovery to certain claimants, but promised most full restitution — some immediately, some only after further proceedings. To implement this settlement it was necessary for the President to intervene in the ongoing processes of the American courts. In so doing, he raised doubts, now partially resolved, concerning the constitutionality of the settlement, called into question the basic foundations of his historic claims settlement power, and handed the Supreme Court an opportunity to open what may yet prove to be a new chapter in the ongoing debate over the Executive's control of foreign relations.

Under the Algerian Declarations¹, Iran agreed to the use of approximately \$3.7 billion of assets owned by Iran but blocked by previous order of the President to pay immediately all outstanding syndicated loans from American and foreign banks. It also agreed to negotiate the settlement of its remaining bank debt, and to place approximately \$1.4 billion of blocked assets in escrow to pay those settlements. Last, Iran also agreed to the establishment of an international arbitral tribunal to hear the bulk of the non-bank claims and to pay the Tribunal's awards in full. To secure this latter undertaking, \$1 billion of blocked assets was to be placed in a special "security account." If that account dropped below \$500 million Iran agreed to replenish it until all awards were discharged.

* Associate Dean and Professor of Law, The University of Miami School of Law; Conference Chairman.

1. Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, 81 DEP'T STATE BULL., No. 2047 at 1 (1981), [for text, see *infra* Appendix at 28]; Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by Iran and the United States, Jan. 19, 1981, 81 DEP'T STATE BULL., No. 2047 at 3 [for text, see *infra* Appendix at 35].

LAWYER OF THE AMERICAS

In return for these commitments, President Carter undertook to bar the prosecution of all claims against Iran by the hostages and certain other Americans, to revoke all American trade sanctions against Iran, to withdraw all claims of the United States then pending before the International Court of Justice, and to return to Iran all of the blocked assets not required for the several escrow and security accounts called for by the agreements. The President also agreed to freeze the American assets of the late Shah and his family and to forestall the pleading of certain defenses should Iran sue to recover those assets. These commitments necessitated an Executive Order barring the hostages and others with proscribed claims from suing in the American courts² and several orders³ nullifying all judicial attachments against Iranian assets located in the United States. The attached assets and certain other funds were ordered transferred to Iran or to the security account for the payment of arbitral awards.⁴

When he took office, President Reagan ratified these orders and, in addition, ordered the "suspension" of all actions against Iran pending in U.S. courts by claimants whose cases were arguably within the jurisdiction of the arbitral tribunal.⁵ If the tribunal determines that it lacks jurisdiction over the claim, the claimant may, under the latter order, pursue his judicial remedies. Otherwise the suit remains suspended until the tribunal either decides that the claim is without merit or grants an award and the award is paid in full, in which event the arbitrators' decision acts as "a final resolution in discharge of the claim for all purposes."⁶

The announcement of so unprecedented an arrangement evoked an outpouring of commentary by practicing lawyers and legal scholars around the country. The most immediate and overriding issue was whether the President had the constitutional authority to nullify judicial attachments, to interdict an attachment creditor's claim of right in the debtor's property, and to suspend all judicial proceedings designed to determine the merits of the creditor's underlying claim. By its decision in *Dames & Moore v. Regan*⁷ the Supreme Court has now concluded that the President did in fact have the

2. Exec. Order No. 12,283, 46 Fed. Reg. 7,927 (Jan. 19, 1981).

3. Exec. Order No. 12,277, 46 Fed. Reg. 7,915 (Jan. 19, 1981); Exec. Order No. 12,279, 46 Fed. Reg. 7,919; Exec. Order No. 12,280, 46 Fed. Reg. 7,921 (Jan. 19, 1981); Exec. Order No. 12,281, 46 Fed. Reg. 7,923 (Jan. 19, 1981).

4. *Id.*

5. Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (Feb. 24, 1981).

6. *Id.* at 14,111.

7. 49 U.S.L.W. 4969 (1981).

PREFACE

power to issue these orders and that the nullification of the attachments did not constitute such a "taking" of property as would entitle an attachment creditor to "just compensation" under the fifth amendment.

A great many questions, however, remain unanswered. Does the President have the constitutional authority to implement other parts of the settlement? Once the settlement is fully accomplished, will the result square with the Constitution's guarantees of equality and of rights in private property? There are also questions pertaining to Iran's immunity from suit in the U.S. courts, questions engendered by the international community's attempt to proscribe duress in the settlement of international disputes, issues bearing upon the reach of American regulatory power, and upon the response that national courts might make to decisions of the arbitral tribunal. The settlement of the hostage crisis, in short, is laden with portent for certain broad areas of international and foreign relations law.

If the issues are large, the answers are often elusive. Much has yet to unfold and prediction is uncertain. In the hope of aiding the search for answers, however, and in the belief that inquiry could be advanced if held in the less adversarial setting of the academy, the University of Miami School of Law invited a group of practitioners and scholars to gather for a free and relatively unstructured exchange of views on the subject. The result is found in the following transcript of the discussion. Supplementing the conference transcript, is the text of an address given at the Law School by Mr. Lloyd Cutler. As Counsel to President Carter and a leading participant in the negotiation of the Algerian Declarations, Mr. Cutler undertakes to place the settlement in a broader foreign policy and domestic political context.

As noted, the question of the President's constitutional authority to nullify judicial attachments and suspend cases pending in the U.S. courts has been, from the start, the issue of greatest interest. It received a good deal of attention at the Conference.⁸ While one could not claim that the Conference foreshadowed the Supreme Court's decision in *Dames & Moore*, it is fair to suggest that the Conference discussion throws certain features of that decision into sharp relief, lending credibility to the view that the decision may yet assume a seminal force well beyond the confines of the immediate issues addressed by the Court.

8. See Transcript at 94 *et seq.*

LAWYER OF THE AMERICAS

Prudently in *Dames & Moore* the Government argued that the President's orders were all authorized by statute. In argument before the Court and repeatedly on other occasions, however, the Government has also contended that the President's orders were a mere incident of his independent, constitutional power to settle any and all citizen claims against a foreign government in such manner and to such extent as would, in the President's judgment, best serve the foreign policy interests of the nation as a whole. Sanctioned by historic practice and such decisions as *United States v. Pink*⁹ and *United States v. Belmont*¹⁰, this independent, plenary authority was said to be derived from the President's "inherent" or "implicit" foreign relations power.

The Government's view was ably and forcefully presented at the Conference. It was received, however, with some skepticism. The historic practice was questioned. Past Presidential settlements, it was thought, were confined largely to claims based upon a breach by the foreign government of its "state responsibility" under international law. It was doubted that many of the contract and torts claims against Iran could qualify under that traditional rubric and that, with the advent of the restrictive theory of sovereign immunity, one could not uncritically extend the President's historic power beyond its original boundaries. Other participants pointed out that the history and cases relied upon by the Government date from a time when international law was dominated by the Vattellic theory (*i.e.* that nations, not individuals, were the only proper subjects of that law) and by the principle of absolute sovereign immunity. If, in such a setting, the President had come to possess a plenary claims settlement authority, that, it was suggested, may have reflected nothing more than a pragmatic adjustment to the prevailing international legal order under which diplomacy was the only recourse available to citizen and government alike. If so, neither the history nor the cases were very persuasive predicates for the contemporary assertion of a plenary Presidential power.

The international economic and legal order has changed. Governments have increasingly become engaged in a broad range of commercial and financial activities which had historically been left to private business and to domestic courts. With increased governmental participation in and the extraordinary expansion and consequent de-

9. 315 U.S. 203 (1942).

10. 301 U.S. 325 (1937).

PREFACE

pendence of national economies upon international trade and investment, there had arisen a need for the impartial adjudication of disputes which the traditional legal order could not meet. As a result, international law had come to accord each nation the right to replace the principle of absolute sovereign immunity with the restrictive theory. Congress has responded by enacting the Foreign Sovereign Immunities Act,¹¹ thereby assigning the judiciary a much larger role in the settlement of private claims against foreign governments and also fashioning a wholly new context for judging the President's powers.

First of all, Article III of the Constitution grants to Congress, not the President, power to regulate the jurisdiction of the federal courts. Moreover, that power is subject to some, albeit poorly defined, limitations reflective of American society's basic commitment to the rule of law and of a citizen's right of access to a court of law as the cornerstone of that commitment. If, in the context of a legal order dominated by the Vattelian theory and the principle of absolute immunity, it was impossible to give practical effect to this fundamental commitment that did not mean, it was suggested, that either the commitment or the limitations on the President's power implicit in article III could continue to be ignored as circumstances changed. If an expectation of absolute immunity was no longer sanctioned by State practice, if political bargaining was no longer the only available mode for the settlement of international claims, one could not invariably exempt the international claims settlement process from so fundamental a tenet of the American constitutional system or so explicit a constitutional allocation of power. Yet, that is precisely what would occur if the President were accorded plenary authority over that process. Even more broadly a plenary authority would mean that, in all claims settlement cases, the successful pursuit of foreign policy, as defined by the President, would be preferred over every other constitutional value, unless the President chose, as a matter of policy, to accord the latter pre-eminence. That, many thought, was wholly incompatible with our constitutional traditions and contained frightening possibilities for abuse.

To this there was ready response. The danger lay not, according to some, in a possible abuse of power but in the effort to cabin within rigid legal (*i.e.* constitutional) boundaries a power that should properly remain capable of being employed swiftly, secretly and at the behest of policy. The Iranian case was said to be illustrative. There

11. Foreign Sovereign Immunities Act of 1976, 90 Stat. 2891, codified in 28 U.S.C. §§ 1330, 1332(a)(2) to 1332(a)(4), 1391(f), 1441(d), 1602-1611 (1976).

LAWYER OF THE AMERICAS

the President confronted a major foreign policy crisis affecting some of the most important of the nation's strategic interests. Yet, a host of political, economic and historic forces were at work to assure that in solving that crisis the President would also seek as complete a settlement of American claims as possible. He was not a free agent. The danger lay not with a possible abuse of power but elsewhere. Neither the claims nor the political crisis could have been successfully settled except for the fact that the President was free to act swiftly and secretly when an opportunity arose. To act swiftly and secretly, however, also meant that the President had to have absolute discretion in defining the optimal balance between the claimants' interests and the interests of the nation as a whole.

In response to these differing perceptions of the problem a number of participants reflected on their possible resolution. Rigid constitutional rules were inappropriate. Yet, many thought it equally unwise to abandon all constitutional limitations upon the President. It was a matter of reasonableness; of balancing the nature and weight of the interests surrendered to the dictates of policy against the weight and urgency of the national interests at stake in that policy. Within such a constitutional formulation, Congress manifestly had a major role to play. Where checks and balances were otherwise at work, where Congress had judged that it was necessary to grant the President discretion and had abstained from disapproving the exercise of that discretion in any particular case, the judiciary could be far more assured that any Presidential compromise of the claimants' interests was justified by the urgency of policy than if the President had acted alone.

Read against the background of this discussion, it becomes clear that the decision in *Dames & Moore* contains some seminal possibilities. Writing for the Court, Justice Rehnquist steadfastly refused to endorse the Government's assertion of a broad independent Presidential claims settlement power. The opinion was narrowly drawn. No effort was made to address the Government's claim. The Justice merely searched the statutes to determine whether there was, in fact, a Congressional warrant for the President's orders.

The power to nullify judicial attachments and return the attached assets to Iran was, the Court held, conferred on the President by the International Economic Emergency Powers Act.¹² Support for the order suspending suits against Iran was found in the general tenor

12. 50 U.S.C. §§ 1701-1706 (1978).

PREFACE

of a number of statutes.¹³ These, the Court thought, reflected an affirmative legislative acquiescence in the President's exercise of a discretion broad enough to encompass his suspension orders. Although the Court found support for this conclusion in the absence of any Congressional effort to reverse the President, the gravamen of Congress' warrant was found in its acts of affirmative acquiescence, not in any acquiescence by silence.

The same statutes were invoked either to answer or avoid some of the problems which preoccupied the Conference. The Court essentially avoided speaking to the impact of the restrictive theory of sovereign immunity on the President's historic power. It merely observed that several of the statutes evidencing Congress' acquiescence in a broad Presidential discretion to settle claims had been enacted after adoption of the restrictive theory, indicating that the theory was not intended to limit the discretion. A similar re-shaping of the issue was used to answer petitioner's contention that by prohibiting the courts from exercising a jurisdiction conferred upon them by the Immunities Act, the President had violated article III of the Constitution. Since the President had only suspended, not terminated, the lawsuits against Iran, and had only done so pending their submission to an alternative international forum, his orders did not, in the Court's view, conflict with the Immunities Act or "divest" the federal courts of jurisdiction in the sense contemplated by article III. They only "direct[ed] the courts to apply a different rule of law."¹⁴ But query, from whence did this power of substantive legislation come? The Court's answer is clear: from the statutory evidence of Congressional acquiescence in a broad discretion by the President to settle international claims.

Doubtless there are technical flaws in some of what Justice Rehnquist wrote. To cite the Court's own pre-Immunities Act practice of following Executive suggestions as evidence of an Executive power to control the courts is highly suspect. To characterize the President's suspension order as substantive law-making and not a jurisdictional measure seems a bit too easy, even dangerously easy. Hopefully suspension, as distinguished from termination, will mark the outer limits of this device. Nevertheless, the Justice's more general disposition to read this mosaic of statutes, historic practice, and prior decisions in

13. International Economic Emergency Powers Act, *supra* note 12 and the Hostage Act, 22 U.S.C. §§ 1731-1732 (1979).

14. *Dames & Moore v. Regan*, 49 U.S.L.W. at 4977.

LAWYER OF THE AMERICAS

light of the momentous objectives at stake in the Iranian settlement cannot be faulted.

More importantly, when juxtaposed to the Government's assertion of a broad independent power, the very existence of this disposition suggests a more than ordinary determination to find some Congressional sanction for the President's actions. Indeed, the very pervasiveness of the Court's search for a legislative warrant, combined with certain broader theoretical reflections, mark the decision as one of signal interest. That interest becomes all the more apparent when the decision is read against the background of the Conference discussion. By identifying how a changing international economic and legal order may merit the re-ordering of an older, historically established accommodation between efficacy in the conduct of foreign policy and other constitutional values, the Conference discussion suggests that the Court's disposition to avoid reaffirming that historical accommodation may reflect something far more fundamental than simple caution or judicial restraint.

At the formal, doctrinal level one must acknowledge the possibility of reading into the opinion an implied negative: the rejection of any independent Presidential claims settlement power which would automatically encompass a power to interfere in the judicial process. Such a reading does not suggest that the President possesses no independent power whatsoever, nor does it suggest that his power might not support some types of intervention in the judicial process without Congressional sanction. It warns instead that there are limits on when and how an independent claims settlement power might be exercised, and that these limits may be especially narrow if the power is used to interfere in the ongoing processes of the courts. Nowhere is this warning made clearer than in certain of Justice Rehnquist's introductory reflections which deserve to be set out in full:

The tensions present in any exercise of executive power under the tri-partite system of Federal Government established by the Constitution have been reflected in opinions by Members of this Court more than once. The Court stated in *United States v. Curtiss-Wright Export Corp.*:

. . . [W]e 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 government-

PREFACE

tal power, must be exercised in subordination of the applicable provisions of the Constitution.

And yet 16 years later, Justice Jackson in his concurring opinion in *Youngstown, supra*, which both parties agree brings together as much combination of analysis and common sense as there is in this area, focused not on the “plenary and exclusive power of the President” but rather responded to a claim of virtually unlimited powers for the Executive by noting:

The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image. [Citation omitted]

As we now turn to the factual and legal issues in this case, we freely confess that we are obviously deciding only one more episode in the never ending tension between the President exercising the executive authority in a world that presents each day some new challenge with which he must deal and the Constitution under which we all live and which no one disputes embodies some sort of system of checks and balances.¹⁵

Surely a plenary, independent Presidential power is difficult to square with a system of checks and balances. The difficulty is compounded if that power encompasses the authority, otherwise given to Congress, of regulating the jurisdiction of the federal courts. Likewise, a power to settle any and all citizen claims against a foreign government upon such terms as the President sees fit, may, on occasion, require footings in a comprehensive foreign relations power of the kind affirmed in *Curtiss-Wright*¹⁶ and all but rejected in *Steel Seizure*.¹⁷ If the Court’s opinion, therefore, signals a refusal to exempt foreign relations from the separation of powers doctrine and a willingness to replace *Curtiss-Wright* with *Steel Seizure* as the seminal point in contemporary discussions of the President’s power over foreign relations, it also casts serious doubts on any plenary, independent Presidential authority to settle claims and the notion of an “inherent” or “implicit” foreign relations power upon which that authority may depend. That the President has vast powers over foreign relations

15. *Id.* at 4971.

16. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

17. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1953).

LAWYER OF THE AMERICAS

cannot be doubted. That he has a "foreign relations" power is now highly suspect.

All this is further underscored by Justice Rehnquist's handling of the *Pink* decision. He assigned the agreements sanctioned in that case a narrow theoretical predicate: they were merely incidental to an exercise of the President's textually founded "recognition" power, not of any broader "inherent" or "implicit" foreign relations power. This narrow predicate was then given a certain expansive possibility. The "recognition" power was thought broad enough to encompass settlements "normalizing"¹⁸ relations with a foreign government. While one can, of course, readily envision settlements that would not qualify under this broader formulation, the Iranian settlement would surely do so. It was a step toward healing a massive breach in relations with a country of vital strategic importance to the United States. Thus, against the background of the Government's repeated citation to *Pink* as authority for a plenary, independent Presidential power, the very fact that Justice Rehnquist could find support for the Iranian settlement in that decision while drawing a line impossible under the Government's reading, signals a high order of skepticism regarding both that reading and the theory of an "inherent" foreign relations power essential to it.

In addition to its doctrinal impact, the decision in *Dames & Moore* may also be read as signaling a revival by the Court of a distinctive style and approach to the Constitutional allocation of power over foreign relations. It is not a new style or approach. It has ancient antecedents and has, at least since the war powers debates, been quietly regaining currency in a few lower court decision, in the on-going Congressional-Executive debate and in some scholarly criticism. Not so much a matter of whether the President will gain or lose power over foreign policy, the revival is a matter of how rigorously his claims to power are to be argued and decided.

To replace *Curtiss-Wright* with *Steel Seizure* is, at the most general level, to abjure decision-making by deduction from some singular, over-arching characterization of the Presidential Office (*i.e.* of "inherent" powers), the latter usually drawn more from a vision of expediency than from the text and structure of the Constitution. It bespeaks instead high respect for both text and structure. It recognizes that from the text, reinforced by a commitment to democratic values, flows the fundamental structural precept of the separation of powers.

18. *Dames & Moore*, 49 U.S.L.W. at 4977.

PREFACE

Regard for that precept means that most allocative questions are to be viewed as creating what Justice Rehnquist called, a "tension between the President exercising the executive authority in a world that presents each day some new challenge with which he must live and the constitution under which we all live."¹⁹ As an aid to resolving that tension within the framework of the constitutional text, the revival implied by *Dames & Moore* would acknowledge the expansive possibilities once thought to lurk in certain of the article II grants, especially the "take-care" clause.²⁰ It would also recognize that the instrumental character of many of those grants, contrasted with the vast grants of foreign policy-making power encompassed in article I, compels a careful distinction between a Presidential power to initiate policy proposals and a power to make policy unilaterally. It would not equate one with the other as so often happens when, for example, the power to make international agreements is discussed. In resolving the tension between the need for an effective foreign policy and other constitutional values, the revival would also recognize that any Presidential policy that can command affirmative Congressional support also commands a much different and higher order of legitimacy than any unilateral Presidential initiative. In the end, *Dames & Moore* bespeaks a change in both substance and style. Substantively, it intimates that there are few, if any, broad areas of policy where the President's unilateral vision of expediency will invariably supersede other constitutional values. In style it suggests that the decisional process is to be one of choosing between the efficacy of policy and other values case-by-case, inductively, by modest increments of law. If this is to be the style, then some of the reflections at the Miami Conference may yet prove prescient.

Needless to say, this revival does not imply any crippling of the Presidential office. The generous interpretive techniques used by the Court in *Dames & Moore*, its patent sensitivity to the larger objectives at stake in that case, the Court's natural bent to caution and restraint in matters of this sort, and the expansive possibilities in certain of the article II grants all presage an amplitude of Presidential power. The revival does suggest, however, that much current learning will have to be redone. New limitations on the President's power may emerge. It warns that the Executive may have to pause and articulate its constitutional claims more carefully and lay those claims upon more sub-

19. *Id.* at 4971.

20. U.S. CONST. art. II, § 3, " . . . he [the President] shall take care that the laws be faithfully executed."

LAWYER OF THE AMERICAS

stantial grounds than has sometimes heretofore been the case. Unilateral Executive practice, as interpreted by the Executive, is less likely to be accepted uncritically or so authoritatively. In the end, if the revival does bear fruit, it will certainly make for a more interesting constitutional dialogue and, in this writer's view, for a more effective foreign policy as well.

Lastly, of course, the decision in *Dames & Moore* only means that the settlement process contemplated by the Iranian agreements can now move forward. As it does so, a great number of additional questions discussed at the Miami Conference may arise depending upon how the process unfolds. There is the possibility, perhaps remote once the attached assets are returned to Iran, that some claimant may challenge the competence of the arbitral tribunal on the ground that the Algerian Declarations are void under the principles of customary international law found in articles 52 and 53 of the Vienna Convention on the Law of Treaties.²¹ The same issue could surface if a claimant, having lost on the merits before the arbitral tribunal, commences an action against Iran in either a U.S. or foreign court and then challenges the arbitrators' decision when that decision is pleaded as a defense to his suit. Also, the arbitrators are very likely to face challenges to their jurisdiction in all claims based on contracts with clauses calling for disputes to be submitted to the Iranian courts. Comparable jurisdictional challenges may arise if a minority U.S. shareholder in an Iranian or other foreign corporation seeks to recover on a corporate claim against Iran. Much discussed at the Conference, these and other jurisdictional problems facing the arbitrators are not inconsiderable. For some claimants, the chances of success are problematic. Even for a successful claimant, the jurisdictional issues may again arise if there are insufficient funds in the security account to pay his award and he brings an enforcement action in a municipal court. Indeed, the whole issue of the degree of finality that national courts will accord the arbitrators' decisions could yield some new and important developments in the law of international arbitration.

Some of these possibilities — dismissal of claims for lack of arbitral jurisdiction and insufficient funds to pay awards — could precipitate a new round of statutory and constitutional argument. The Supreme Court in *Dames & Moore* endorsed the Solicitor General's admission that the Court of Claims would have jurisdiction under the Tucker Act²² to entertain a suit against the United States for "just

21. U.N. Doc. A/Conf. 39/27 and Corrigenda, May 23, 1969 [for text, see *infra* Appendix at 184].

22. 28 U.S.C. § 1636(a) (1976).

PREFACE

compensation," if the unpaid claimant had previously sued Iran and that suit had been subject to the President's nullification and suspension orders.²³ If, at the time of suit against the United States, however, the disappointed claimant could still sue Iran or seek enforcement of an unpaid award in a national court, a "ripeness" question would surely arise at the threshold of the action. Beyond that point — or perhaps in spite of it under an equal protection argument — a question may arise concerning the effect upon the claim for compensation of Iran's immunity from the claimant's original action or pre-judgment attachment. If immunity is a defense to the compensation claim, there may yet emerge new and very interesting law concerning both sovereign immunity and the scope of the fifth amendment's "just compensation" clause. If, in the end, a substantial number of claims subject to the President's suspension and nullification orders remain unsatisfied, the courts may face far-reaching challenges to the settlement predicated upon the unequal treatment accorded various classes of American claimants. These challenges could, in turn, raise intriguing choice of law, regulatory jurisdiction and constitutional questions.

The reader can, of course, formulate his own scenario for the future. Variations abound and those noted above are only suggestive. Hopefully, however, the reader will find the transcript of the Conference instructive on many of the questions to which he may be brought whether by imagination or circumstance.

23. *Dames & Moore v. Regan*, 49 U.S.L.W. at 4978 n.14.