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# Constitutionality of the Settlement

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*Robert Mundheim:* The Chinese assets! We got a promise of \$80 million in cash from the Chinese and then said, "The blocked property is yours to the extent that you can persuade an American court that it is yours."

*Alan Swan:* And there were suits pending against China in the courts of the United States at that time?

*Covey Oliver:* Yes. One before Judge Goodman in the Northern District of California pending since 1952!<sup>127</sup>

*Mark Feldman:* Is that so? I never knew that.

#### CONSTITUTIONALITY OF THE SETTLEMENT

*Alan Swan:* We're going to pick up where we left off at the end of last session with a discussion of the constitutionality of the agreements. There are a number of facets to this issue and it may be helpful to lay some of them out, especially since there are some particularly pertinent provisions in the agreements which we ought not to forget. At one level, we must concern ourselves with the power of the President to settle private international claims. One does not, I suppose, have much quarrel with the proposition that if the President can negotiate a settlement which results in full payment of all claims, he has the power to make that settlement. The problem arises where, as part of the settlement process, he undertakes to terminate or nullify the legal rights asserted by the private claimants and obtains, in return, only partial payment or, in some cases, no payment whatsoever. A variant of this, of course, is the situation where, as in the case of a substantial number of the claims against Iran, the President undertakes to foreclose the claimants' right to seek their remedy in a court of law and remands them to an alternative arbitral tribunal. I hope that the arbitral process will result in full payment of all provable claims, but there is an apprehension that that may not happen. I do not really know how one deals with that apprehension in the context of these constitutional issues at this time. Nevertheless, it is well to note article IV(3) of the Claims Settlement Agreement<sup>128</sup> which, as I understand it, provides that should a claimant receive an award from the arbitral tribunal and should there not be sufficient funds available to satisfy that award under the escrow account, the

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127. *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 104 F. Supp. 59 (N.D. Cal. 1952) *modified*, 209 F.2d 467 (9th Cir. 1953).

128. This provision provides: "Any award which the Tribunal may render against either Government shall be enforceable against such Government in the courts of any nation in accordance with its laws."

claimant is free to seek recovery of the deficiency in any court willing to enforce the award, located in any country where there is property available to satisfy the judgment.

The second facet of our broader question concerns the relationship between the President's power to settle claims and the due process and "takings" clause of the Fifth Amendment to the Constitution. If, on the face of it, an exercise by the President of his power appears to constitute a deprivation or "taking" of a property right, the question arises whether, in light of the foreign policy context in which the President acts, the apparent deprivation is one that violates the due process clause or gives rise to a claim for "just compensation?"

The last facet to our question concerns the remedy. If indeed there is a violation of due process or a "taking" that gives rise to a right of "just compensation," does that mean that the courts can bar the President from carrying out the settlement altogether or, in the case of a "taking," until some provision for compensation is forthcoming? Or does it merely mean that the private claimant now has a cause of action against the Government for compensation? On this point, does the Tucker Act<sup>129</sup> grant the Court of Claims jurisdiction to hear these claims, and even if it does, *query*: would the absence of any indication of a congressional willingness to appropriate the funds necessary to pay the judgments withdraw the cause altogether from the judicial power? Perhaps under the theory of *Bivins*,<sup>130</sup> the claimants would have to sue the President personally in the federal district court.

Against this background, let me do what we were about to do at the end of the last session and turn this back to Mark Feldman who had so deftly opened the issue to us. First, however, let me offer a personal note. I thank you, Mark, very much for the contribution you have made here. I only wish that the candor and the ability which you have exhibited were common to all our public officials. We would all be better served by our public institutions if that were the case. [General Applause]

*Mark Feldman*: That is very, very nice, thank you. I suppose that I cannot complain about being presented here as a target for everyone else's arrows because I guess I knew that was why I was invited.

I have no dissent to register from the summary that Alan made of the issues. The issue here certainly comes up in a context that is in

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129. 28 U.S.C. § 1636(a) (1976) (vesting in the Court of Claims jurisdiction over actions for money damages against the United States).

130. *Bivens v. Six Unnamed Agents*, 403 U.S. 388 (1971).

many ways unique, but there is also a background to which I think the courts are going to be very sensitive and very reluctant to ignore. It is certainly the conventional wisdom, literally the black letter law of the Restatement,<sup>131</sup> of hornbooks like Borchard's,<sup>132</sup> and of the Supreme Court opinions in *Pink* and *Belmont*—that the President has the constitutional authority to settle international claims. Indeed, the theory is that the claim is the claim of the state and not of the person, and that such a claim can be dealt with by the Executive in the national interest and in the interest of our foreign policy. This is especially so where the settlement is linked with the recognition or the normalization of relations with another state—to extend slightly the circumstances of *Belmont* and *Pink*. There is even authority for the proposition that the proceeds of a settlement need not be paid over to a claimant. It is also perfectly clear after two hundred years of state practice that the President can submit a private claim to arbitration without the consent of the claimant, or can enter into a comprehensive agreement settling a whole class of claims by a lump sum payment without receiving either the claimant's consent or a statutory authorization. All of this, I think, must come as a surprise, not to this audience, but to the typical practitioner or even judge sitting in Texas, Florida, Chicago, or one of those places where they do not get as many foreign relations cases. When it gets up to the Supreme Court there are going to be a few people who know these issues, and I think it is fair to say that the Justice Department, under the Reagan Administration as well as under the Carter Administration, is very confident that the settlement with Iran is entirely constitutional.

In our office we looked at this very hard over a long period of time, and there are new angles to a number of issues, not the least of which is what is the impact of the Immunities Act on the President's historic powers? Does that Act in any way change the basic relationship of the three branches of government to this issue? I think not, but it is certainly an issue that is going to be argued and discussed before the courts. My guess is that the Supreme Court is going to be able to avoid deciding the ultimate constitutional question of whether the Executive can bargain away a national's claim because it will find that the remedy here is fully adequate. It will not need to look beyond the foreign affairs power of the President to provide an alternative forum for the settlement of private claims, particularly since the commitment in this regard is absolute: 100 cents on the dollar.

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131. RESTATEMENT, *supra* note 32.

132. E. BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1916).

Whatever uncertainties there are, and it is understandable that there would be uncertainties, I do not think that the Court will find sufficient reason to raise a cloud over the President's constitutional authority.

There is another aspect of the case which is very difficult for a court to cope with, and that is the assertion by the Government that most of the cases filed in the U.S. courts would not, in all events, succeed in coming to an execution of judgment. There are a whole range of reasons for this. For example, we do not know how many of the contracts have the contacts with the United States necessary to overcome immunity. That some courts have found to the contrary is, in my opinion, less a careful application of current doctrine than a reaction to the turbulent times and the emotions of the Iran crisis. In addition, there is the question of execution of judgments. Even if the attachments were valid, a foreign government may have immunity from execution of judgments. In a great but unknown number of cases, therefore, it is very doubtful that the claimants will have a property interest significant enough to be the subject of a deprivation. Moreover, I do not know how the courts are going to decide these questions on any broad general basis when you have something like 300 to 400 claims. I would be delighted to hear anybody else's views on that subject. It is a serious problem in judicial management. My guess is that the Supreme Court will be encouraged to find sufficient grounds for upholding the Presidential power.

*Charles Brower:* First of all, one should be worried about trying to travel too far on *Belmont* and *Pink*. In *Belmont*, the assets sought to be recovered were in a fund representing, in effect, an addition to the shareholders' equity in a Russian company, all of whose creditors had been paid off. There was only a question of who was entitled to the remaining equity. In the *Pink* case, while some creditors had not been paid off, it was strictly a question of foreign creditors. In neither case, to my recollection, was there a domestic interest being prejudiced by the upholding of the agreement. Much of the Court's rationale involved the need for a power in the President, in conjunction with recognition, to marshal assets from foreigners for the benefit of domestic claimants. That is quite different from a situation in which some domestic claimants feel that they have been prejudiced for the benefit of other domestic claimants. In the Iranian settlement, radical distinctions have been made in procedure, and possibly in the measure of recovery, among various classes of claimants. So it is not nearly the same situation.

Without prejudice to any position that I might be taking in these cases, I do think, as a predictive matter, that the problem for the

courts will lie, in a sense, in the issue of ripeness. How do the courts know, how can the claimants really show right now, that they are going to be hurt by this action? The argument against the claimants is that, even if they may be subject to the exclusionary clause, they will have an opportunity first to make their case before the arbitral tribunal. If they lose, under the regulations as now promulgated they will have another chance before the courts here. And if they recover in either forum, they will still have to try and execute the judgment or award they receive. An arbitral award may be enforceable under the U.N. Convention<sup>133</sup> in any number of countries of the world against the assets of Iran, but the same is generally true with respect to judgments. It may be years from now before anybody is sure of what they have received. At present, it will be very difficult to prove to anyone, which is partly a legal matter, but arguably a factual matter, that, but for the President's action in depriving them of their attachments or their causes of action, they would have actually been able to recover. What we are talking about is a constitutional provision protecting individuals from a deprivation of property without due process of law. The Government can well argue that the claimants cannot prove at this point that they have been deprived of property, even if they could prove that they had a property interest. It is also difficult to prove right now that any deprivation is occurring without due process of law. I have a growing feeling that all the claimants out there are the proverbial Seven Dwarfs looking for Snow White: every time they think they have found Snow White, she kind of disappears. Larry Newman halfway told us yesterday that there would be no Snow White in New York. The emphasis, therefore, is likely to be on preserving a position so that at such time as the claimants find that they do not have an adequate recovery, they will be in a position to assert their claims against the United States. Also, it is extremely difficult for the Supreme Court to speculate on the issue of whether any wrong will in fact occur or to say—even if it is clear that harm has occurred—that the remedy is not compensation from the United States Government but rather judicial interference in an important diplomatic step. The latter would certainly be a momentous event.

*Edward Gordon:* I have one question to ask of Keith Rosenn, or to any of you who are following the Supreme Court's work in constitutional law. Is it absolutely clear that this problem will be presented as the deprivation of a property interest under the due process clause,

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133. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3.

as opposed to a liberty interest? For example, the loss of a forum for hearing one's cause of action is not, as I understand it, being treated by the Burger Court as the same as a property interest. Can you clarify that?

*Keith Rosenn:* The ripeness problem that Charlie Brower talked about is a very real problem in this case. Much depends upon how you present it. If you argue deprivation of property, the ripeness problem is very apparent. I would not be at all surprised to see a court say, "That issue is premature at this time." On the other hand, if what you seek is a declaration that the President's action here is unconstitutional because it deprives the claimants of all review by an article III court, that issue may well be ripe. In other words, suppose you go into a court and argue: "We would like a declaratory judgment that the Executive order<sup>134</sup> is unconstitutional because the President is making an exception to the jurisdiction of the federal courts. Only Congress has the power to do that, and even Congress may not completely shut off all review by the federal or state courts." Then quite possibly you will have framed a question with which the courts can deal right now.

It is, of course, clear under *Crowell v. Benson*,<sup>135</sup> that you do not have to have an article III court as your original tribunal. It is not, however, at all clear that the Congress can take away all possibility of review by an article III court. I do not see in the procedures agreed to by the President any possibility for the claimants of ultimate review by the Supreme Court or any other article III court. With an arbitral tribunal as the sole forum, presumably what the President has done is to shut out the federal courts completely from the business of determining the validity of the claims against Iran. That kind of issue may well be ripe.

*Michael Silverman:* I would like to ask whether you think it would make a difference if Congress passed a statute to the same effect?

*Keith Rosenn:* It does not make the problem go away. What it does is pose the problem in the starkest form that we have had since the *Battaglia*<sup>136</sup> case.

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134. Exec. Order No. 12283, 48 Fed. Reg. 7,927 (1981) [for text, see *infra* appendix at 75].

135. 285 U.S. 22 (1932).

136. *Battaglia v. Gen. Motors Corp.*, 169 F.2d 254 (2d Cir. 1948), *cert. denied*, 335 U.S. 887 (1948).

*Mark Feldman:* Let me refer you in this connection to the International Claims Settlement Act,<sup>137</sup> which forecloses the courts absolutely from any adjudication of claims settled by international agreement.

*Alan Swan:* Do we not have to draw a distinction here? First of all, if you have a statute, if for example the International Claims Settlement Act is applicable, it is a very different situation from one in which the President relies entirely upon his own authority, because the power to regulate the jurisdiction of the courts is vested by the Constitution in Congress, not in the President. Secondly, I do not believe that the International Claims Settlement Act or any other legislation upon which the President might rely forecloses the courts from judging whether or not the President's settlement, including a Presidential effort to close the courts, is constitutional. All they foreclose the courts from judging are the merits of the underlying claims against the foreign government. So, if the charge is that the President's settlement is unconstitutional, that there is a deprivation or a taking of a property right, there is nothing, I think, in these statutes which forecloses someone from going into a court to test that charge. All that they are foreclosed from doing is litigating the issue of whether Iran owes them some money. This is a fairly big difference because neither the effort by Congress to close the courts under the International Claims Settlement Act nor the President's effort to close the courts, to the extent he has that power under IEEPA, are an effort to say that the courts may not consider whether there has been a deprivation of constitutional rights. If the courts are open to test the deprivation of constitutional rights, then I would doubt that the Congress has reached the limit of its power to control the jurisdiction of the article III courts or to delegate that power to the President.

*Stefan Riesenfeld:* But the case is foreclosed by the agreements only when Iran is the party defendant. In any case where you are testing the constitutionality of the settlement, the President will be the party defendant and the agreements do not even apply to the President. The agreements only bar cases against Iran; therefore, the courts are open.

*Alan Swan:* That is right. As long as the cases against the President are not banned, I question whether Congress has overstepped the boundaries of its power to control the jurisdiction of the federal courts. That is all I am saying.

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*Mark Feldman:* So the agreements are constitutional; that's my point.

*Stefan Riesenfeld:* To what extent?

*Alan Swan:* Well, to the extent that you can rest these agreements on a statute. That is why it is very important to establish a statutory predicate for the agreements.

*Mark Feldman:* That is a separate issue. I would argue that this is the President's power, not that of Congress, in the international claims field. But there was a question raised about the judicial power: Whether the settlement encroaches upon the judicial power by foreclosure? I am suggesting that Congress has already indicated its view that the judicial branch may constitutionally be excluded from the adjudication of international claims—claims against the foreign state. I am not addressing the question whether there is a forum for resolution of a taking question, but, if what you say is correct, I think this case will be upheld.

*Charles Brower:* I agree with Keith Rosenn's contention that perhaps the better way to approach this matter at the present time is with a separation of powers argument. The only problem is that the worst damage has already been done over the last year by the United States Government. There is no way for that to be remedied. The argument that the Government makes now is that it is not affecting the process, only the substance. The executive departments are only reaching the substantive claim against Iran that we were trying to assert in court; they are not telling the judicial branch how to treat a claim which is otherwise present. What has been done over the last year is that the United States Government repeatedly came into court and, in effect, said: "Please stop operating because it is going to foreclose or reduce our options." The whole struggle over the last year was to try and push these claims to an adjudication over an amorphous resistance from the executive branch which simply said: "We do not quite know what we are about or how to get out of this. All we know is that it is going to be harder to do it if you change the facts on us or put us in a corner." That is exactly what it was all about. That was, in my view, a serious violation of the separation of powers principle and an interference in the independent functioning of the judiciary for which there seems to be no remedy. Now the Government is in a better situation. Now the officials have taken action and they say: "All right, we have made up our minds, now we have done something, and what we have done is to affect your claim and the prerogative of the court to adjudicate it." I think that this is a difficult argument under the present circumstances.

*Covey Oliver:* I suggest that we keep clearly in mind what claims we are talking about. My friend Mark is calling them all "international claims," and he refers to the International Claims Settlement Act. The semantic and legislative referent for "international claims" is in the normal usage with regard to claims that private parties cannot pursue under international law on their own but must have espoused for them, if at all, by the State. Since Vattel took the position long ago that persons (natural and corporate) are not "subjects" of international law<sup>138</sup> as states (and now international organizations)<sup>139</sup> are, the customary international law of "state responsibility" for injury to the persons and property of aliens has controlled the concept "international claims." A cause of action that a person may bring against a foreign state in domestic courts without the assistance of an espousing state is not in accepted usage as such an "international claim," simply because a foreign state is the defendant. In the typical "international claim" situation, the private person lacks standing before any international tribunal, has no cause of action under international law, even in a domestic court applying international law, and is barred from suit anyway under sovereign immunity. But where a private party has standing in a domestic court, a cause of action under the properly applicable law, and the claim is not barred by sovereign immunity (as often is the case under the "restrictive" theory), state espousal is not necessary, and state-to-state principles of "state responsibility" are not invoked.

Reference has been made in the context of this point to the *Pink* and *Belmont* cases and to the International Claims Settlement Act passed by Congress in 1949, initially to ratify and implement the United States-Yugoslav Lump Sum Claims Settlement Agreement,<sup>140</sup> negotiated, incidentally, by me. I submit that in these three sources of U.S. foreign relations law the term "international claims" was used in the above normal context. The Act clearly refers to *nationalization claims*, whether for takings in Yugoslavia or in other states with which lump sum settlements were to be negotiated later. These are all necessarily espoused claims, put forward by the United States under the Vattellian principle and settled "as if" claims of the United States. Putting *Belmont* to one side for the sharper *Pink* issue, the holding is

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138. M. D. VATTEL, *THE LAW OF NATIONS* (1758).

139. See generally Rama-Montaldo, *International Legal Personality and Implied Power of International Organizations*, [1970] BRIT. Y.B. INT'L L. 123.

140. Agreement Relating to the Settlement of Pecuniary Claims Against Yugoslavia, July 19, 1948, United States-Yugoslavia, 62 Stat. 2658, T.I.A.S. No. 1803.

that United States foreign policy as to the espousal of nationalization claims against the U.S.S.R. overrides the administrative law and policy of the State of New York with regard to the marshalling and winding up by the State Superintendent of Banks of various creditor claims against the New York branches of nationalized Russian banks. Considering that since the days of Secretary of State John Quincy Adams the United States has not espoused *creditor claims*, *Pink* is, in effect, a “super-espousal” case for American property nationalized in the U.S.S.R. Probably, also, *Pink* took away no vested, private rights to sue, it simply stopped Superintendent *Pink* from going ahead. *Pink* is thus flimsy authority for the point that an executive agreement by the President alone may take away an existing cause of action of a plaintiff with standing in a domestic court and not barred by immunity. If *Pink* did go farther, it seems overruled by *Reid v. Covert*<sup>141</sup> and other cases involving due process and separation of powers.

*Cynthia Lichtenstein*: The problem you have with historical practice or precedent here is the great shift in the concept of sovereign immunity. We are now in an age where states do business: “Princes stoop to trade.” This means that, to the extent that these claims against a foreign state such as Iran are on the basis of a commercial contract, there is little question under international law that the state instrumentality is no longer immune. It is a very different situation from the kind of international claims for the expropriation of property that the executive power was dealing with in terms of the International Claims Settlement Act.

*Covey Oliver*: We are not arguing; we are just trying to get the discussion focused. And I do not parade a horrible—I am not being argumentative—when I say that if you regard as an “international claim” any claim that involves a foreign government defendant which, if sued upon, would adversely affect a foreign policy interest of the United States, then you have given to the Executive the power to wipe us out all of the time. Suppose someone wanted to sue and could sue PEMEX<sup>142</sup> in Texas, but for one reason or another the Department of State fears it would ruffle the Government of Mexico too much; so, does the judge throw it out of court? It is a very dubious power—one the courts will probably not stand for.

*Ved Nanda*: Are there any plans for having Congress participate in some sort of consultative capacity on this issue?

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141. 354 U.S. 1 (1957).

142. PEMEX, the state-owned Mexican petroleum company.

*Mark Feldman:* We have had lengthy, extensive consultations and committee hearings, some with the majority in executive session, some public. I think it's just about done. Two committees in the Senate and in the House, both the Foreign Affairs and the Banking Committees, have had hearings or meetings of one kind or another. As far as I know they are just about wrapped up.

The point that Covey Oliver raises is a serious one and should be addressed. I do not know of any contract—talking about the non-banking sector—where there is a waiver of sovereign immunity in the contract. Certainly I am not aware of any. Most of the contracts that I am aware of have an arbitration clause, usually with some reference to Iranian law, although there are some with references to the ICC<sup>143</sup> and other things like that. I am not sure about the past practice of the Foreign Claims Settlement Commission. Surely you are right that in the great majority of cases it was property or tort.

*Covey Oliver:* Actions giving rise to “state responsibility.”

*Mark Feldman:* Yes, but I do not think tort, as a general rule, is a question of state responsibility under international law. There are exceptions to that, but I do not think the distinction was drawn on the basis of what was a claim of state responsibility under international law and what was just a claim of liability of a foreign state. I think also that there have been some contract claims. Certainly our agreements have, on occasion, included contractual claims. There is a doctrine, a bit ambiguous in scope, which says that a tortious breach of contract is a matter of international responsibility. We have certainly taken a broad view of that in recent years in our office, particularly if some anti-U.S. motivation gave rise to the claim or if there was a property interest, such as in a natural resource or a concession agreement or that sort of thing. The question is, assuming you are right about the premise, whether the federal courts are going to decide that they, rather than the President, should determine which of the claims are international claims in a situation where there is a cataclysmic disruption of relations between two countries.

*Covey Oliver:* Yes, I think the courts will decide this issue. Constitutionally, the issue is a judicial question unless properly withdrawn from the judiciary in accordance with the Constitution. I do not think it can be withdrawn by executive action alone. The most that could

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143. Rules for the International Chamber of Commerce Court of Arbitration, reprinted in 1 C. SCHMITTHOFF, INTERNATIONAL COMMERCIAL ARBITRATION, Doc. IV. A.3 (1979 & Supp. Dec. 1980).

be done is by legislative participation with the Executive to restrict the jurisdiction of the lower federal courts. The basic point I am trying to get at here is that, when a claimant appears in court with a claim against a foreign state that is potentially suable, the Executive cannot prejudge the issue.

Take a simple diversity case involving a choice of law provision in a contract. It is for a court to say whether that choice of law provision does or does not violate the public policy of the forum and, therefore, whether that provision should be applied or not. It is a part of the choice of law process itself. Under the settlement with Iran, the Executive purports to make that decision. I do not recall that the executive department in the past has been the source of authority on what to do about stipulations in contracts as to what law governs a case. In *Bremen v Zapata*,<sup>144</sup> the Court made the decision whether a choice of forum clause in the agreement was valid or not in terms of public policy, either federal public policy (in admiralty cases) or the best federal guess as to the applicable state public policy (in diversity cases).

*Robert Mundheim*: Take a particular claim: A contractor built something and says, "I now want to get paid." You respond, "That's a nice commercial claim that ought to be decided in the courts." The question is: "Why isn't he getting paid?" That "why" doesn't arise out of a commercial transaction. It arises out of the difficulty between two nations. To resolve that problem the President makes the settlement.

*Covey Oliver*: It could go that way in your case, as creditor claims are not "espoused" under U.S. practice.

*Oscar Schachter*: I want to note that I am not sure whether these comments apply to the case of the clearly excluded claimants who are denied access to the arbitral tribunal because of the Iranian courts clause. There I presume that *Bremen v. Zapata* would apply. It is conceivable that the courts would hold that the choice of forum clause was unreasonable and unjust. Certainly that is an arguable point. I also agree with Mark on one point he made. I think the settlement of foreign claims that we negotiated in the past were not confined to international responsibility in the strict sense. I think there were other cases, although the general thrust of your argument, Covey, would still be relevant. My point, though, was about the denial of access to

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144. *Bremen Towing Co. v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

any forum except the Iranian forum, and whether in those cases the question of public policy and due process would be a ripe question at this stage.

*Mark Feldman:* That question does not really arise because our regulations provide that those cases may be continued in the U.S. courts, although there is some tension with Iran over this point.

*Oscar Schachter:* You mean all of the excluded claimants may still have their remedy in the American courts?

*Charles Brower:* It is for a court to decide whether the choice of forum clause is to be upheld. The United States Government is not precluding the possibility of those clauses being adjudged unenforceable.

*Alan Swan:* But I understand that in the case of the so-called "paragraph 11 claims"<sup>145</sup>—the hostage claims and all that—your regulations call for dismissal. It is just cases excluded by reason of an Iranian choice of forum clause that will have the benefit of suspension rather than dismissal.

*Hans Smit:* May I ask a question on that? What if the court says, "I am not suspending the case because the Agreements say you can't come here. I am dismissing the case."

*Mark Feldman:* I would guess a court would not do that. It would have no incentive to do that. The Agreements are not self-executing. It has been interpreted by the executive branch in a manner congenial to the property interests of U.S. citizens.

*Hans Smit:* But if the Agreements did that, would it be constitutional?

*Mark Feldman:* If the court says it is constitutional, I guess it's constitutional.

*Keith Rosenn:* I have one question and then an argument to make, depending upon how the question comes out. First the question: The Agreements say that the United States will bar and preclude the prosecution in the courts of the United States of any pending or future claims against Iran. Does that apply to claims like the EDS case<sup>146</sup> where a final judgment has already been entered?

*Mark Feldman:* That paragraph does not apply to the EDS case at all. It applies only to hostage claims.

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145. Algerian Declaration, *supra* note 1, at para. 11.

146. 508 F.Supp. 1350 (N.D. Tex 1981).

*Keith Rosenn:* Will the agreement, nevertheless, cut off a claim that has already reached final judgment in any of the courts? There is only one. What happens to that one?

*Mark Feldman:* Let me just say that Bob Mundhiem's opinion was, and everybody's opinion still is, that the judgment was not licensed. That is a nice issue.

*Keith Rosenn:* The *EDS* case could very well pose a kind of *United States v. Klein*<sup>147</sup> issue if the attempt is made to deprive the court of jurisdiction. That is the kind of case where a judgment has already been entered in favor of the claimant. If you attempt to take away jurisdiction of the court at that point, a court is likely to say that is an attempt, in effect, to prescribe the rule of decision for the court and the Constitution prevents you from doing that. I just don't know.

*Alan Swan:* It is not a rule of decision in the process of adjudicating the claim. It is a withdrawal from the court of the ability to execute against assets. I would think Congress has the power to do that.

*Keith Rosenn:* Then you are back into the point Cynthia Lichtenstein<sup>148</sup> was making yesterday. Does that become the taking of property without due process? That also shifts the nature of the argument from the article III problem, the *Ex Parte McCardle*<sup>149</sup> situation, to the problem of the "taking" clause.

*Stefan Riesenfeld:* I would like to speak to that very problem. But I would like you to travel a little route with me. I start out with something Cynthia Lichtenstein said. It perturbs me very much. She referred to the change in the doctrine of immunity.<sup>150</sup> What has changed is that the rule of international law barring one state from adjudicating acts of other states in its domestic courts no longer applies to commercial acts. Many courts have said so, foreign courts particularly. What has changed is that there is no longer a rule of international law, if there ever was one, restraining a nation state from adjudicating commercial claims against another state in its own courts. It does not say that it has to be so, nor does it say immunity no longer exists. It only says that there is no longer any international law rule mandating immunity in such cases. That, in turn, affects the claims which our citizens have against a foreign state. As Mark Feld-

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147. 80 U.S. (13 Wall.) 128 (1872).

148. *Supra* at 90.

149. 77 U.S. (7 Wall.) 506 (1868).

150. *Supra* at 103.

man pointed out at the start, a claim against a foreign nation is on the level of an international claim. Whether there is a parallel claim in our courts because our courts now may have jurisdiction over the foreign state is another question. Basically, the claim remains a claim against a foreign nation; that is the Vattelian analysis. It is still an international claim, yet, under international law, we can say to a party that we will adjudicate the claim in our courts because those courts have jurisdiction and you [claimant] have asked for relief. This, in turn, gives rise to two separate constitutional issues. There is the due process issue; because we say that ordinarily you can sue in our courts, the court has to ask whether by barring that suit a property right has been taken away for which the United States is responsible. But there is also article III of the Constitution which poses a totally different question. We can find the same distinction on the domestic level. Right now the Supreme Court of California in *Agins v. City of Tiburon*<sup>151</sup> has ruled that, with regard to the zoning of property, there is a difference between the case where the property owner wants money—that is called inverse condemnation—and the case where the property owner is attacking the zoning statute. In this latter instance, the court asks whether the zoning measure should ever have been issued. In similar fashion, the article III question is quite different from the due process problem. Under article III all you can do is challenge the validity of the Agreements. Under the due process problem, you have the question whether a due process violation invalidates the Agreements or only requires that the Government pay compensation.

If you follow this analysis and the point I started out with, then under the “due process” question you must ask, “Was the claim of any value whatsoever and has, in fact, the United States by its action diminished that value?” Under article III, the question is not whether anything was taken away, but whether the President invaded a constitutional power which Congress has and the President does not have. I think that if you muddle all these concepts you do not get anywhere.

*Alan Swan:* I certainly agree with carefully sorting the two issues out. The point that Charlie Brower and Keith Rosenn were making earlier is that in terms of the ripeness issue—what questions the courts can deal with under present circumstances—the article III issue is probably a little easier to deal with right now than the due process question. The latter is going to turn a lot on what happens down the road.

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151. 23 Cal.3d 603 (1979), *modified*, 24 Cal.3d 266, 598 P.2d 25 (1979).



*Cynthia Lichtenstein:* Let me respond to one point. To the extent that an enormous amount of commercial activity in today's world is conducted by state entities, it may cause difficulties, I think, to label any claim arising out of a commercial relationship with a state entity as an "international claim." Covey Oliver illustrated this point nicely with his PEMEX hypothetical.<sup>152</sup>

*Stefan Riesenfeld:* That is not so difficult, if the foreign government that does business chooses its own forum by contract. That does not create any difficulties.

*Cynthia Lichtenstein:* The fact is that when we are talking not about prejudgment attachments, but about simple substantive contract claims for payment from the state entity, the foreign government waived its immunity by treaty. That is exactly what the 1955 Treaty said: The Government of Iran said that when our enterprises come and do business with your people we will not plead state immunity.<sup>153</sup>

*Stefan Riesenfeld:* But you have to use a term that is an Anglo-American term and not known to half of the world; namely, the term "waiver." Either there is immunity or there is not in such cases; you already start muddling the waters.

*Frank Mayer:* I wanted to ask Mark Feldman a question. Alan has suggested that there has to be a statutory basis for what the Government has done here. I thought Mark had suggested, however, that that was not true; that the executive power itself would support it. I want to know how far you go with that as your basis?

*Mark Feldman:* All the way. It is historical. It is primarily the responsibility of the President to settle international claims. It has always been an executive power. This is recognized, for example, in a post-Civil War statute which required the Secretary of State, when he received funds in settlement of claims, to pour them into the Treasury.<sup>154</sup> It was a housekeeping statute to make sure that funds went

152. *Supra* at 103.

153. 1955 Treaty, *supra* note 98, at 125.

154. Act of Feb. 27, 1896, 39 Stat. 32, 31 U.S.C. 547 (1976). The text of the provision is as follows:

*Disposition of Trust Funds Received from Foreign Governments for Citizens of United States.*

All moneys received by the Secretary of State from foreign governments and other sources, in trust for citizens of the United States or others, shall be deposited and covered into the Treasury.

The Secretary of State shall determine the amounts due claimants, respectively, from each of such trust funds, and certify the same to the

into the Treasury; they were then to be paid out of the Treasury of the certification of the Secretary of State. It was based on the concept that the Secretary of State received the funds as trustee. He was to determine the validity of claims and the entitlement of citizens to funds received from foreign governments.

It seems clear to me that the President has the power to settle international claims. In the 1930's there was a list in the Congressional Record of about forty executive agreements on arbitration. There have been many settlements that did not use arbitration. Yet, I think that in this particular case there is a statutory basis in IEEPA as well. It has been exercised by the President in that way. We rely on both authorities. The question that seems to have crystalized here, and a question that has to be presented to the courts, is whether all of this history and practice and hornbook law (including the Restatement<sup>155</sup>), are no longer applicable for the reasons that Cynthia Lichtenstein suggests. And I do not think that that is so. It seems to me that when you have a cataclysmic break in relations affecting the overall commercial relations between two states, it is fundamentally a foreign policy problem. I believe that the indulgence which the courts gave the executive branch throughout these months reflects an appreciation of the fact that the problem is not manageable in the judicial branch of government.

*Harold Maier:* Let me return to the question of the effect of these Agreements. Is the executive branch taking the position that, given that the President has the power internationally to make this kind of agreement, he can make it self-executing without some form of participation by the legislative branch? That seems to me to be the threshold question. If there is not any effective internal law conformable to the terms of the Agreements, presumably the courts can go right ahead and adjudicate the private claims, execute against the attached property if not immune, and then due process questions become inappropriate. So, is it the position of the executive branch that these Iranian Agreements are self-executing? I realize you argue that there is a statutory base that retroactively, in effect, serves to legitimate the Agreements. But let us assume that argument does not hold up. Is it your position that 150 or 200 years of history give the President the

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Secretary of the Treasury, who shall, upon the presentation of the certificates of the Secretary of State, pay the amounts so found to be due.

Each of the trust funds covered into the Treasury as aforesaid is appropriated for the payment of the ascertained beneficiaries thereof of the certificates provided for in this section.

155. RESTATEMENT, *supra* note 32.

power to make agreements of this kind self-executing and, therefore, automatically enforceable as internal law?

*Mark Feldman:* Absolutely; but self-executing is an elusive concept. I am not sure that these particular agreements are drafted in a way to make them self-executing, but they may be executed by the President, and they have been executed by the President.

*Harold Maier:* If they required the payments of funds to Iran rather than the cutting off of domestic claims, would that suggest that the funds could be withdrawn from the Treasury without going to Congress for an appropriation?

*Mark Feldman:* I do not think you could ever appropriate funds from the Treasury by Executive order.

*Harold Maier:* I do not either, and that suggests some limit on the power of the President to make self-executing—or Presidentially executed—claim settlements.

*Edward Gordon:* Before we go further, is the executive branch saying that the President's power to make the commitments to Iran are based upon existing statutory authority, such as the Hostage Act<sup>156</sup> and IEEPA together with the President's "inherent" power? Or, is the executive branch adding a third foundation, namely, that the 1955 Treaty itself provides some authority in the President to undertake at least some of the commitments he made, such as the commitment to establish an international arbitral tribunal?

*Mark Feldman:* I appreciate your raising the point. Frankly, I had forgotten to mention it. It is one of the least discussed of the issues and one of the most innovative arguments. The 1955 Treaty provides for the settlement of disputes by reference to the World Court or by any other means of pacific settlement. Because the Senate has given its advice and consent to this Treaty and the Treaty applies to questions of expropriation, breach of contract, and exchange regulations, among other things, we feel that there is treaty authorization to submit all such questions to arbitration. The 1955 Treaty authorizes recourse to "some other pacific means."<sup>157</sup> If you look at the Charter of the United Nations or at any other listing of the means of pacific settlement, arbitration is always there. We have argued, therefore, that the 1955 Treaty is an additional authority for these agreements.

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156. 22 U.S.C. § 1731-1732 (1976) [for text, see *infra* Appendix at 187].

157. 1955 Treaty, *supra* note 98, at art. XXI (2).

*Edward Gordon:* The reason I raise that question is because I sense a danger here. Because of the interesting constitutional questions that have been raised, we are making the same mistake that a number of international lawyers made in anticipating the Supreme Court decision in *Sabbatino*.<sup>158</sup> They were terribly familiar with the case law. They could discuss the decision that the Supreme Court should have made from a very learned position. Unfortunately, it was not a learned Supreme Court that was dealing with those issues—at least not learned in those issues. Or, to put it another way, the Supreme Court in 1964 was preoccupied with the parameters of its own role and with the enormous tensions that had gone into deciding *Baker v. Carr*.<sup>159</sup> So *Sabbatino* does not sound like what one might have expected on the basis of seemingly relevant case law up to that time. The case reflects the concerns of a group of nine men in 1964, which included, *inter alia*, personal rivalries that had grown up in the *Baker v. Carr* context. Now, assuming that the Supreme Court is the only body that will ultimately decide these constitutional law questions—I defer to whether the international arbitral tribunal might be called upon to address those questions—isn't the most relevant factor the current preoccupations of the Burger Court? I think the most relevant case, if we are going to try to predict what the Burger Court would do, is *Goldwater v. Carter*,<sup>160</sup> which I read to be a split of something like four to two to two to one, depending on how you want to read those opinions. I do not think you can predict what the Burger Court is going to do, that is why I raised the question with Keith Rosenn. What the Burger Court has done in limiting the judicial role is to force the plaintiff to describe precisely the interest of which it may have been deprived and which the Court must weigh against the governmental interest in taking whatever action it took. This is apparent in such cases as the tenure cases<sup>161</sup> and termination of employment cases.<sup>162</sup> I think that the Court will do the same thing in this situation. It will ask, "Are the interests of which you say you are deprived—whether they are liberty interests, property interests, or whether it is due process in substantive terms or procedural terms—sufficient to outweigh the overwhelming governmental interest in the

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158. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

159. 369 U.S. 186 (1962).

160. 444 U.S. 996 (1979).

161. *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

162. *Bishop v. Wood*, 426 U.S. 341 (1976); *Arnett v. Kennedy*, 416 U.S. 134 (1974).

conduct of foreign relations," not as the Court said in previous cases like *Belmont*<sup>163</sup> or *Curtiss-Wright*,<sup>164</sup> but in terms of whether the Court should get involved in this business at all." All the rest is more theoretically interesting, but not more predictive of what this particular group of nine people is likely to do.

*Soia Mentschikoff*: Are you suggesting, Ed, that the desire of at least some members of the Burger Court to get rid of litigation in the federal courts would lead them inevitably to say this is constitutional? This eliminates litigation in the federal courts.

*Edward Gordon*: It does not eliminate it, but it does affect the amount and scope of it. And it is designed to.

*Soia Mentschikoff*: Well, lessens it. I just want to be sure I understood your point.

*Edward Gordon*: I think it will lead them at least to look more fondly upon certain precedents than others. For example, in the *Goldwater* case,<sup>165</sup> why did they unearth *Curtiss-Wright*, which, after all, deserves a decent burial? I don't know why, but they did. And they treated it as if it was still the leading case and nothing had happened since it was decided. I think the underlying motivation may well be just as you said; simply, that this is precisely the sort of case "up with which the courts of the United States should not put." [Laughter]

*Alan Swan*: May I interject the point here that it seems to me there is a coalescence of two things going on. On one hand you have this tradition—which I suppose needs some examination—that Mark was talking about. There is also the notion that, in spite of the commercial aspects of the individual claims, we are really involved in a major foreign policy conflict between two governments. Together, this tradition and the perception of foreign policy reality become the basis for saying that all these claims are internationalized; that they are really government to government claims. On the other hand, subsumed in the present jurisprudence of due process is the question whether the property or liberty interest of which the claimant has been deprived is so important as to outweigh the governmental interest. I am not sure, but I suspect that this Court would be less inclined to address the issue in terms of the kind of esoteric question which asks whether or not the Iranian settlement is within the bounds of the historic Presidential power to internationalize private claims. They

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163. *United States v. Belmont*, 301 U.S. 325 (1937).

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

165. 444 U.S. 996, 1004 (1979).

would prefer, I should guess, to work with the more familiar due process methodology—of weighing the hurt to the claimants against the governmental interest—particularly since they can say the due process issue is not ripe and thereby keep the decision off for a while.

*Covey Oliver:* I had asked for the floor to make a suggestion as to what we should focus on, but the discussion has lead me to believe that it might be useful, for the record at least, to deal with a few of the points that have come up in discussion. First, an executive agreement is “inherently self-executing,” as one casebook notes<sup>166</sup> [laughter] in an international sense (*i.e.*, the agreement is not *ad referendum* but immediate). The U.S.-Iran Agreements show us that this is not necessarily true in a domestic legal sense, for by Executive orders and otherwise the now effective international obligation remains to be put fully into effect nationally. The President may bind the country internationally, but he alone cannot commit Congress or bind the courts. Internationally, the President acts as Chief of State; internally he is not above the law and under separation of powers cannot make or change internal law—at least internal federal law.

Secondly, as to the Vattelian principle: Perhaps I have turned the principle around a bit, but even so, it is still a takeoff point for legal analysis. Without regard to the immunity of the defendant state, persons, not being states, have no standing to sue internationally; and even if they have standing in domestic tribunals, they may not have a cause of action. Recently, however, we have seen what may be the beginnings of an expansion of private suits against foreign states for offenses of the latter that are made torts under domestic law as well as continuing to be state-to-state delicts under customary international law. (Examples are Judge Kaufman’s decision in *Filartiga*<sup>167</sup> and Judge Joyce Hens Green’s decision in *Letelier v. Republic of Chile*.<sup>168</sup> In the latter case the judge allowed private parties to sue a foreign state civilly for wrongful death (assassination) under an interpretation of the Immunities Act that, apparently resolved the standing, cause of action, and immunities impediments in plaintiff’s favor. If these national law causes of action—to some degree judge-made, if only by determined interpretation of statutes—were to be made exclusively referable to an international arbitral tribunal established by an exclusively Presidential agreement, is it certain that the plaintiffs would be “out of court” within the United States? The relationship of the hypo-

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166. L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW* (1980).

167. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

168. 488. F.Supp. 665 (D.D.C. 1980).

thetical question to the United States-Iran arrangement is close, is it not? In short, the problem of some types of claims having a foreign state linkage is suability in municipal courts. The problem requires us to differentiate sharply as to what the semantic content of the phrase "international claims" is. An "international claim," to me, is a claim that an individual cannot bring on his own anywhere; only a state can espouse it for him. I would go so far as to say that it is not an "international claim"—as distinguished from a municipal claim—unless it is the type of claim that falls within the conventional, customary international law rubric for state responsibility to another state with regard to the injuries caused by the first state to the national or the economic interests of a citizen of the claimant state. But to repeat the basic point, I think it is essential, in our predictive analyses here, to identify, as Mark so far has not done, what we mean by "international claims."

Now, leaving this aside, I suggest that before we adjourn we ought to think about how much we can do; what constructive suggestions we can make as a group to reduce the danger of constitutional conflict in the United States with respect to the United States-Iranian Agreements. We all understand the difficult circumstances under which these agreements were negotiated. Mark was very frank with us yesterday. If diplomacy, in the trite old phrase, is the art of the possible, the possible in this case was the best we could do under the circumstances. We knew all along that we were going to have some internal problems with any agreement we might be able to negotiate with Iran. It is very interesting to talk about what the Supreme Court will do in this or that variant of a core situation. Let us think, however, before we adjourn as to what we can do to tone the constitutional issues down as much as possible.

I do not mention it to advocate it, but one possibility would have been to get Congress more into the act. I suspect one reason we did not ask Congress to act is that Congress did not want to get into the act. So often in foreign affairs that is part of the problem. It seems to me, referring to *Goldwater v. Carter*, that we may have a line there for the mitigation of conflict; not in Justice Rehnquist's opinion which, to my way of thinking, overdoes the political question doctrine, but in Justice Powell's concept of ripeness. Strict adherence to the ripeness doctrine and the "suspension suggestion"<sup>169</sup> that the Executive has made to the courts might be the way to reduce as much as

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169. Pursuant to Exec. Order No. 12294, 46 Fed. Reg. 14,111 (1981), *supra* note 89.

possible constitutional conflict in this situation. And here I am still talking only about cases involving a cause of action cognizable by the American courts. I am not talking about the hostage claims, which are classic "international claims." I will stipulate that section 213 of the Restatement<sup>170</sup> is rightly grounded on 200 years of practice with respect to claims that are "international claims" in the sense of those that create state responsibility. The government can settle such claims, no question about it, by executive agreement alone, unless all the books be overturned. It is true that when section 213 was considered in the American Law Institute, there was a great deal of shock, but it survived. And I think it probably will survive further review.

*Charles Brower:* I wanted to support the concern expressed by Cynthia Lichtenstein, which is reflected at least inferentially in what Covey Oliver has said, and that is a concern that anytime you enter into the simplest commercial contract with a foreign state entity you are putting yourself at risk, not only to the policies of the foreign state, but also to the foreign policy of the United States. It may not rise to a constitutional issue, but I think there is a great underlying concern that the trend reflected in the Immunities Act and other actions of the United States Government to leave commercial relations to the usual commercial world, including adjudication by national tribunals, has, in fact, been reversed in this case. There is also a concern that there may be a broader reversal in the future as reflected partly in Judge Duffy's decision putting control over sovereign immunity back into the executive branch whenever a declaration of national emergency has been made.<sup>171</sup> This is reflected in many other actions taken by the Government in the Iranian situation. I think Mark has, to some extent, poured gasoline onto the flame of that concern with his broad position that any claim falls within the international settlement authority of the President. Maybe it goes a little too far to extend that power to claims not described as international claims by Covey Oliver. Perhaps the Government should simply rely on the IEEPA and not so extensively upon an independent constitutional authority in the President. In all events, there is a very broad concern with this matter of policy which I believe the United States Government should work to allay in the course of implementing these agreements and in the subsequent actions in which we might be involved.

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170. RESTATEMENT *supra* note 32.

171. *New England Merchants Nat'l Bank v. Iran Power Co.*, 502 F.Supp. 120 (S.D.N.Y. 1980).



*Hans Smit:* You know, when I first looked at the Agreements, I thought, "Can the President do all of this?" Now, my colleague, Lou Henkin, assures me that in the area of foreign relations the President is God Almighty. Apparently he is very almighty, although divine guidance seems not to have been with him on all occasions. This is a disturbing notion to someone who is concerned about having an open society and preserving the possibility for an input by the body politic on decisions that are of pervasive importance. This is especially so in light of the fact that our Constitution does not, in express terms, give the President that power. It is a power culled from disparate episodes through 200 years of history. Thus, I believe we should start to think more carefully about whether the President does have such power the moment we can say that somehow the foreign relations of the United States are at stake. I started thinking about some cases in which the foreign relations of the United States were not at stake, and couldn't think of any. That would mean that the President can rule as Caligula or, if you want, Tiberius.

All the concerns expressed here are that there should somehow be a limitation imposed upon the President's powers. The question is, "How do we do this?" Two hundred years of history do not really mean much if you look at the situation today. Whether the President could make a deal with France in 1940, when international intercourse was wholly different from what it is today, is not really a precedent for what the law should be today. We are all groping for some way in which we can mark out concrete and fair guidelines by which the power of the President, which in many cases is exercised in secret, can be limited to those areas that we regard as properly foreign relations. I think Covey Oliver's attempt goes in that direction, saying international claims are claims that arise under international law.

The question, again, is: "How do we do this?" Well, one way is to go to article III and say that the Constitution vests the judicial power of the United States in the federal courts and not in some arbitral tribunal. Maybe there should be an exception to that rule. Maybe arbitration as an alternative forum is appropriate for cases posing a narrow range of foreign relations complications, and then only if Congress does it. And perhaps even if Congress does it, you may want to say that ordinary claims already pending in the courts may not be put over into an international tribunal. On this point, the authority of the IEEPA is not self-evident to me. You can always construe that act as not intending to bestow upon the President an extensive power to remand all claims to an international body. In fact, the IEEPA does not deal with claims; it deals only with rights to assets.

Another way is to look at the due process clause. But, as Charlie Brower has already said, it is not so easy to shape a "ripe" substantive due process challenge in these cases at this time. On this point, I am a little indignant about the United States Government saying, "Well, you know these claims were not worth much anyway, because Iran has the act of state doctrine and sovereign immunity as defenses," when, in these same documents, the Government turns around and waives the defenses of the act of state doctrine and sovereign immunity on behalf of the very same government that had held fifty-two American citizens hostage for 444 days.

Lastly, there is the problem that Keith Rosenn properly raised. In *Barney v. Connecticut*,<sup>172</sup> the Supreme Court held that there was a right of access granted in the Constitution. The justices differed on whether it was due process or equal protection. It seems to me that this is a case upon which you could make the plausible argument that here, some claimants are denied access to the American courts and are treated quite differently from other claimants, such as the banks, who were satisfied right away. The President did that in one fell swoop. Does that strike you as fair conduct, as reasonable as something that we can countenance?

A lot of this discussion tends to become very technical. What is in these cases? What is in the practice? What have they done before? I think we should ask ourselves whether or not this is really something that we wish to countenance in a democratic society; whether the President can do this on his own with the stroke of a pen, without any input from the democratic process, and, of course, without any input from those people who were most immediately affected. The banks were consulted because without the banks the Government could not do anything. But the other claimants were really not consulted. Their claims were in fact treated by the President in the way he saw fit. Since he did not have any money to give the Iranians, and would have had to go to Congress to get that money, he gave the claims of the hostages and this adjudication to an international tribunal instead. So, if out of this whole incident comes some way of developing constitutional or statutory standards for imposing reasonable limits on the power of the President to "go it alone" in these areas, I think we will have made some progress. The Foreign Sovereign Immunities Act is, of course, a manifestation of the desire to limit the power of the President in areas that are in the ordinary commercial sphere and not in his typically international sphere.

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172. 401 U.S. 371 (1971).

*Tone Grant:* I question whether the various constitutional issues arising from the United States-Iranian Agreements will, as a practical matter, be ripe for adjudication by U.S. courts. There appear to be three general constitutional issues. First, there is the article III question concerning whether the Executive has the power to regulate the jurisdiction of the courts. Second, there is an equal protection issue arising out of the means of recovery provided to banks with syndicated loans, banks with nonsyndicated loans, and nonbank claimants. Third, there is the question whether there has been a deprivation in violation of the due process clause.

In connection with the actual hostage release, the Iranian deposits located in branches of U.S. banks outside the United States were transferred to the escrow account in England along with Iran's deposits with the Federal Reserve Bank.<sup>173</sup> President Carter issued an Executive order effective January 20 ordering the transfer of deposits located in the United States to the Federal Reserve Bank of New York for subsequent transfer, in part, to the security account and, in part, directly to Iran.<sup>174</sup>

The Office of Foreign Assets Control has issued a regulation stating that, pending a resolution in the U.S. courts of the issues concerning the effect of this latter order on the prejudgment attachments, there will not be any civil or criminal penalties assessed against those banks that do not transfer the Iranian assets as ordered.<sup>175</sup> To the best of my knowledge, all of these assets still remain in the U.S. banks.

The international arbitral tribunal is in the process of being structured, syndicated bank loans have been paid off, and negotiations have begun in London concerning the claims of U.S. banks with nonsyndicated loans to Iran. For the resolution of these claims, a \$1.4 billion escrow account has been established in the Bank of England. There is a six month period for the parties to settle their claims directly. Since litigation pending in U.S. courts has merely been suspended, rather than terminated, by the most current Executive order<sup>176</sup> (presumably pending action by the arbitral tribunal), and the

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173. Exec. Order No. 12278, 46 Fed. Reg. 7,917 (1981) [for text, see *infra* Appendix at 66].

174. Exec. Order No. 12279, 46 Fed. Reg. 7,919 (1981) [for text, see *infra* Appendix at 68].

175. 31 C.F.R. § 535.214 (1981); see also amendments to the Iranian Assets Control Regulations, June 12, 1981, at 46 Fed. Reg. 31630, and June 4, 1981, at 46 Fed. Reg. 30340 [for text, see *infra* Appendix at 172-75].

176. Exec. Order No. 12294, 46 Fed. Reg. 14,111 (1981), *supra* note 89.

attachments have not actually been dissolved, there is a question whether the article III issue is reached. The Reagan Administration has taken a position that it will not comment on the constitutionality of the Agreements.

Against this background, let us consider the three constitutional issues. First, there is a question whether U.S. banks currently holding frozen Iranian deposits subject to prejudgment attachments should transfer those assets to the Federal Reserve Bank of New York. Currently, President Reagan's Executive Order<sup>177</sup> provides that litigation is suspended in the U.S. courts.

Second, the equal protection issue may arise as a result of the different means provided for resolution and payment of syndicated bank loans, nonsyndicated bank loans, and claims of non-banks. The consideration of the differences between liquidated and nonliquidated claims should be important in the determination of this issue.

Third, with regard to whether or not there has been a taking, there may be a problem concerning the means by which the issue becomes ripe for adjudication. I believe that the issue of a taking may arise only if a U.S. claimant presents his claim to the arbitral tribunal and loses, or receives an award which is not in full satisfaction of his claim. It is likely, however, that the arbitral tribunal will not be established and will not make such an award until the assets which are currently in the U.S. banks are transferred out of the United States into the security account. On the other hand, it is unlikely that the U.S. banks will transfer those assets until there is a resolution in the courts concerning the constitutionality of the Agreements and the effect of the prejudgment attachments. Yet, if the constitutional issues will not be ripe for adjudication until the assets are transferred and the arbitral tribunal denies a claim or makes a partial award, there may never be an opportunity for resolution in the U.S. courts if those assets are not transferred and the tribunal does not become operative.

*Hans Smit:* With respect to those claims which under the Iranian version of the Claims Settlement Agreement, must go to the Iranian courts but which under the Executive Order remain suspended in the American courts while the tribunal determines whether to hear them; what happens to the attachments laid to provide security for those claims?

*Mark Feldman:* All the attachments have been terminated.

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177. *Id.*

*Hans Smit:* So that since the claims remain pending, they will go back to the American court if the international tribunal decides that it will not hear them? In other words, they will then be in the posture in which they were initially, but without attachments?

*Mark Feldman:* That is correct.

*Frank Maier:* May I add another wrinkle to Tone's question? Assuming that the issue of the voidness of the attachment does get up to the Supreme Court, will it be the issue, or will there be other claimants who have a slightly different approach that the Supreme Court will not reach? And will a bank ever be able to know when it is safe to send its money overseas?

*Tone Grant:* There is an additional issue. If a U.S. claimant loses before the arbitral tribunal or the arbitral tribunal makes an award which does not satisfy the claim, does the U.S. claimant have any further redress in the U.S. courts? President Reagan's Executive Order, by merely suspending pending litigation conceivably has not precluded that claimant from obtaining redress in the U.S. courts. If such a claimant were then able to obtain a judgment in the U.S. courts, do the Agreements contemplate that the judgment creditor could execute on that judgment by attaching Iranian property in the United States?

*Mark Feldman:* If there is a cause of action over which the court has jurisdiction under the Immunities Act, the claimant can get a judgment and then can execute to the extent that there are Iranian assets within the court's jurisdiction. That would take some time, I suppose, but in due course he will probably be able to execute the judgment.

*Alan Swan:* He can seek enforcement in the courts of some other country.

*Hans Smit:* Tone says that the banks are just not going to transfer those funds into the escrow account until these questions have been resolved. Is that correct?

*Tone Grant:* Better to go to jail. Or, stated more carefully, it may not be prudent for U.S. banks to transfer the Iranian assets frozen in their U.S. branches until the issues concerning attachment are resolved. Since Mark Feldman has previously suggested that any bank which does not transfer the assets may be prosecuted, however, I seek temporary reprieve until the issues are resolved! [Laughter]

*Mark Feldman:* We'll make an exception in your case, Tone! [Laughter]

*Alan Swan:* In fact your reprieve is already in the regulations. They say that there is no danger of jail until there is a "definitive legal ruling;"<sup>178</sup> whatever that means.

*Stefan Riesenfeld:* I would like to emphasize again the article III point. I am not talking about the security fund; I want to make that very clear. I am talking about the article III point, and would like to take it through a few steps. How will the Supreme Court, if the issue ever comes to it, perceive the controversy? Congress certainly could, although I do not think it will, repudiate the Agreements. It could enact a statute or a joint resolution and say, "We will not permit the implementation of this agreement." But, in fact, Congress has washed its hands of the matter. It does not want to have anything to do with it. Will the Supreme Court now perceive this as a matter in which the Executive and Congress are in conflict and not as a conflict between the Executive and the Judiciary and will it then rule as it did in *Goldwater*<sup>179</sup> that the issue is not really for the Judiciary to decide? Will it say, "This is a conflict between the other two branches of government and we should not interfere?" Or will the Supreme Court see it as a conflict between the Executive and the Judiciary itself and say, "we must speak as we did in the salary case?"<sup>180</sup> To me this is quite material. It is also the answer to Hans' and to Covey's question regarding the impact of the case on our democracy. The Supreme Court may say: "We have a democratic institution - Congress. Congress did not do anything, so why should we do anything?" Is it democratic for the Supreme Court to jump in when Congress washes its hands? That to me is the first important problem: Will the Supreme Court consider it as a conflict between the Judiciary and the Executive or as a conflict between the Executive and Congress?

The next question the court will have to consider is whether the President's actions were justified under the circumstance. Here Cynthia Lichtenstein talked about normal commercial relations, as did Charlie Brower. Let us look, however, at this "normal commercial relationship." It involved agreements between the Shah's government and private citizens in the United States. That was certainly a "normal commercial relationship." Then, a new government comes to power in Iran and rejects some of the contracts. A lot of litigation took place before the hostages were taken. Much of the litigation involved

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178. 31 C.F.R. § 535.221(g) (1981), added 46 Fed. Reg. 14330-37 (Jan. 19, 1981) [for text, see *infra* Appendix at 3164].

179. *Goldwater v. Carter*, 444 U.S. 996 (1979).

180. *United States v. Will*, 49 U.S.L.W. 4045 (1980).

the question of whether the claimants could attach Iranian property. The question was whether attachment was the proper remedy or whether the law of retention could be invoked by the contractors under conflicts principles, since local law controlled and Iranian law was based on Swiss law, which has the so-called "right of commercial retention." Some contractors had delivered prefabricated goods to warehouses. Some contractors then said, "We will exercise our right of retention and not send the goods to Iran although Iran has paid for them, either because Iran has not paid in full or because we have other damages." Then the hostages were taken. Does that mean that the limit had been reached; that the commercial relationship was no longer normal, and that, therefore, private claims became internationalized? Or is it the reverse? Are international claims temporarily privatized because we have some domestic judicial remedies? On the basis of past experience we seem to have reached a stage where the Executive is legitimately under the Constitution, authorized to try to work us out of the mess.

All these questions are valid issues. Yet, if we look at them all at the same moment we create confusion. Could Congress, for instance, decide to repudiate the Agreements, pass an internal law, and override a Presidential veto? Whether that is constitutionally possible may be a key to solving all other problems. I wish somebody would say something on that point. What do you think, Mark?

*Mark Feldman:* Everything in my instinct rebels against Congressional interference in the claims settlement process, as happened in the Czech claims matter, but that certainly is a precedent.

*Stefan Riesenfeld:* I think Congress, wisely, would not do it; but you would have to live by it, wouldn't you? I think it is an important issue to see how the Court would perceive the matter if they tried to face it.

*Mark Feldman:* Why is it important? Why is this an issue? Do you think we have to argue this issue before the Court?

*Stefan Riesenfeld:* I do not think you have to, but the Court may ask you the question. You cannot predict what they will ask you. They may say that this is a controversy between you and Congress; that is like the *Goldwater* case. It came as a bit of surprise, as you know, then the Court said that the *Goldwater* case was really a conflict between two branches of government and that, therefore, it was not ripe. Others said it was a political question.

*Alan Swan:* The conflict in *Goldwater* was over the scope of the President's power. I do not think that the question would be quite the

same if it were posed in terms of a conflict between a later enactment of Congress and a prior executive agreement.

*Stefan Riesenfeld*: No, no. I mean the question as it stands now. Congress has done nothing, although the President sent a message. The question is, "What type of conflict is it? Is it on the political level? And if so, what is the political question?" In its present posture, you could conceive of Congress passing a statute or a joint resolution. It has not done so. Now, in that framework, "How will the judges look at it?" That was Mr. Gordon's question, was it not?

*Edward Gordon*: May I just add to that? Alan, you said that the issue in the *Goldwater* case was the President's power versus that of Congress. The issue in the *Goldwater* case seems to have depended upon who was deciding what the issue was. From the perspective of the Court, at least to some of the justices and some of the commentators, the issue was simply what role the Court should play, not what the underlying dispute was.

*Alan Swan*: I understand, but the framing of the issue concerning the position of the Court was in terms of the underlying dispute. The Court would clearly have perceived its role differently if the underlying dispute had been different.

*Stefan Riesenfeld*: Well, there was still a remedy in the Senate.

*Robert Mundheim*: It is very hard to know how to jump into this diverse discussion. I guess, in part, the problem is one of determining what kinds of restraints were appropriate on Executive power. Steve, I think you are right. Congress is not going to pass the kind of resolution that you have talked about. That is important because it indicates basically a Congressional acquiescence in what the Administration has done. If Congress did act, I do not know what the legal consequences would be. But if you had that kind of unhappiness with the Executive's actions it seems to me that there then would be substantial practical consequences. It also seems to me that the worst solution, in terms of restraining the Presidential power, is to say that individual contract claimants could, in effect, upset the President's attempted resolution of a number of major problems with a foreign power. That seems to me to go to your article III and due process question. I think Covey Oliver struck the right note in saying that we have to be careful that we do not posture this case in a way which would invite a court to say that individual contract claimants have that right.

Another form of restraint on the Presidential power is that of making the Government pay to the extent that it uses individual



property or other rights to effectuate its foreign policy purposes. That is a point that we have not yet talked about. I hope we will.

A third kind of restraint on the Presidential power is the very substantial although informal political constraints which exist with respect to the exercise of executive power. What I am referring to is a general constraint on the President doing anything more objectionable than is necessary to accomplish an acceptable purpose. That seems to be the point about which Hans Smit has worried consistently throughout the day. I want to say a word or two about that. He has said that the only people with whom the Government consulted during the settlement process were those representing the banks. That was an example, he suggested, of executive power run riot. But that is not true. There were, from the very earliest times, consultations with the broadest spectrum of claimants. The way that the letter of credit problem is being handled reflects extensive discussions early in the process with people who had that kind of problem. Mark Feldman, Rich Davis,<sup>181</sup> Bob Owen<sup>182</sup> and I met with innumerable contractors, oil companies, and other people with claims. We asked for their suggestions in the event we were able to move toward a settlement.

Let me give you another example of restraint. When the Government froze bank accounts, we could have frozen accounts on as broad a basis as possible. We did not do that. For example, we specifically licensed foreign currency accounts in U.S. bank branches abroad. This was done for a very practical reason: so that we would not get into more trouble than we had to with our foreign friends. For the same reason, "cover accounts" were specifically licensed. So the notion that the Executive can act without any substantial constraints just is not so. I think all of the actors in these proceedings, and the President especially, were worried about how history would treat them. That was also a substantial constraint.

*Alan Swan:* Could I interject a point here? There is a continuous theme that comes up any time we discuss the question of the President's role in foreign policy. There are an enormous number of practical constraints operating on him, but one of the things that I puzzle about is how much Presidential restraint is actually dependent upon a realization that down the road there is Presidential accountability either in the courts or before Congress; an accountability that is much more than either history or the exigencies of foreign policy can offer.

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181. Richard J. Davis, Assistant Secretary (Enforcement and Operations), Department of the Treasury.

182. Robert B. Owen, Legal Adviser, Department of State.

While it is important to understand that an impotent President, a President who cannot handle problems, is as bad as a President run riot, we have to be very careful about the dynamics that assure us a restrained President. Law is the critical factor in those dynamics; the threat of having to answer before the courts, the threat of Congressional repudiation, the threat of Congressional oversight. These kinds of things are critical to assuring a structure of Presidential responsibility. Much of the discussion here, therefore, is in terms of at what point and under what rubric it is appropriate for the courts to step in to assure that that structure is in place.

*Michael Silverman:* Actually, I would like to amplify a bit on Bob's point concerning restraint. The issue that almost passed me by now links up to this very well. I am concerned with due process. That seems to me to be related to the adequacy of the remedy that is involved in this case. I would say that two aspects of the Agreements should be stressed. First, that the Government has acted with great restraint in merely asking for suspension of the pending cases when the language of the Algerian Declaration calls for termination.<sup>183</sup> So, when in these circumstances we use words like "deprivation" and "denial," I, for one, do not use them as terms of art. It may be that we go too far when we use those terms with reference to the claimants' actual rights, with perhaps the exception of the EDS case. The second thing I would note, which has not been noted and may be worth a footnote, is the Government's position in its recently filed Statement of Interest.<sup>184</sup> The Government has stressed the arbitrability of the claims under the exclusion provision and has asked Iran to take a position on that issue which, I understand, is upsetting Iran's lawyers greatly since it could be thrown back in their faces before the arbitral tribunal. So, again, the Government has gone out of its way to aid the private claimants. All of this ties together to suggest that the Agreements may actually work. As Hans Smit was saying, you have to view this matter not in the light of 200 years, but as a problem in diplomacy under the particular circumstances that actually obtained.

*Alan Swan:* Could I just ask a technical question in connection with the new Executive Order?<sup>185</sup> It suspends the claims that are arguably submissible to the tribunal. It does not, as I see it, go so far as to say that those claims will remain in suspension until the arbitral award is paid in full.

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183. Algerian Declaration, *supra* note 1, at para. 11.

184. *Supra* note 33.

185. Exec. Order No. 12294, 46 Fed. Reg. 14,111 (1981), *supra* note 89.

*Mark Feldman:* Oh, yes. The Executive order so provides.

*Alan Swan:* Is the point of disposition the point of payment or the grant of an award?

*Mark Feldman:* If the award is negative, the claim is discharged. If it is positive—if an award is made—the claim is discharged only upon payment in full.

*Alan Swan:* And you are squaring that with the Agreements?

*Mark Feldman:* We have undertaken in the Agreements to terminate litigation through the process of arbitration. If Iran does not meet its commitments to pay these claims in full, then the claims remain valid until discharge by payment. I imagine, that if you were a claimant in that situation you would probably be using the award, not the original claim, as the basis for trying to collect the balance.

*Frank Maier:* To add to Michael Silverman's footnote, there is another way in which our Government has gone out of its way to help protect American claimants. A substantial number of U.S. companies have stand-by letters of credit written in a way that arguably permitted Iran arbitrarily to draw upon the credits. Iran, in fact, did so in a number of cases. In some of these cases, U.S. banks were enjoined from making payments, at least on a preliminary basis. Those disputes may proceed in the courts under the 1981 Executive orders and the regulations, and the funds held under the bank stand-by letters of credit continue to be frozen.

*Edward Gordon:* I want to go back to Cynthia Lichtenstein's comment this morning<sup>186</sup> and amplify it in this way. The problem of government interference with private rights in pursuit of the entire national interest is not new. It goes back at least to the 19th century. What is new is not merely that the doctrine of sovereign immunity has changed, but that the level of interaction between national communities has reached such a peak, and is so constant a factor, that what was once an occasional, intermittent government interference with otherwise protected rights and liberties is now likely to be so frequent an occurrence as to change the constitutional arrangement completely. Also, it seems plain that this level of interaction between individuals in different nations, and between individuals and the governments of other countries, is going to increase, not decrease. What was once merely an occasional annoyance is now a constant

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186. *Supra* at 109.

factor that is difficult to square with the traditional framework of the Constitution.

*Tone Grant:* Ed Gordon and Cynthia Lichtenstein have expressed some concern about the growing interference of the U.S. Government in private commercial relationships. They seem to imply that there is an adverse effect created when governments become involved in the commercial transactions of private parties. I believe that we must recognize that many of the private international commercial transactions would not be possible unless governments were involved. Banks lending internationally to government-controlled entities rely upon the guarantees or the credit of such entities in making these loans or extending letters of credit. Private contracting parties in international commercial transactions rely upon banks for the issuance of letters of credit. A concern is being expressed about government interfering with private commercial parties' rights, but in many transactions, the private commercial parties are relying upon the credit of the government. Also I think that, as you go through the Agreements, you will find them remarkably workable under a lot of different circumstances. In fact, the Government may, in many instances, have provided potential claimants with a more viable remedy. I also want to go back to my underlying point on the private attachments. As Mark noted yesterday, many of the attachments were brought as a result of the freeze and its protection, not necessarily because a claim has ripened.

*Alan Swan:* Are you reflecting the problems created by the defenses of sovereign immunity and act of state in making that assessment? Once the Government stepped in and blocked Iran's accounts, apart from the defenses of sovereign immunity or act of state, I would think that the remedy in the American courts was certainly as effective, if not more effective, than anything the arbitral tribunal might do. The security of any award by the arbitral tribunal is dependent ultimately upon the willingness of the Iranians to provide the funds.

*Robert Mundheim:* No, but I think the point is that absent the freeze the funds would have gone.

*Hans Smit:* I would have wagered you anything that the courts would have stayed that.

*Robert Mundheim:* No. The Iranians were going to pull the funds out of the banks, so you would have had to chase them somewhere else. Now, how much were in time deposits as opposed to checking accounts and how they would have orchestrated the withdrawal are questions. They could have moved the money out fairly

rapidly and there would not have been anything for anybody to attach.

*Mark Feldman:* That's government helping its own people.

*Robert Mundheim:* That is exactly Tone's point.

*Tone Grant:* In considering the issue of waiver of sovereign immunity, I believe it must be considered in connection with economic circumstances as they exist today. In previous decades there may have been a more clearly defined distinction between private commercial activity and government-related commercial activity. In today's economic markets, both domestically and internationally, I believe that distinction almost ceases to exist.

*Cynthia Lichtenstein:* I do not suggest that in working through its settlement with Iran the Government was unaware of private rights or disregarding private rights. I recognize that there was an enormous concern with what were the bargaining chips to be used here. I was trying to suggest, however, that, to the extent Government has supported international economic relationships (such as Tone Grant's example of loans made by the banks to developing countries underwritten by a kind of International Monetary Fund seal of approval) that support reflects a determination that the ultimate foreign relations interest of the United States is a world where everyone is economically healthy; that underdeveloped countries left to increasing degradation are potential sources of world conflagration: "The fire next time."

Not only developing nations but, in economic theory at least, all members of the world ultimately benefit from the free flow of trade and exchange needed to pay for trade. So the Government supports the flow of private funds; that is fine. I am only suggesting that, to the extent the Government sees its immediate short-term foreign relations interest served by the utilization of private rights, such as in grain blockages, and so on, it is by that utilization discouraging the very expectations that it had previously raised. There is thus a balancing here. We really have to think about it. Even when we are talking constitutional power, or compensation for rights, we must think about what kinds of expectations have been raised in private claimants as to their ability to deal with foreign governmental entities.

*Robert Mundheim:* Is that a political problem or a constitutional law problem? Take, for example, the embargo of grain sales to Russia. Ultimately you had an enormous amount of political reaction to what the Government did that will get resolved in a political context. The next question is, when the Government does what it did in the grain

embargo, does it have a legal obligation to provide compensation? Now, it decided as a matter of political judgment to do something in that area. We did not, however, do anything with respect to those people who lost good contracts in connection with the blocked trade transactions with Iran. Are we talking constitutional law or legal obligation or are we talking about judgments that governments necessarily have to make in a political context?

*Mark Feldman:* The broad issues that have been presented today are, I think, valid issues. I am not at all sure the courts will reach them in this case. I would like to remind you that we're talking about an issue that is going to be litigated on the basis of a particular set of facts. There are any number of facts that are compelling in this particular situation. There is first of all the fact that you had a serious crisis in our international relations affecting the entire society, so I do not think we are talking here about the normal course of commercial relations. There is also the fact that this is not a waiver of claims (setting aside for the moment the hostage claims). We are talking here about a comprehensive settlement of claims with a commitment to, in effect, litigate in a special tribunal, to pay all awards in full, and to provide a substantial security, a lot of money. There is every expectation of substantial compensation even if people are skeptical about complete compensation. There is also the fact that these attachments were authorized by the Government on the basis of a revocable license. That is something people relied upon. They brought their actions in order to establish priorities against various contingencies that did not ensue.

Last, but not least, I am very uncomfortable with the suggestion that the U.S. Government used the claims for its own purposes. The U.S. Government used the assets of Iran for multiple purposes. It used them for obtaining the release of the hostages and it used them for obtaining a remedy for the claimants. As I look back on our history, I cannot think of a situation in which there has been a rupture of relations resulting in a lot of claims, where it has not been necessary to deal on a collective basis with the claimants in order to put the situation back together again. I think everybody expected, whether they liked the idea or not, that the U.S. Government was going to be in there one way or the other. The objections to this were in most cases nothing more than an attempt to lay a basis for a constitutional challenge later on. They knew we would be in there; we had been talking to the claimants practically since the first day. The basic question was what kind of settlement we should try to make. Should we go for a lump-sum settlement or for arbitration? Some, I suppose,

hoped that there would be a vesting, and maybe that is what it really comes down to. The Government has taken a course of action looking away from the vesting of Iranian assets. Only through vesting could the claimants be compensated with greater certainty and in a more generous manner than is likely under the process we decided to establish. However, the U.S. Government has not vested assets in a long time, and I do not think it is likely to do so in the near future.

*Oscar Schachter:* Coming back to Hans Smit's question concerning the restraints upon the power of the President that should be applied in this matter,<sup>187</sup> I am sympathetic to his wish. Yet it seems to me that our whole discussion has demonstrated that it is really quite impossible to lay down any abstract formula. I do not think Covey Oliver's suggestion on the distinction between international claims and domestic claims would be especially helpful as a general rule. Nor has any other broad criterion emerged here. Does that mean that we have to conclude that this is all a political matter, as Bob has suggested, or is there a constitutional issue? I am not a constitutional law expert, but it does seem to me that we can conclude that there is a constitutional determination that might be made, not in terms of any particular abstract formula, but rather utilizing the old reasonableness type of approach, taking account of various particular factors and weighing the interests which the Court has by now repeatedly addressed in similar contexts. In short, it does seem to me that we can conclude that we are not talking here about an arbitrary exercise of power. In other words, Mark's analysis is one that most of us can accept as applied to this particular situation. The only thing that we can contribute, if we do not try to formulate hard-and-fast rules, is a further exploration of what sorts of interest are relevant. Points about consultation—the procedural side—are relevant. There are a number of factors here which we can throw into the pot as relevant factors in weighing governmental interests. In a way the discussion has been useful. It does suggest that there are elements of restraint in the situation and that these are relevant to a constitutional determination but we are not going to be able to legislate hard-and-fast rules in the future.

*Harold Maier:* I suppose I am about to reiterate some of the things that Oscar Schachter said. I do not think the issue is whether we should lay down or attempt to identify hard-and-fast constitutional rules. At the same time, however, in each of these situations

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187. *Supra* at 198-200.

where the Government has a specific problem to solve, there is a tendency to focus upon the validity or the utility of the particular solution without focusing upon the longer term impact of accepting that solution on the allocation of governmental power. The Legal Adviser's Office regularly takes the position that, in the United States, executive power exists because it has been exercised over time in a particular way. Out of history one develops a customary constitutional practice that creates executive power. The point I am making is that the distinction that Bob Mundheim drew is one that is potentially dangerous, although I do not think he meant it to come out quite that way. one of the reasons we have constitutional controls on what government does, and one of the reasons for the separation of powers doctrine, is to insulate the populace from the effect of governmental decisions which are made in response to perceived short term needs without at the same time bringing into the equation the longer term effects of those actions on the governmental structure. In that sense, what Oscar was saying is absolutely accurate: One cannot constrain the Government effectively by broad, hard, fast rules that might make it difficult to conduct foreign policy in a manner that serves all of us. On the other hand, one must always be aware of the assumed principles of government action that are reflected in any given decision-making process. To the extent that discussions of constitutional principles raise such issues, they are directly relevant to the question of whether a particular agreement is one that ought to be given effect and, if so, what its effectiveness should be in the courts, in Congress, or in the executive branch.

*Keith Rosenn:* I would like to go to those constitutional issues again. First of all, I want to answer Steve Riesenfeld's question.<sup>188</sup> It has been too long unanswered. It is clear that Congress could constitutionally pass a statute which says "We disavow the whole agreement." What would happen is what happens whenever Congress passes a subsequent statute inconsistent with a treaty. You may have international responsibility, but in terms of raw constitutional power, Congress has the power to pass such a statute. We have identified at least three substantial constitutional issues. One is, of course, the taking question. The second is whether the President, by himself, has the power to make exceptions to the jurisdiction of the federal courts. The third is whether Congress has the power to deprive a class of litigants from resort to all U.S. courts, federal or state, and whether that

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188. *Supra* at 124.



power can be jointly exercised by Congress and the President acting in tandem.

There is no question that Congress has the power to make exceptions and to regulate the jurisdiction of the courts; article III is clear on that. What is not clear is how far that power can be pushed in particular situations. This is one area that has been left vague under the decisions of the Supreme Court. Perhaps it ought to be left vague. It is a delicate kind of issue that goes right to the heart of the political system, and there is some felicity in the fact that historically it has not been pushed to the testing point. If it is going to be pushed to the testing point, if Congress is going to deliberately put its power on the line and say, "Yes, we intend to take this away from the courts altogether," I hope that it would do so in a context different from this one. This context is very ambiguous. For example, had Congress taken away the courts' powers by repealing the Foreign Sovereign Immunities Act to the extent that it waives sovereign immunity in this particular case and also repealed that part of the 1955 Treaty that waives sovereign immunity on Iran's part, few would deny the constitutionality of the statute.

There are other uncertainties. The procedural posture in which the case is presented to the Supreme Court and the facts of any particular case could well influence the Court's decision. If it comes up in the context of something like the *EDS* case—which seems to pose the constitutional issue most starkly—I think it would probably be ducked by the Court. I would at least expect the Court to try very hard to figure out a way of avoiding that kind of constitutional issue. It is an extremely delicate one and, as Charlie Brower was pointing out earlier, it is not all that clear how anybody is going to be hurt. It may be that *EDS* is going to be hurt, but it is not clear that anybody else is. It is a situation where prudential considerations of ripeness might well come into play, and the Court may stay its hand for some time to see how the dust clears. If you can wait for years and years, relying on the distinction between the suspension and the actual termination of claims, it may all go away. I would not be at all surprised to see the Supreme Court invoke the prudential aspects of ripeness to say, "We simply will not interfere with this delicate situation at this particular time," and I think that would be a very felicitous outcome. It would be unfortunate if the Court sought to decide what I regard as a very delicate and extremely difficult constitutional issue in a procedural context as complex as this one. It does not pose the constitutional issue with quite the starkness and clarity that the Court should wait for.

*Stefan Riesenfeld:* Then, prudentially, what weight would you attach to Congressional inaction in the whole matter? That was the point I really raised.

*Keith Rosenn:* I think it always very difficult to attach much weight to Congressional inaction. The Court has gotten itself into trouble when it tries to divine the sound of silence; Simon and Garfunkel are much better at that.

*Covey Oliver:* This is a point on which Felix Frankfurter had the last word in the dissenting opinion in a famous estate and gift tax case, when he said that we build on quicksand when we attempt to find in Congressional inaction guiding legal principles.<sup>189</sup> I think that takes care of the inaction aspect. I came back to the discussion for a moment to say that I do not believe there is any thought here that we should have some fixed or rigid set of rules. Our discussion was going just the other way, so I am not quite sure what the thrust of the remarks by my friend Oscar Schachter<sup>190</sup> and others is. I want to clarify that when I talked about international claims in the context of international public law, I was only trying to narrow the problem. If we can identify the "international claims" that are truly those that individuals could not possibly sue on in a domestic court—those which only their governments could espouse for them internationally—we could remove a whole group of cases from any domestic concern at all and relegate them to the arbitrators. All we have to do is hope that the Court will stick with the 200 years of practice.

Now, as to the remaining cases, my general feeling is that the due process taking compensation issue as applied to attachments falls on Mr. Justice Holmes' side of the tolerated larceny of the police power or, in this case, of the foreign affairs power. There is not much that the Court will predictably do about the loss of the opportunities for attachments and the like. But what we do want to avoid—and I do not regard this as a rigid or black-letter rule, but a matter of public policy linked to law—is getting ourselves in a posture of sanctioning a naked power in the Executive to deny to private parties having a dispute with a foreign government an access to the courts that they would otherwise have as to substantive rights. The Executive simply

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189. "Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of the Treasury and of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." *Helvering v. Hallock*, 309 U.S. 106, 121 (1940).

190. *Supra* at 222.

cannot close the doors of courts for reasons of foreign policy preference. That is clear, certainly with respect to the federal courts, under the separation of powers.

It is reasonably easy to avoid that confrontation. The first step has already been taken. The suspension technique is a very positive one in this regard. I for one applaud it, although under it we will not get any black-letter rules out of the cases. Indeed, if there are potential Supreme Court clerks in this symposium, they might begin to get ideas of how their justices should write the opinion in a great test case, should one be taken up.

*Tone Grant:* In response to Keith Rosenn's concerns about whether the various constitutional issues are ripe for decision by the Supreme Court, I submit that the Court must make a determination of the issues or the Agreements will never be fully implemented. I do not believe that U.S. banks will transfer the assets until there is a final resolution in the courts. As a result, the arbitral tribunal may never function. I, too, am concerned about how the procedural aspects of the Agreements will create a situation where the issues are ripe for determination by the Court. I suggest that one means of creating a taking in order to frame the issues for the Court may arise by ordering the U.S. banks to transfer the assets. Even if it is determined that the prejudgment attachments of nonbank parties are invalid, the banks themselves may have claims in connection with outstanding nonsyndicated loans. If the banks are not able to exercise their right of offset against those deposits and must transfer the deposits, there may be a taking. Further, in making the transfer, the banks may have liability to those parties who have obtained prejudgment attachments against those deposits. I believe the Court must make a determination of those issues as soon as possible in order for the Agreements to be implemented.

*Hans Smit:* Since I see that the conference is drawing to a close and we have really not covered what I regard as two very substantial issues, I want to take the opportunity of asking Mark Feldman two questions. The first relates to the waiver of the hostage claims. That is clearly a case in which you took the claims and gave them away. The question is the Government under a constitutional obligation to pay compensation to the hostages for the claims that were taken from them? Secondly, what is the significance of the provisions in the Algerian Declaration relating to the assets of the late Shah and his close relatives?<sup>191</sup> By those provisions the United States agrees, in

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191. Algerian Declaration, *supra* note 1, at para. 12, provides:

12. Upon the making by the Government of Algeria of the certification described in paragraph 3 above, the United States will freeze, and

effect, to recognize the decrees nationalizing the assets of the late Shah and his close relatives. I have spoken to some lawyers from Iran and they said that this is right in point with the *Pink* case.<sup>192</sup> The United States, by executive agreement, agrees to give extra-territorial effect to a nationalizing decree of a foreign country. That means that the courts in this country have no choice but to give those assets to the power that has nationalized them. I do not think that the United States intended to do that. It says, in the same provision, that the United States waives the act of state doctrine and sovereign immunity on behalf of the State of Iran. Yet, Iran would never have to worry about those doctrines if the assets already belonged to it. On the other hand, if the intention is that Iran can go after the Shah and his close relatives in an American court but will have to prove that those assets were improperly taken from the original owners, I wonder why it was necessary to recognize the extraterritorial effect of the nationalization decrees.

*Mark Feldman:* There are three things I want to say. We have not recognized the extraterritorial effect of any Iranian decree relating to the Shah. As I have stated publicly and have told the Iranians, the words "in accordance with U.S. law" mean that the law of the local jurisdiction will apply. We will be prepared to tell the courts that. Our understanding, for example, is that the public policy of the State of New York does not give extraterritorial effect to such decrees. Moreover, they do not have any such decree.

*Hans Smit:* No, but they were trying to get one fast enough but could not manage it, right?

*Mark Feldman:* On hostage claims, we do not think that there was any taking apart from the fact that we obtained for the hostages their liberty. In our view, the courts of the United States have no jurisdiction over torts taking place outside of the United States.<sup>193</sup> Therefore, nothing was taken from them. Of course, the subject of compensation for them is under study.<sup>194</sup> I think there is a disposition

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prohibit any transfer of property and 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 U.S. litigation brought by Iran to recover such property and assets as belonging to Iran. As to any such defendants, including the estate of the former Shah, the freeze order will remain in effect until such litigation is finally terminated. Violation of the freeze order shall be subject to the civil and criminal penalties prescribed by U.S. law.

192. *United States v. Pink*, 315 U.S. 203 (1942).

193. *Contra*, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

194. Exec. Order No. 12285, 46 Fed. Reg. 7931 (1981) establishes the President's Commission on Hostage Compensation [for text, see *infra* Appendix at 78].

that they should have compensation in line with the general trend of compensation made available in the past for other persons similarly situated; that is to say no bonanza. I am not sure that the hostages will be very satisfied with that, but we have the POW's and others to consider.

On Tone's point, what is going to happen to solve the bankers' problem is that the attachments are going to be vacated by court order. Then there will not be any excuse or concern for the banks. There is also the provision in the IEEPA saying that no person can be held liable for any action taken in furtherance of an order. But I think the most important thing that I have learned from this seminar is that we in the Government have got to persuade the Court that this is not a question of depriving the judicial branch of jurisdiction. We have never thought in those terms. We start from the point that there is a substantive power in the President to settle international claims. We could have settled them for twenty cents on the dollar or ninety cents on the dollar and there could not have been a cause of action. What we have is an agreement for the payment of these claims in full upon certain determinations by an arbitral tribunal. In view of the history and practice of arbitration up until World War II, we do not think that raises a different point, so we do not look at this as a matter of the jurisdiction of the courts; it is a question of the cause of action. I can see we have some articulation to do on that.

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The Commission shall study and analyze, and make recommendations to the President on the question whether the United States should provide financial compensation to United States nationals who have been held in captivity outside the United States, either (1) by or with the approval of a foreign government, or (2) by reason of their status as employees of the United States Government or as dependent of such employees.

*Id.*