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# Recent Decisions

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# RECENT DECISIONS

## EXECUTIVE POWER—PRESIDENT HAS THE POWER TO BLOCK AND TRANSFER IRANIAN ASSETS, NULLIFY PREJUDGMENT ATTACHMENTS, AND SUSPEND CLAIMS OF UNITED STATES NATIONALS IN IMPLEMENTING EXECUTIVE AGREEMENT FOR RELEASE OF HOSTAGES

### I. FACTS AND HOLDING

Petitioner[1] sued the United States and the Secretary of the Treasury[2] to enjoin enforcement of Treasury Department regulations[3] and executive orders[4] implementing an executive agreement with Iran[5] that would nullify petitioner's prejudgment attachment of Iranian bank assets and prevent further litigation of its claim against Iran.[6] The events leading up to this suit are relevant to a discussion of the legal issues.[7]

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1. Petitioner is the assignee of interest in a contract between the Atomic Energy Organization of Iran and Dames & Moore International, S.R.L., petitioner's wholly owned subsidiary. Dames & Moore v. Atomic Energy Org. of Iran, No. 79-04918 (C.D. Cal. filed Dec. 19, 1979); *see also* Dames & Moore v. Regan, 101 S. Ct. 2972, 2979 & n.4 (1981).

2. Petitioner's first suit was against the Government of Iran, the Atomic Energy Organization of Iran, and a number of Iranian banks for $3,436,694.30 plus interest claimed due for services rendered under contract prior to termination. For purposes of convenience this suit will be referred to in text as Suit I. The instant action, Dames & Moore v. Regan, 101 S. Ct. 2972 (1981), will be referred to in text as Suit II.

3. 31 C.F.R. §§ 535.101 - 904 (1980); *see also infra* note 7.

4. Exec. Orders Nos. 12,276 - 12,285, 12,294, 46 Fed. Reg. 7,913-32, 14,111 (1981); *see also infra* note 7.

5. *See infra* note 15.

6. *See infra* notes 15-24 and accompanying text.

7. The following chronology may be useful and will be referred to throughout these notes.

11/4/79—United States Embassy seized; hostages taken.

11/14/79—National emergency declared and Iranian assets ordered frozen. Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979), *reprinted in* 50 U.S.C.A. § 1701 (West Supp. 1981).

11/15/79—Treasury regulations issued:

—freezing assets. 31 C.F.R. § 535.201 (1980).

—requiring licenses to proceed against frozen assets. 31 C.F.R.

On November 4, 1979, Iranian "students" seized the United

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§ 535.203(e) (1980).

—making licenses revocable. 31 C.F.R. § 535.805 (1980).

11/26/79—Treasury regulations issued:

—granting general licenses. 31 C.F.R. § 535.504 (1980).

—authorizing prejudgment attachments, 31 C.F.R. § 535.418 (1980).

12/19/79—Petitioner files suit on contract claim in district court (Suit I). *See supra* note 2.

—District court orders prejudgment attachment of Iranian property.

4/17/80—Executive Order No. 12,211 issued, prohibiting certain further transactions with Iran and specifically citing both the International Emergency Economic Powers Act, 50 U.S.C.A. §§ 1701-1706 (West Supp. 1981) [hereinafter cited as IEEPA], and the Hostage Act, 22 U.S.C. § 1732 (1976), as authority. 3 C.F.R. 253 (1980 Compilation), *reprinted in* 50 U.S.C.A. § 1701 (West Supp. 1981).

1/19/81—Executive agreement with Iran signed, *see infra* note 13; President Carter orders licenses revoked, attachments nullified and Iranian assets transferred. Exec. Orders No. 12,276 - 12,285, 46 Fed. Reg. 7,913 -32 (1981).

1/20/81—Hostages released by Iran pursuant to agreement.

1/27/81—Petitioner moves for summary judgment in Suit I.

2/18/81—District court grants motion and awards petitioner amount claimed plus interest. Petitioner takes steps to execute on the judgment.

2/24/81—Citing the IEEPA and the Hostage Act as authority, President Reagan ratifies executive orders of 1/19/81 and suspends all claims against Iran pending adjudication in Iran-United States Claim Tribunal. *See infra* note 24.

4/28/81—Petitioner files instant suit (Suit II) to enjoin enforcement of executive orders and Treasury regulations implementing agreement with Iran.

5/22/81—First Circuit Court of Appeals upholds President's authority to issue executive orders and enforce Treasury regulations. Charles T. Main Int'l, Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800 (1st Cir. 1981).

5/28/81—District court stays execution of petitioner's judgment in Suit I pending appeal by Iran and vacates all prejudgment attachments. Court also denies injunction and dismisses Suit II.

6/3/81—Petitioner appeals Suit II to Ninth Circuit Court of Appeals.

6/4/81—Treasury Department regulations amended to require transfer of Irannian assets. 46 Fed. Reg. 30,340 (1981).

6/5/81—District of Columbia Circuit Court of Appeals upholds President's authority to enforce executive orders and Treasury regulations. American Int'l Group, Inc. v. Islamic Republic of Iran, 657 F.2d 430 (D.C. Cir. 1981).

6/8/81—District court enjoins transfer of assets pending petitioner's appeal. *See infra* note 28.

6/11/81—Petition for writ of certiorari before judgment granted. *See infra* note 29.

States Embassy in Tehran, Iran and forcibly detained United States diplomatic and consular personnel. The revolutionary government in Iran took no action to oppose this seizure. Ten days later, President Carter declared a national emergency[8] and, citing the International Emergency Economic Powers Act[9] (IEEPA) as authority for his actions, signed executive orders that blocked the removal or transfer of any property subject to United States jurisdiction in which the Government of Iran or its nationals had any interest.[10] The Treasury Department immediately issued regulations nullifying judicial proceedings pending against the blocked Iranian property.[11] These regulations made future proceedings contingent upon licensing or other special authorization and all such licenses revocable.[12] The President later granted a general license that authorized, *inter alia,* prejudgment attachments but did not permit entry of any judgment.[13] On December 19, 1979, petitioner filed suit (Suit I) against the Government of Iran and others claiming damages for breach of contract.[14] The court issued orders to attach Iranian property to secure any judgments subsequently entered. On January 20, 1981, the hostages were released pursuant to an executive agreement[15] in which the United

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8. Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979), *reprinted in* 50 U.S.C.A. § 1701 (West Supp. 1981). The National Emergencies Act authorizes the President to declare national emergencies where required by specific acts of Congress. 50 U.S.C.A. § 1621(a) (West Supp. 1981). *See infra* notes 72 & 73 and accompanying text.

9. 50 U.S.C.A. §§ 1701-1706 (West Supp. 1981). *See infra* notes 62-74 and accompanying text.

10. Exec. Order No. 12,170, *supra* note 8.

11. 31 C.F.R. § 535.203(e) (1980). "Unless licensed or authorized . . . any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property which on or since [November 14, 1979] there existed an interest of Iran." *Id.*

12. *Id.*; 31 C.F.R. § 535.805 (1980).

13. 31 C.F.R. §§ 535.504(a), 535.408 (1980).

14. Dames & Moore v. Atomic Energy Org. of Iran, No. 79-04918 (C.D. Cal. filed Dec. 19, 1979).

15. The agreement consisted of three separate documents initialed on January 19, 1981, in Algiers, Algeria, by Deputy Secretary of State Warren M. Christopher. Declaration of the Government of the Democratic and Popular Republic of Algeria [hereinfter cited as Declaration I], 20 INT'L LEGAL MATERIALS 224 (1981); Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran [hereinafter cited as Declaration II], 20 INT'L LEGAL MATERIALS 230 (1981); Un-

States agreed to terminate all legal proceedings against Iran pending in United States courts,[16] nullify any attachments of Iranian property,[17] transfer all assets to Iran,[18] and suspend all future claims by United States nationals against Iran pending submission to binding arbitration in an Iran-United States Claims Tribunal.[19] President Carter then issued executive orders[20] that revoked all licenses previously granted,[21] vacated all attachments,[22] and required the transfer of all Iranian assets to a special escrow account.[23] President Reagan later ratified these orders and "suspended" all claims against Iran which could be submitted to the new Iran-United States Claims Tribunal.[24] Meanwhile, petitioner was granted summary judgment on his contract claim and

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dertakings of the Government of the United States of America and the Government of the Islamic Republic of Iran with Respect to the Declaration of the Government of the Democratic and Popular Republic of Algeria, 20 INT'L LEGAL MATERIALS 229 (1981); Christopher acted under an express delegation of authority. U.S. Authorization to Approve Text of Documents Relating to the Release of the Hostages, 20 INT'L LEGAL MATERIALS 223 (1981).

16. Declaration I, *supra* note 15, art. B.

17. *Id.*

18. *Id.* ¶ 6.

19. Declaration II, *supra* note 15. The tribunal has exclusive jurisdiction over all claims against the government of Iran not settled within six months except those which: (1) relate to the seizure of the embassy and the taking of hostages, Declaration I, *supra* note 15, ¶ 11; (2) arise out of actions of Iranian nationals not subject to control by the Iranian authorities, *id.;* or (3) concern contracts which specify Iran as the forum for adjudication or arbitration. Declaration II, *supra* note 15, ¶ 1, art. II; *see also* American Int'l Group Inc. v. Islamic Republic of Iran, 657 F.2d 430, 435 (D.C. Cir. 1981). The tribunal is to be composed of at least nine members with each of the parties choosing one third of the members. Those chosen then fill the remaining positions. Declaration II, *supra* note 15, ¶ 1, art. III. Any decision of the tribunal is to be "enforceable . . . in the courts of any nation in accordance with its laws." *Id.*, art IV, ¶ 3.

20. Exec. Orders Nos. 12,276-12,285, 46 Fed. Reg. 7,913-32 (1981).

21. Exec. Order No. 12,277, ¶ 1-102(a), 46 Fed. Reg. 7,915 (1981).

22. *Id.* ¶ 1-102(b).

23. *Id.* ¶ 1-101.

24. Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981). The order set up a "triage" of claims: (1) if the tribunal determines that it lacks jurisdiction over the claim, suspension of that claim will terminate, *id.* § 3; (2) if claimant is adjudged unable to recover on the merits of his claim, that claim will be discharged, *id.* § 4; or (3) if the tribunal finds in favor of claimant and issues an award, the claim will be deemed discharged upon payment in full of the award. *Id.; see also* American Int'l Group, Inc. v. Islamic Republic of Iran, 657 F.2d 430 (D.C. Cir. 1981).

awarded damages. Before petitioner could execute the judgment, the execution was stayed pending appeal by Iran and all prejudgment attachments were vacated pursuant to the suspension order.[25] On April 28, 1981, petitioner filed the instant suit (Suit II) claiming that enforcement of the executive orders and Treasury Department regulations would be beyond the constitutional and statutory powers of the Executive and would constitute a taking of property without just compensation in violation of the fifth amendment.[26] The United States District Court for the Central District of California dismissed the suit for failure to state a claim upon which relief could be granted,[27] but later enjoined the transfer of Iranian property that was subject to any judicial lien.[28] On writ of certioriari before judgment[29] to the United States Su-

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25. Order of May 28, 1981, as amended by order of June 8, 1981, United States District Court for the Central District of California. Dames & Moore v. Atomic Energy Org. of Iran, No. 79-04918 (C.D. Cal. filed Dec. 19, 1979). Apparently the order was never published. *See* Dames & Moore v. Regan, 101 S. Ct. 2972, 2980 (1981).

26. Dames & Moore v. Regan, 101 S. Ct. at 2980.

27. *Id.* Executive Order No. 12,294 transformed petitioner's claim in Suit I into one for which relief could not be granted under Federal Rule of Civil Procedure 12(b)(6). 46 Fed. Reg. 14,111 (1981). The order did not suspend the power of the courts to consider the claims or in any way modify the jurisdiction of the courts; rather, it altered the substantive rule of law the courts were to apply to such claims. *Id.; see American Int'l Group, Inc.*, 657 F.2d at 441; *accord* Charles T. Main Int'l Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800, 808-10 (1st Cir. 1981). It has long been established that the courts must apply the law as they find it at the time of decision. *See* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 316 n.4 (2d ed. 1973). This principle even applies to changes in law between the judgment and its appeal "if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed . . . ." United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) (Marshall, C.J.).

28. On June 3, 1981 petitioner filed an appeal in the United States Court of Appeals for the Ninth Circuit. On June 4, the Treasury Department amended its regulations to require the transfer of all Iranian assets to the Federal Reserve Bank of New York by June 19th. This action prompted the district court to enter an injunction pending appeal. Dames & Moore v. Regan, 101 S. Ct. at 2981.

29. *Id.* at 3071. The United States Code provides: "An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment." 28 U.S.C.A. § 2101 (West 1959). Supreme Court Rule 18 allows a writ of certiorari before judgment "only upon a showing that the case is of such imperative public

preme Court, *affirmed. Held:* (1) When the President has declared a national emergency in response to an unusual and extraordinary threat to the national security, foreign policy, or economy of the United States originating wholly or partially outside of the United States, the International Emergency Economic Powers Act empowers him to nullify attachments on, and order the transfer of, assets of the foreign state involved; (2) When the suspension of claims of United States nationals against a foreign state pending adjudication in an international claims tribunal has been determined to be necessary for the resolution of a major foreign policy dispute with a foreign state, and Congress has acquiesced in the settlement of private claims by executive agreement without the advice and consent of the Senate, the President is authorized to suspend such claims.[30] *Dames & Moore v. Regan,* 101 S. Ct. 2972 (1981).

## II. LEGAL BACKGROUND

### A. *The Foreign Affairs Power*

Contemporary constitutional law gives the President considerable authority and discretion in foreign affairs.[31] In *United States*

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importance as to justify the deviation from normal appellate practice and to require immediate settlement [by the Supreme Court]." Prejudgment review was warranted because Iran could consider the United States to be in breach of the agreement unless the United States Government acted to bring about the transfer of Iranian assets by July 19, 1981. *See* Declaration I, *supra* note 15, ¶ 6; Dames & Moore v. Regan, 101 S. Ct. at 2977; *see also supra* note 28.

30. The Court did not address petitioner's argument that the suspension of claims constituted a taking of property that, absent just compensation, would violate the fifth amendment to the United States Constitution. It held instead that the "treaty exception" jurisdiction of the Court of Claims, 28 U.S.C.A. § 1502 (West 1973), did not apply, and that petitioner could bring its claim before the court under the Tucker Act, 28 U.S.C.A. § 1491 (West Supp. 1981). Dames & Moore v. Regan, 101 S. Ct. at 2991-92.

Justice Stevens filed a concurring opinion suggesting that the Court should not have addressed the jurisdictional issue because the possibility that the transfer of petitioner's claim to the Claims Tribunal might be an unconstitutional taking was too remote. *Id.* at 2992. Justice Powell concurred in part and dissented in part, accepting the Court's position on the suspension of claims but holding that both of the taking claims—attachments and claim suspension—should be left to the Court of Claims. *Id.*

31. The Supreme Court set forth the following rationale for this position:

> [I]f, in the maintenance of our international relations, embarassment . . . is to be avoided and success for our aims achieved, congressional legisla-

*v. Curtiss-Wright Export Corp.*,[32] the Supreme Court noted that the President acts as the "sole organ of the federal government in the field of international relations"[33] and characterized the power he exercises in that role as "plenary and exclusive."[34] That case stands for the proposition that the President possesses inherent constitutional authority to act on foreign affairs matters without explicit congressional authorization.[35] In *Youngstown Sheet & Tube Co. v. Sawyer*[36] (The Steel Seizure Case), the Court examined the constitutional validity of executive action taken contrary to the express will of Congress.[37] Justice Jackson's concurring opinion described three general categories of executive-legislative interaction.[38] The first category involves cases in which the President acts pursuant to express or implied congressional authorization and exercises his own general constitutional powers plus those powers delegated by Congress.[39] Action in this category "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."[40] The President may also act when Congress has neither granted nor denied authority to act. Actions in this second category will rest solely upon the President's own independent powers.[41] A "zone of twilight" exists between these two categories where concurrent

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> tion which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissable were domestic affairs alone involved.

United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

32. 299 U.S. 304 (1936).

33. *Id.* at 320.

34. *Id.*; *see also* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 37-65 (1972). Not all courts agree with this description: "To the extent that denominating the President as the 'sole organ' of the United States in international affairs constitutes a blanket endorsement of plenary Presidential power over any matter extending beyond the borders of this country, we reject that characterization." American Int'l Group, Inc. v. Islamic Republic of Iran, 657 F.2d 430, 438 n.6 (D.C. Cir. 1981).

35. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-36 n.2 (1952) (Jackson, J., concurring).

36. 343 U.S. 579 (1952).

37. *Id.*

38. *Id.* at 634-55.

39. *Id.* at 635.

40. *Id.* at 637.

41. *Id.*

Congressional and Presidential authority may be exercised.[42] The extent of the President's power to act in cases where Congressional action is equivocal may "depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[43] Finally, when the President acts contrary to the will of Congress, his power "is at its lowest ebb," for he can exercise only his own constitutional powers diminished by any powers Congress may exercise over the subject.[44] In a separate concurring opinion, Justice Frankfurter proposed that long-continued congressional acquiescence in a "systematic, unbroken executive practice" constituted a further source of authorization for executive action that would "give decisive weight" to a presumption of constitutionality for such action.[45]

### B. *The Executive Agreement and Claims Settlement Powers*

The President possesses broad power to bind the United States under domestic and international law without the advice and consent of the Senate through the use of executive agreements.[46] The constitutionality of such action is well established.[47] In *United*

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42. *Id.*

43. *Id.* at 637 & n.3.

44. *Id.* at 637-38.

45. *Id.* at 610-13; *see also* United States v. Midwest Oil Co., 236 U.S. 459 (1915).

46. An executive agreement is an international agreement, other than a treaty, which is entered into by the President on the basis of his own constitutional powers as Chief Executive, Head of State, and Commander-in-Chief. *See* 11 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 721 (1974). Unlike treaties, executive agreements do not require the advice and consent of the Senate. *See, e.g.*, American Int'l Group, Inc. v. Islamic Republic of Iran, 657 F.2d 430, 434 (D.C. Cir. 1981). They are binding under domestic and international law. *See* United States v. Pink, 315 U.S. 203, 230 (1942); United States v. Belmont, 301 U.S. 324, 331 (1937); L. HENKIN, *supra* note 34, at 262. The scope of the executive agreement-making power is considerable:

> It may be proper, therefore, to regard the executive agreement-making power as extending to all the occasions on which an international agreement is believed by the Chief Executive to be necessary in the national interest, but on which resort to the treaty-making procedure is impracticable or likely to render ineffective an established national policy.

Lissitzyn, *The Legal Status of Executive Agreements on Air Transportation,* 17 J. AIR L. & COM. 436, 442 (1950).

47. *See* United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937); B. Altman & Co. v. United States, 224 U.S. 583 (1912); Lissitzyn, *supra* note 46, at 438-39.

*States v. Belmont*[48] the Supreme Court first recognized the validity of executive agreements,[49] and in *United States v. Pink*[50] the Court held that they were the "Law of the Land" under the Supremacy Clause.[51] For almost two hundred years these agreements have been used to settle the claims of United States nationals against foreign states.[52] Though Congress has never expresssly authorized the Executive to settle claims of nationals by executive agreement, it implicitly approved of the practice by passing the International Claims Settlement Act of 1949.[53] This Act created the International Claims Commission and gave it the power to make binding decisions on claims by United States nationals.[54] Congressional failure to object to the long-standing use

48. 301 U.S. 324 (1937).

49. *Id.* at 330; *see also American Int'l Group, Inc.*, 657 F.2d at 437.

50. 315 U.S. 203 (1942).

51. *Id.* at 230; *see also Belmont*, 301 U.S. at 331.

52. The practice of Presidential settlement of these claims goes back as far as 1799. Lillich, *The Gravel Amendment to the Trade Reform Act of 1974*, 69 AM. J. INT'L L. 837, 844 (1975). In the last twenty-five years the President has made the following settlements: Settlement of Claims, May 11, 1979, United States—People's Republic of China, 30 U.S.T. 1957, T.I.A.S. No. 9306; Claims: Marcona Mining Company, Sept. 22, 1976, United States—Peru, 27 U.S.T. 3993, T.I.A.S. No. 8417, Claims of United States Nationals, May 1, 1976, United States—Egypt, 27 U.S.T. 4214, T.I.A.S. No. 8446; Settlement of Certain Claims, Feb. 19, 1974, United States—Peru, 25 U.S.T. 227, T.I.A.S. No. 7792; Settlement of Claims, Mar. 6, 1973, United States—Hungary, 24 U.S.T. 522, T.I.A.S. No. 7569; Claims: Trust Territory of the Pacific Islands, Apr. 18, 1969, United States—Japan, 20 U.S.T. 2654, T.I.A.S. No. 6724; Claims of United States Nationals, Nov. 5, 1964, United States—Yugoslavia, 16 U.S.T. 1, T.I.A.S. No. 5750; Claims, July 2, 1963, United States—Bulgaria, 14 U.S.T. 969, T.I.A.S. No. 5387; Settlement of Claims of United States Nationals, July 16, 1960, United States—Poland, 11 U.S.T. 1953, T.I.A.S. No. 4545; Settlement of Claims of United States Nationals and Other Financial Matters, Mar. 30, 1960, United States—Rumania, 11 U.S.T. 317, T.I.A.S. No. 4451. *See also* W. MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS 53 (1941); 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 247 (1970).

53. 22 U.S.C.A. §§ 1621-1644 (West 1976). The Act had two purposes: (1) allocation of funds received as the result of an executive claims settlement with Yugoslavia, and (2) provision of a procedure for distributing funds received as the result of future executive claims settlements. Dames & Moore v. Regan, 101 S. Ct. 2972, 2987 (1981). For the Act's legislative and amendment history, see S. REP. No. 800, 81st Cong., 2nd Sess., *reprinted in* 1950 U.S. CODE CONG. SERV. 1949; H. R. REP. No. 1021, 83rd Cong., 1st Sess., *reprinted in* U.S. CODE CONG. & AD. NEWS 2280; S. REP. No. 1050, 84th Cong., 1st Sess., *reprinted in* 1953 U.S. CODE CONG & AD. NEWS 2745.

54. 22 U.S.C.A. § 1623(a) (West 1979). The International Claims Commission

of this power by the Executive may be interpreted as congressional acquiescence in the settlement of claims by executive agreement. Furthermore, the Supreme Court has recognized that the President has some measure of inherent constitutional authority to settle claims by executive agreement.[55] In *United States v. Pink,* Justice Douglas observed that

> Power to remove such obstacles [to a foreign policy objective] as settlement of claims of our nationals . . . certainly is a modest implied power of the President who is the "sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Corp.* . . . No such obstacle can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs . . . is to be drastically revised . . . . We would usurp the executive function if we held [otherwise].[56]

There are two major objections to the validity of this Presidential power to settle claims of United States nationals without their consent. Some critics object that the exercise of such authority may constitute a taking[57] of property[58] without just com-

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was abolished in 1954 and its functions were transferred to the newly established Foreign Claims Settlement Commission. Reorg. Plan No. 1 of 1954, §§ 1, 2(b), 4(a), 3 C.F.R. 442 (1954-1958 Compilation), *reprinted in* 22 U.S.C.A. (West 1979) *and in* 68 Stat. 1279 (1954).

55. *Pink,* 315 U.S. at 229-30. Though this power is exercised most often at the request of the claimants, it does not depend on any consent and in fact may be exercised in the face of strident objections. *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 213 (1965) ("The President may waive or settle a claim against a foreign state based on the responsibility of the foreign state for an injury to a United States national, without the consent of such national."); *see also* Ozanic v. United States, 188 F.2d 228, 231 (2d Cir. 1951).

56. *Pink,* 315 U.S. at 229-30. In a concurring opinion, Justice Frankfurter called this Presidential power to settle claims "indisputable." *Id.* at 240.

57. A distinction has been drawn between taking, which involves compensation, and deprivation, which does not. Using this characterization, a freeze order blocking assets would involve deprivation. Once the property actually has been disposed of without compensation to the owner, a taking claim may lie. *See Emergency Controls on International Economic Transactions: Hearings on H.R. 2382 Before the Subcomm. on Int'l Economic Policy and Trade of the House Comm. on Int'l Relations,* 95th Cong., 1st Sess. 50-51 (1977) (remarks of Stanley D. Metzger) [hereinafter cited as *Emergency Controls*].

58. Petitioner's argument that a claim for damages is property under the taking clause of the fifth amendment should be distinguished from its claim that

pensation in violation of the fifth amendment.[59] Second, Congress arguably removed the ability to settle claims from the ambit of the executive foreign affairs power by enacting the Foreign Sovereign Immunities Act of 1976 (FSIA),[60] which codified the restrictive theory of sovereign immunity and provided that the courts, rather than the President, would decide whether sovereign immunity applied to bar claims against foreign states.[61] In light of these objections, the Executive may seek to bolster a claim to this settlement power with some colorable evidence of specific congressional authorization.

### C. *The IEEPA and the Hostage Act*

In 1977 Congress passed legislation[62] in response to a history of extensive Presidential abuse of section 5(b) of the Trading With the Enemy Act (TWEA).[63] That legislation amended the TWEA[64]

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the prejudgment attachments, acquired pursuant to a general authorization and subsequent to a freezing order, constituted property under the same clause. *See generally* Hawaiian Agrinomics Co. v. Government of Iran, 518 F. Supp. 596, 599 (C.D. Cal. 1981); Orvis v. Brownell, 345 U.S. 183, 188 (1953).

59. The court of claims has implied that in a proper case it might consider the cancellation of private claims against foreign nations by executive agreement to constitute a taking of property in violation of the fifth amendment. American Int'l Group, Inc. v. Islamic Republic of Iran, 657 F.2d 430, 446-47; Aris Gloves, Inc. v. United States, 420 F.2d 1386, 1391, 1396 (Ct. Cl. 1970); Gray v. United States, 21 Ct. Cl. 340, 392-93 (1886). *But see* L. HENKIN, *supra* note 34, at 263.

60. 28 U.S.C.A. §§ 1330, 1602-1611 (West Supp. 1981).

61. *Id.* § 1602. For background material on the history and interpretation of the Foreign Sovereign Immunities Act of 1976 see H. R. REP. No. 1487, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 6604; 6 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 569-71 (1968).

62. Amendments to the Trading with the Enemy Act, Pub. L. No. 95-223, 91 Stat. 1625 (1977). For the legislative history, see S. REP. No. 466, 95th Cong., 1st Sess., *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 4540.

63. 50 U.S.C.A. app. § 5(b) (West 1976) *amended by* Amendments to the Trading With the Enemy Act, Pub. L. No. 95-223, §§ 101-103, 91 Stat. 1625 (1977). For the legislative and amendment history of the Act, see S. REP. No. 466, 95th Cong., 1st Sess., *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 4540; and H.R. REP. No. 1507, 77th Cong., 1st Sess., *reprinted in* 1941 U.S. CODE CONG. SERV. 1029. The language of § 5(b) is virtually identical to that of the IEEPA. *See supra* note 9. *Compare* 50 U.S.C.A. app. § 5(b) (West 1976) *with* 50 U.S.C.A. § 1702(a) (West Supp. 1981).

Prior to the changes brought about by the IEEPA, § 5(b) gave the President great power to affect property of a foreign state or national thereof during time of war or declared national emergency. Under the TWEA as it then stood there was no requirement that actions taken relate to the situation for which the na-

and enacted the IEEPA[65] which placed limits on the President's authority to regulate international and domestic economic transactions.[66] Once a national emergency has been declared,[67] the IEEPA authorizes the President to:

> regulate, direct and compel, nullify, void, prevent or prohibit any acquisition, holding, withholding, use, transfer, withdrawal . . . of, or dealing in, or exercising [by any person, or with respect to any property, subject to the jurisdiction of the United States] any right, power or privilege with respect to . . . any property in which any foreign country or a national thereof has any interest.[68]

This "sweeping and unqualified" language[69] empowers the President to block the transfer of foreign assets.[70] Furthermore, a

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tional emergency was declared, nor was there any way to terminate a state of emergency absent another proclamation. *See Emergency Controls, supra* note 57, at 13 (statement of Andreas F. Lowenfeld). Thus, Presidents could, and often did, take action under § 5 (b) based on national emergencies long since declared but never terminated. *Id.* at 6-10, 16-19, 22, 28-31, 34-38 (statements of Andreas F. Lowenfeld, Harold G. Maier, and Stanley D. Metzger). The National Emergencies Act of 1976 was enacted to rectify this situation by terminating all pre-existing states of emergency and providing for automatic termination of subsequent declarations. National Emergencies Act of 1976, 50 U.S.C.A. §§ 1601-1651 (West Supp. 1981). It did not, however, limit actions taken under § 5(b) of the TWEA. *See* 50 U.S.C.A. § 1651(a)(1) (West Supp. 1981); *Emergency Controls, supra* note 57, at 21 (statement of Harold G. Maier).

64. The 1977 Act limits § 5(b) to wartime situations, removes certain economic transactions from the scope of § 5(b) power, and repeals the exclusion of § 5(b) from coverage by the National Emergencies Act. Amendments to the Trading With the Enemy Act, Pub. L. No. 95-223, §§ 101-103, 91 Stat. 1625 (1977); S. REP. No. 466, 95th Cong., 1st Sess. 4, *reprinted in* U.S. CODE CONG. & AD. NEWS 4540, 4542-43. This exclusion is, however, carried over to the IEEPA. *See infra* note 74 and accompanying text.

65. Pub. L. No. 95-223, §§ 201-208, 91 Stat. 1626-29 (codified at 50 U.S.C.A. §§ 1701-1706 (West Supp. 1981)).

66. 50 U.S.C.A. §§ 1702, 1703 (West Supp. 1981). Under the IEEPA, the President can declare a national emergency only when faced with an "unusual or extraordinary threat . . . to the national security, foreign policy, or economy of the United States" having its origin wholly or partially outside the United States, and any action taken must be with respect to that threat. *Id.* § 202; *see* 50 U.S.C.A. § 1701(a) (West Supp. 1981); S. REP. No. 466, 95th Cong., 1st Sess. 5 *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 4540, 4543.

67. *See supra* note 66.

68. 50 U.S.C.A. § 1702(a)(1)(B) (West Supp. 1981).

69. Charles T. Main Int'l, Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800, 807 (1st Cir. 1981).

70. *See* Propper v. Clark, 337 U.S. 472 (1949). *Propper* involved the inter-

freeze order issued under the IEEPA cannot be superseded by subsequent judicial attachments.[71] Finally, Presidential use of this emergency power is not limited by the National Emergencies Act,[72] which provides for the automatic termination of declared states of emergency absent notice to the Congress that such an emergency is to continue in effect.[73] Section 1706(a) of the IEEPA specifically excludes economic controls from the ambit of the National Emergencies Act and empowers the President to continue the controls over foreign assets despite the termination of the declared state of emergency.[74]

In 1868 Congress enacted legislation entitled *An Act concerning the Rights of American Citizens in foreign States.*[75] Originally intended to protect the rights of naturalized United States citizens abroad,[76] the "Hostage Act"[77] requires[78] the President to take whatever measures he deems necessary[79] to obtain the release of United States nationals held hostage by or in another country.[80] In relevant part, the statute reads:

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pretation of language in § 5(b) which was subsequently incorporated in the IEEPA. *Compare* 50 U.S.C.A. § 1702(a)(1)(B) (West Supp. 1981) *with* 50 U.S.C.A. app. § 5(b)(1)(B) (West 1968).

71. Orvis v. Brownell, 345 U.S. 183, 188 (1953). *But see* Zitman v. McGrath, 341 U.S. 446 (1951). This would include any prejudgment attachments. *Charles T. Main Int'l, Inc.*, 651 F.2d at 807 & n.9.

72. 50 U.S.C.A. §§ 1601-1651 (West Supp. 1981); *see supra* note 63.

73. 50 U.S.C.A. § 1622(d) (West Supp. 1981).

74. 50 U.S.C.A. § 1706(a) (West Supp. 1981); *see also* 50 U.S.C.A. § 1621(b) (West Supp. 1981).

75. 22 U.S.C.A. § 1732 (West 1979).

76. *See* CONG. GLOBE, 40th Cong., 2d Sess. 4356, 4357 (1868) (remarks by Sens. Howard and Morrill). *But see id.* at 4233 (remarks by Sen. Williams).

77. The title is of recent origin: District of Columbia Circuit Court Judge Mikva has termed it "a sobriquet newly coined for the purposes of the Iranian crisis" and claims that the name had "never before appeared in any of the reported cases alluding to the statute." American Int'l Group, Inc. v. Islamic Republic of Iran, 657 F.2d 430, 452 (D.C. Cir. 1981) (Mikva, J., concurring). *But see* Narenji v. Civiletti, 617 F.2d 745, 753 (D.C. Cir. 1980) (statement of MacKinnon, J., on denial of rehearing en banc); Agee v. Muskie, 629 F.2d 80, 96-98 (D.C. Cir. 1980) (MacKinnon, J., dissenting), *cert. granted*, 101 S. Ct. 69 (1980).

78. The statute states that "it shall be the duty of the President forthwith" to take the measures permitted. 22 U.S.C.A. § 1732 (West 1979); *see* CONG. GLOBE, *supra* note 76, at 4330 (remarks by Sen. Williams concerning language ultimately adopted as § 1732).

79. *See infra* note 84 and accompanying text.

80. 22 U.S.C.A. § 1732 (West 1979).

> Wherever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to war, as he may think necessary and proper to obtain or effectuate the release [of such citizen].[81]

The legislative history of the Act shows that Congress intended to vest the President with broad discretion,[82] and judicial attempts to limit this power have been unsuccessful.[83] Nevertheless, executive power under the Hostage Act is subject to two basic limitations: measures taken must not amount to acts of war[84] or abrogate constitutionally guaranteed individual rights.[85] Aside from the discussion of whether the Act is a congressional mandate "that the President afford assistance to United States citizens in trouble abroad," the Act has received little judicial attention or

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81. *Id.*

82. *See, e.g.*, CONG. GLOBE, *supra* note 76, at 4233 (remarks by Sen. Williams); *id.* at 4358 (remarks by Sen. Fessenden). Senator Howard opposed the language as "plac[ing] in the hands of the President . . . [a] broad and almost illimitable discretion," *id.* at 4359, to which Senator Williams replied: "If you propose any remedy at all, you must invest the Executive with some discretion so that he may apply the remedy to a case as it may arise." *Id.* Such a delegation of foreign affairs power is not invalid merely because it may be overbroad. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 at 635-36 n.2 (Jackson, J., concurring); *American Int'l Group, Inc.*, 657 F.2d at 450 (McGowan, J., concurring).

83. *See, e.g.*, Worthy v. Herter, 270 F.2d 905, 910 (D.C. Cir. 1959), *cert. denied*, 361 U.S. 918 (1959); *American Int'l Group, Inc.*, 657 F.2d at 451 (McGowan, J., concurring).

84. *See supra* text accompanying note 81. This language prompted Congressional debate over the nature of means authorized by the statute. CONG. GLOBE, *supra* note 76, at 4205-06, 4331 (remarks by Sen. Sumner); *id.* at 4333 (remarks by Sen. Conkling). Senator Howard suggested that these means included termination of diplomatic, economic, and social intercourse as well as reprisals against the persons and property of the transgressing nation. *Id.* at 4359.

85. Narenji v. Civiletti, 481 F. Supp. 1132, 1141 n.7 (D.D.C. 1979) *rev'd on other grounds*, 617 F.2d 745 (D.C. Cir. 1979), *cert denied*, 446 U.S. 957 (1980). Suspension of claims against a foreign state has been held not to abrogate individual rights. *American Int'l Group, Inc.*, 657 F.2d at 451 (McGowan, J., concurring).

citation.[86]

In addition to their general executive foreign affairs and claims settlement powers, Presidents Carter and Reagan each cited the IEEPA and the Hostage Act as authority for the actions taken and executive orders issued in response to the hostage crisis.[87] The Supreme Court was thus presented with a unique opportunity to define the scope of the President's foreign affairs and economic regulation powers in light of the IEEPA and the Hostage Act.

## III. INSTANT OPINION

Writing for the Court, Justice Rehnquist's lengthy introductory discussion of the limited precedential value of judicial decisions concerning the day-to-day activities of Congress or the Executive strongly suggested an intent to limit the instant case to its facts.[88] Finding Justice Jackson's *Steel Seizure* analysis to be helpful but limited, he suggested that executive action should be evaluated on a continuum of congressional authorization ranging from explicit authorization to explicit prohibition.[89]

The Court first addressed the issue of the President's power to nullify judicial attachments on Iranian assets and order their transfer and held that the IEEPA specifically authorized such acts.[90] The Court found the President's actions in keeping with the plain language of the statute: "initially he 'prevent[ed] and prohibit[ed]' 'transfers' of Iranian assets; later he 'direct[ed] and compell[ed]' the 'transfer' and 'withdrawal' of the assets, 'nullifying' certain 'rights' and 'privileges' acquired in them."[91] Justice Rehnquist rejected petitioner's contention that the legislative histories of the IEEPA[92] and section 5(b) of the TWEA[93] limited the President's post-blocking order power over the assets to the

86. Electronic Data Sys. Corp. Iran v. Social Sec. Org. of the Gov't of Iran, 508 F. Supp. 1350, 1362 (N.D. Tex. 1981) (mem.).

87. Exec. Orders Nos. 12,276-12,284, 46 Fed. Reg. 7,913-30 (1981) (Carter); Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981) (Reagan).

88. Dames & Moore v. Regan, 101 S. Ct. 2972, 2977 (1981).

89. *Id.* at 2981-82.

90. *Id.* at 2984.

91. *Id.* at 2982 (quoting Charles T. Main Int'l, Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800, 806 (1st Cir. 1981)); *accord American Int'l Group, Inc.*, 657 F.2d at 439.

92. *See supra* note 62.

93. *See supra* note 63.

power merely to continue or terminate the freeze.[94] Instead, he found support for a broad reading of executive power in the legislative history[95] and the case law[96] of the TWEA which indicated that the changes brought about by the IEEPA[97] did not affect Presidential authority to nullify attachments and transfer assets.[98] The Court also noted that the legislative purpose in authorizing blocking orders was to give the President control over foreign assets for use in responding to a declared national emergency.[99] Congress intended that these assets be used as "bargaining chips" in negotiations with a hostile nation.[100] Accepting petitioner's position that the President has limited post-blocking power, Rehnquist reasoned, would allow individual claimants to tie up foreign assets through attachments and other judicial liens thereby severely impairing the President's ability to negotiate the resolution of a foreign policy crisis.[101] The Court was not willing to permit this.[102] It also held that, since the licenses granted were revocable, petitioner had no recognizable property interest in the attachments that could be the subject of a "taking" claim.[103] After holding that the IEEPA provided specific congressional authorization to nullify the attachments and transfer the assets,[104] the Court found that the President's actions were "supported by the strongest of presumptions and the widest latitude of judicial interpretation"[105] and held that petitioner failed to meet his burden of proof.[106]

The Court then considered the question of the President's power to suspend and terminate claims of United States nationals against Iran through mandatory arbitration in a claims tribunal.[107] Rehnquist determined that Justice Jackson's *Steel Seizure*

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94. Dames & Moore v. Regan, 101 S. Ct. at 2983.
95. *See supra* note 63.
96. *See, e.g.*, Orvis v. Brownell, 345 U.S. 183 (1953).
97. *See supra* notes 64 & 66.
98. Dames & Moore v. Regan, 101 S. Ct. at 2983.
99. *Id.* at 2984; *accord* Propper v. Clark, 337 U.S. 472, 493 (1949).
100. *See* Dames & Moore v. Regan, 101 S. Ct. at 2984.
101. *Id.*
102. *See id.*
103. *Id.* at 2984 n.6; *see also supra* notes 11, 12 & 58 and accompanying text.
104. Dames & Moore v. Regan, 101 S. Ct. at 2984.
105. *Id.* at 2984 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).
106. Dames & Moore v. Regan, 101 S. Ct. at 2984.
107. *Id.*

analysis was an insufficient framework within which to analyze Presidential powers.[108] The Court held that though the FSIA did not evidence congressional intent to prohibit claims settlement by executive agreement,[109] neither the IEEPA nor the Hostage Act provided specific authorization for such actions.[110] Under the *Steel Seizure* analysis, actions taken by the President in this situation would rest solely upon his own constitutional powers.[111] Rehnquist found, however, that the "general tenor" of the IEEPA and the Hostage Act permitted a broad reading of executive power[112] and that enactment of such legislation indicating congressional intent to allow the President broad discretion could "invite" "measures on independent presidential responsibility"[113] which in turn suggested that the President did not act solely upon his own constitutional authority.[114] Since the instant case did not fall neatly into one or the other of Jackson's three categories, Rehnquist suggested that the scope of executive authority

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108. *See generally id.* at 2981-82, 2986-91.

109. *Id.* at 2989-90. The Court noted that the primary purpose of the Act was to replace the absolute theory of sovereign immunity with a more restrictive view, thus removing a barrier to suit against a foreign state. *Id.* At least 10 claims settlements have been made by executive agreement since 1952, the date of adoption of the restrictive theory of sovereign immunity. *Id.* at 2987; *see supra* note 52. Furthermore, despite the fact that the Act removes the decision to accord a nation immunity from the President and vests it in the judiciary, the Court held that this could not be read as prohibiting the President from settling claims of United States nationals. Dames & Moore v. Regan, 101 S. Ct. at 2989-90; *see supra* text accompanying notes 60 & 61.

110. Dames & Moore v. Regan, 101 S. Ct. at 2986. As in personam lawsuits, claims of United States citizens against Iran could not be "transactions" involving Iranian property, nor could they be "efforts to exercise any rights with respect to such property." Therefore, they are not covered by IEEPA. *Id.* at 2984-85; *accord,* Charles T. Main Int'l Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800, 809 (1st Cir. 1981); *American Int'l Group, Inc.*, 657 F.2d at 443 n.15; Marschalk Co. v. Iran Nat'l Airlines, 518 F. Supp. 69 (S.D.N.Y. 1981); Electronic Data Sys. Corp. Iran v. Social Sec. Org. of the Gov't of Iran, 508 F. Supp. 1350 (N.D. Tex. 1981) (mem.). The Court also held that the legislative history of the Hostage Act indicated that the Act was intended to deal with a situation unlike that of the instant case. Dames & Moore v. Regan, 101 S. Ct. at 2985; *see, e.g.,* CONG. GLOBE, *supra* note 76, at 4331 (remarks by Sen. Fessenden); *id.* at 4354 (remarks by Sen. Conness).

111. *See* Dames & Moore v. Regan, 101 S. Ct. at 2986.

112. *Id.*

113. *Id.; see also Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring).

114. *See* Dames & Moore v. Regan, 101 S. Ct. at 2986.

should be considered as a continuum ranging from express congressional authorization to express congressional prohibition.[115] He then found that the long-standing history of congressional acquiescence in the practice of claims settlement by executive agreement and the enactment of and frequent amendment to the International Claims Settlement Act of 1949[116] evidenced congressional approval of the claims suspension.[117] Rehnquist reasoned that, by creating and refining a procedure through which future settlements could be implemented,[118] Congress had de facto accepted the practice.[119] Finding the suspension of claims to be sufficiently like a settlement, the Court then held that the "inferences" to be derived from the "character" of legislation such as the IEEPA and the Hostage Act, together with the history of congressional acquiescence in the well established practice of executive claims settlement, raised a presumption of constitutionality and supported the conclusion that the President was authorized to suspend the claims of United States nationals.[120] Finally, the Court found that the question whether the suspension of claims would constitute a taking of property without just compensation was not ripe for review.[121] It did, however, suggest that petitioner may have a remedy against the United States in the Court of Claims should the Claims Tribunal prove ineffectual.[122] By its decision in the instant case, the Court unequivocally confirmed the

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115. *See generally id.* at 2981-82, 2986.

116. *See supra* note 53.

117. Dames & Moore v. Regan, 101 S. Ct. 2986-88.

118. *See supra* notes 53-54 and accompanying text.

119. Dames & Moore v. Regan, 101 S. Ct. at 2987, 2988 n.10.

120. *Id.* at 2990.

121. *Id.* at 2991. *See supra* note 30. The court in *American Int'l Group, Inc.*, 657 F.2d at 447, opined that:

> We have no reason to believe that the arbitration panel will not render meaningful relief. We have no reason to believe that the $1 billion security fund will not cover all meritorious claims. We have no reason to believe that the Iranians will not replenish the fund as they have agreed to do. We have no reason to believe that if they do not replenish the fund, then the prevailing claimants will be unable to obtain worldwide enforcement of any award according to the terms of the declarations. Finally, and by no means of least importance, we have no assurance that the appellee's claims are meritorious, and thus that executive action has taken anything of value.

122. Dames & Moore v. Regan, 101 S. Ct. at 2991-2992; *see supra* notes 30 & 121.

President's constitutional authority to vacate attachments, settle claims, and transfer foreign assets in order to fulfill United States obligations under the executive agreement with Iran.

## IV. COMMENT

The instant decision is significant for what it did, what it failed to do, and the manner in which the Court analyzed the issue of claims suspension. By interpreting the language of the IEEPA to specifically authorize the nullification of attachments and transfer of assets, the Supreme Court created a precedent for future executive actions. It also enhanced the President's foreign affairs power by legitimizing his use of foreign assets as bargaining chips in negotiations with a hostile nation. The President now enjoys considerable discretion in the use of this new foreign policy option; the only prerequisites to bargaining with foreign assets are the declaration of a national emergency and a foreign country's extant interest in the property involved.[123] The President alone decides whether the national security, foreign policy or economy is so threatened that the Presidential declaration of a national emergency is warranted.[124] Neither the National Emergencies Act[125] nor the IEEPA's minimal requirement that a foreign state have "some" interest in the assets provides any barrier to the President's use of this power.[126] When so broadly construed, the IEEPA, which grants the Executive ample authority to affect property rights, invites the President to use, and perhaps even to abuse, this emergency power.

Given an opportunity to construe the Hostage Act, the Court specifically declined to do so. The reason for this failure is unclear. The Court could be suggesting that it will ignore the Hostage Act when faced again with similar issues, or it simply may have been unwilling, given the limited time available, to rest its

123. *See supra* note 66 and text accompanying note 68.

124. 50 U.S.C.A. §§ 1621(a), 1701(a) (West Supp. 1981); *see also supra* note 66.

125. *See supra* notes 72-74 and accompanying text.

126. The IEEPA permits executive action against "*any* property in which *any* foreign country or a national thereof has *any* interest." 50 U.S.C.A. § 1702(a)(1)(B) (West Supp. 1981) (emphasis added); *see supra* text accompanying note 68. Under this language, the President could take action against property of United States nationals in which a foreign country, or a national thereof, has only a token interest.

decision on a statute that had attracted so little attention for so many years. A better explanation may be that the Court did not need to interpret the Act to conclude that the executive action suspending claims was constitutional. Justice Rehnquist believed that the long-standing congressional acquiescence in claims settlement by executive agreement provided sufficient indication of congressional approval of these actions.[127] For whatever reason, this failure to construe an Act cited by two Presidents as authority for actions taken to ensure the safety of United States nationals held hostage in a foreign country[128] leaves the status of that Act very much in doubt. By ignoring, rejecting, or limiting the Hostage Act, the Court could have clarified its position that the language of this ancient statute is overly broad. Instead, the Court merely held that the Act provides some evidence of congressional approval of this claims settlement power—a holding which could lead to future use of the Act as authority for executive claims settlements.

Perhaps the most significant aspect of this decision is Justice Rehnquist's modification of the traditional Jackson analysis of the interplay between executive and congressional authority.[129] By analyzing the claims settlement issue on a continuum, Rehnquist implicitly recognized that constitutional questions often involve gradations of constitutional authority ranging from express authorization to express prohibition. The Court did not reject Jackson's three categories; Rehnquist's continuum analysis merely supplemented them by providing a mode of analysis for cases that do not fit into any one of those categories. The instant decision thus represents the Court's acceptance of a new method of deciding constitutional questions involving the validity of executive actions. This mechanism, so useful in the analysis of the claims settlement issue, provides a sophisticated analytical tool that allows the Court to acknowledge that the validity of executive actions more often involves shades of gray than "fields of black and white."[130] Application of this type of analysis is critical

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127. *See* Dames & Moore v. Regan, 101 S. Ct. at 2987-88; *see also* text accompanying notes 114-120.

128. *See* Exec. Order No. 12,211, *reprinted in* 50 U.S.C.A. § 1701 (West Supp. 1981), 3 C.F.R. 253 (1980); Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981).

129. *See generally* Dames & Moore v. Regan, 101 S. Ct. at 2984-91.

130. Springer v. Phillippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting).

if modern constitutional law is to keep pace with the increasing complexity of international relations and the concomitant variety of executive responses to international crises "the nature of which Congress can hardly have been expected to anticipate in any detail."[131]

*Daniel M. FitzPatrick*

131. Dames & Moore v. Regan, 101 S. Ct. at 2982.

## JURISDICTION—BALANCING OF INTEREST TEST APPLIED TO ASCERTAIN WHETHER A SANCTION FOR NONCOMPLIANCE WITH A PRODUCTION ORDER SHOULD BE UPHELD WHEN FOREIGN LAW PROHIBITED SUCH COMPLIANCE

### I. FACTS AND HOLDING

As part of an investigation of possible tax fraud,[1] petitioners, the United States and the Internal Revenue Service (IRS), brought suit in the United States District Court for the Central District of California to enforce summonses[2] issued to respondents Vetco, Inc. (Vetco), an American manufacturer, and its accountants, Deloitte, Haskins & Sells (DH&S).[3] These summonses

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1. Information voluntarily disclosed by Vetco, Inc. (Vetco) in September of 1976 to the Internal Revenue Service (IRS) prompted the IRS to investigate the relationship between Vetco and its wholly owned Swiss subsidiary, Vetco International, A.G. (VIAG). United States v. Vetco, Inc., 644 F.2d 1324, 1326 (9th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3465 (U.S. Dec. 7, 1981) (No. 81-351). Upon investigation the IRS determined that Vetco had attempted to avoid the reporting requirements of subpart F of the Internal Revenue Code (IRC) of 1954 by shipping goods to two Swiss corporations, which then resold them to VIAG. *Id.* Under IRC §§ 954(b)(3)(A) (1954) (amended 1975) and 954(d)(1), which were then in effect, Vetco was not required to report VIAG's income on its federal income tax return if transactions with companies located outside Switzerland accounted for less than 30% of VIAG's income. *Id.* at 1326 n.1. The IRS asserted that Vetco should have reported VIAG's income because the sole purpose of selling to the two Swiss corporations was to avoid the subpart F reporting requirement. *Id.* at 1326. When Vetco refused to assist the IRS further, the IRS sought judicial enforcement of the summonses requesting production of the documents located in Switzerland. *Id.*

2. The summonses, which were issued in October 1977 to Vetco and its accountants, Deloitte, Haskins & Sells (DH&S), required Vetco to produce its financial records and the records of its subsidiaries for the period 1971-1976 and requested that DH&S produce a tax accounting report prepared for Vetco. The production order of November 5, 1979, required DH&S to produce all the documents located in Switzerland that were described in the United States request, but the order did not specify a time or place of delivery. Brief for Appellant Deloitte, Haskins & Sells at 2, United States v. Vetco, Inc., 644 F.2d 1324 (9th Cir. 1981). The production order of March 28, 1980, specified a time and place for delivery: delivery in Los Angeles, California, by April 11, 1980. The text of this order required DH&S to produce all the documents described in the summonses by the IRS regardless of the location of the documents. *Id.*

3. United States v. Vetco, Inc., 644 F.2d at 1324. Respondents also include Vetco's Financial Vice-President, Ronald G. Cullis, and its Secretary, Larry R.

required Vetco to produce its financial books and records for 1971-1976, including the records of Vetco International, A.G. (VIAG), which were located in Switzerland. The court ordered DH&S to surrender a tax accounting report that it had prepared for Vetco in 1976.[4] Both Vetco and DH&S refused to comply because production of the records located in Switzerland would violate article 273 of the Swiss Penal Code.[5] After considering the effect of article 273, and without entering findings of fact or conclusions of law, the district court enforced the summonses. Following the issuance of a show cause order and hearings, the district court threatened sanctions if the Swiss documents were not produced in Los Angeles.[6] On appeal, the Ninth Circuit *affirmed. Held:* A foreign law that effectively prohibits compliance with a United States district court production order may not be sufficient excuse for failure to comply with summonses to produce documents when a tax treaty between the United States and the foreign country in question does not specifically prohibit use of summonses, or expressly state that the exchange of information procedures are exclusive. *United States v. Vetco, Inc.*, 644 F.2d 1324 (9th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3465 (U.S. Dec. 7, 1981) (No. 81-351).[7]

## II. LEGAL BACKGROUND

Courts are undecided about the proper analytical framework for assessing a party's defense that foreign law prohibits compliance[8] (the defense of illegality) with an order to produce docu-

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Langdon. *Id.* Because the district court did not enforce a summons issued by the IRS to Vetco's lawyers, Kindel & Anderson, that summons was not at issue in the instant case. *Id.* at 1327.

4. *Id.* at 1326. This tax survey covered Vetco's finances for the tax years 1971-1976. *Id.*

5. *Id.* at 1329; STGB, C.P., COD., PÉN., art. 273.

6. United States v. Vetco, Inc., 644 F.2d at 1327. The district court imposed a sanction of $500 per day for noncompliance with the production order after April 11, 1980. *Id.* The court of appeals granted a stay of this order pending appeal. *Id.*

7. The instant opinion was amended on Oct. 22, 1981, but the changes the court made were minimal. United States v. Vetco, Inc., Nos. 79-3756 to 79-3758, 79-3786, 80-5276, 80-5327, slip op. Areas of analysis in which the amended opinion is relevant will be indicated.

8. For the purpose of this Comment, a party's claim that compliance with the court's order would cause that party to violate the law of another nation will be referred to as the defense of foreign illegality.

ments located outside the United States.[9] When production of documents may violate foreign law, the courts must balance the jurisdictional claim of the country in which the documents are located against the United States competing claim.[10] Traditionally, courts consider the potentially conflicting principles of *lex fori*[11] and international comity[12] to determine whether to exercise territorial jurisdiction.[13] The source of much of the current confusion over the proper mode of analysis is the Supreme Court's decision in *Societe Internationale v. Rogers*[14] (*Societe*), in which a Swiss holding company[15] brought suit[16] to regain property confiscated during World War II. In *Societe,* the United States sought banking records from petitioner, despite petitioner's defense of foreign illegality.[17] Noting petitioner's good faith efforts to secure

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9. *Compare In re* Westinghouse Elec. Corp., Uranium Contracts Litig., 563 F.2d 992, 998-99 (10th Cir. 1977) *with In re* Uranium Antitrust Litig., 480 F. Supp. 1138, 1146-49 (N.D. Ill. 1979).

10. *See* United States v. First Nat'l City Bank, 396 F.2d 897, 901 (2d Cir. 1968); *In re* Chase Manhattan Bank, 297 F.2d 611, 613 (2d Cir. 1962); Ings v. Ferguson, 282 F.2d 149, 152-53 (2d Cir. 1960). If a federal court can establish in personam jurisdiction over the party who either possesses or has control over the documents located in a foreign country, then the court has the power to compel production of those documents. United States v. First Nat'l City Bank, 396 F.2d at 900-01. For an extended discussion of constitutional limitations upon the court's power to compel acts that violate foreign law, see Note, *Limitations on the Federal Judicial Power to Compel Acts Violating Foreign Law,* 63 COLUM. L. REV. 1441, 1466-73 (1963).

11. Under the principle of *lex fori* the procedure of the domestic forum is controlling. Note, *Foreign Nondisclosure Laws and Domestic Discovery Orders in Antitrust Litigation,* 88 YALE L.J. 612, 614 (1979).

12. For a discussion of international comity as it relates to situations in which one nation's sovereign orders may violate the laws of another nation, see Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-production,* 14 VA. J. INT'L L. 747, 748 n.5 (1974).

13. *See* Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613 n.27 (9th Cir. 1976); *First Nat'l City Bank,* 396 F.2d at 901.

14. 357 U.S. 197 (1958).

15. Petitioner, Societe Internationale pour Participations Industrielles et Commerciales, S.A., is also known as I.G. Chemie or Interhandel. *Id.* at 199.

16. The suit was initiated under § 9(a) of the Trading with the Enemy Act, 50 U.S.C. App. 9(a) (1976), after the Alien Property Custodian confiscated plaintiff's property. *See* 357 U.S. at 197-99.

17. *Societe,* 357 U.S. at 200. According to the Court, the Swiss Federal Attorney determined that compliance with the production order "would constitute a violation of Article 273 of the Swiss Penal Code, prohibiting economic espio-

the Swiss Government's consent for the release of the requested documents, the Supreme Court held that dismissal of petitioner's claim for failure to obey a production order was not justified "when it has been established that failure to comply has been due to inability, and not to willfullness, bad faith, or any fault of petitioners."[18] Thus, the Supreme Court implied that the United States could order production despite the defense of foreign illegality, but held that under special circumstances the court should not dismiss the case under rule 37.[19] Subsequent courts, however, have not chosen to weigh identical factors in an identical manner in evaluating the defense of foreign illegality.

There are two lines of cases that have interpreted *Societe:* The first is conditioned on international comity and the second focuses on the United States interest in obtaining documents. The Second Circuit developed a comity analysis which inherently excused failure to comply with a production order.[20] In *First National City Bank of New York v. Commissioner,*[21] the Second Circuit stated that it would not order the production of records if compliance would violate Panamanian law.[22] Similarly, in *Ings v. Ferguson,*[23] the Second Circuit indicated that international comity demanded that United States courts refrain from issuing subpoenas to produce Canadian documents until a Canadian court determined the legality of production.[24] The Second Circuit's position that a production order will not be enforced when production would violate foreign law recognized the demonstrated importance of international comity.[25] The later decision in *In re*

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nage, and Article 47 of the Swiss Bank Law relating to secrecy of banking records." *Id.*

18. *Id.* at 211-12.

19. *Id.* at 207-08, 212. It should be noted that rule 37 has since been substantially amended. *See* FED. R. CIV. P. 37 (West Supp. 1981).

20. *See infra* text accompanying notes 21-36.

21. 271 F.2d 616 (2d Cir. 1959), *cert. denied,* 361 U.S. 948 (1960).

22. *Id.* at 619. The Second Circuit found that compliance would not have violated Panamanian law and required production of the requested bank records. *Id.* at 619-20.

23. 282 F.2d 149 (2d Cir. 1960).

24. *Id.* at 152-53.

25. The Second Circuit did not consider either in *Ings* or in *First Nat'l City Bank of New York* the possibility that the production order can be enforced even if it has been established that a party will violate a foreign law by producing the requested documents. *Ings,* 282 F.2d at 152-53; *First Nat'l City Bank of New York,* 271 F.2d at 619.

*Chase Manhattan Bank*[26] demonstrated markedly less deference to comity, however, when the Second Circuit declined to vacate a subpoena duces tecum,[27] the compliance with which would violate Panamanian law. Instead, the Second Circuit left the subpeona outstanding to ensure that Chase Manhattan would cooperate with the United States by exhorting the Panamanian Government to release the records.[28] This ongoing threat of sanctions for noncompliance indicated a commitment to acquire the documents[29] without violating Panamanian law;[30] this is consistent with the Second Circuit's comity analysis.[31] In *United States v. First National City Bank*,[32] the Second Circuit retreated even further from its deferential treatment of foreign law. Quoting the Restatement (Second) of Foreign Relations Law,[33] which suggests that a state may order a party to do an act that will violate foreign law,[34] the Second Circuit held that the five factors listed in section 40 of the Restatement should be used to determine whether sanctions should be imposed for noncompliance:[35]

> (a) [V]ital national interests of each of the states;
> (b) the extent and nature of the hardship that inconsistent enforcement actions would impose upon the person;

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26. 297 F.2d 611 (2d Cir. 1962).

27. *Id.* at 613.

28. *Id.*

29. Interestingly, under *Ings* the excuse of foreign illegality released appellants from any duty to seek permission from the foreign government prior to production of the documents; in contrast to *In re Chase Manhattan Bank*, the *Ings* court did not state that appellants would have a continuing duty to assist appellee in securing the documents by alternative means if production were deemed illegal under foreign law. *See Ings*, 282 F.2d at 153.

30. The district court modified a subpoena duces tecum "so as to leave the next move up to the Government," but left the subpoena outstanding. *In re* Chase Manhattan Bank, 297 F.2d at 613. The Second Circuit found that leaving the subpoena outstanding would "insure Chase's cooperation with the Government when and if the Government seeks to obtain the records by application to the Panamanian authorities." *Id.*

31. *See supra* notes 26 & 29 and accompanying text.

32. 396 F.2d 897 (2d Cir. 1968).

33. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) [hereinafter cited as RESTATEMENT].

34. *Id.* § 39(1): "A state having jurisdiction to prescribe or to enforce a rule of law is not precluded from exercising its jurisdiction solely because such exercise requires a person to engage in conduct subjecting him to liability under the law of another state having jurisdiction with respect to that conduct."

35. United States v. First Nat'l City Bank, 396 F.2d at 902.

(c) the extent to which the required conduct is to take place in the territory of the other state;
(d) the nationality of the persons; and
(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.[36]

In balancing the competing interests, the *First National* court found that since bank secrecy was merely a waivable privilege not mandated under law, the German interest in protecting bank secrecy was weaker than the United States interest in enforcing the production order.[37] The significance of the enforcement of this production order is minimized, however, by the fact that there was only a minimal danger that Germany would impose civil litigation and no criminal prohibition was involved.[38]

Since there is no consensus as to the identity of the factors that should be weighed to evaluate a defense of foreign illegality,[39] it is easy for a court to emphasize the interest of the United States forum in acquiring documents. In *Trade Development Bank v. Continental Insurance Co.*,[40] the Second Circuit cited *Societe*'s balancing test and section 40[41] and upheld the trial court's conclusion that there must be either a "compelling necessity" for the documents of a "potential prejudice" to a litigant from nonproduction of the materials to be sufficiently relevant for the principle of *lex fori* to prevail.[42] The Tenth Circuit decision in *In re Westinghouse Uranium Contracts Litigation*[43] followed the Second Circuit's case-by-case balancing approach, but only after examining whether appellant Rio Algom Corp., had made a good faith effort to comply with the production order;[44] the court did

36. RESTATEMENT, *supra* note 33, § 40.

37. United States v. First Nat'l City Bank, 396 F.2d at 903. The court also found that the loss of business due to disclosure of the documents and the risk of civil liability was insufficient justification for noncompliance. *Id.* at 904-05.

38. *Id.* at 902-03.

39. *See infra* notes 43-51 and accompanying text.

40. 469 F.2d 35 (2d Cir. 1972).

41. *Id.* at 41; *see supra* notes 18, 19 & 36 and accompanying text.

42. *Trade Development Bank*, 469 F.2d at 40. The Second Circuit did not discuss the correctness of the trial judge's relevancy requirement, but did note that the trial judge possessed considerable expertise regarding the effect of the foreign illegality defense. *Id.* at 41.

43. 563 F.2d 992 (10th Cir. 1977).

44. *Id.* at 998. The Tenth Circuit stated that Rio Algom had not demonstrated a lack of good faith by waiting until after a hearing on a show cause

not clarify whether a finding of bad faith would preclude the application of the balancing test.[45] The Tenth Circuit also considered the relative importance to the appellees of the documents sought.[46] In the decision in *In re Uranium Antitrust Litigation*,[47] the district court for the Northern District of Illinois recently fashioned yet another permutation of *Societe*'s balancing test by holding that three factors should be considered before issuance of a production order that would require a violation of foreign law.[48] The district court stated:

> *Societe* teaches that the decision whether to exercise that power is a discretionary one which is informed by three main factors: 1) the importance of the policies underlying the United States statute which forms the basis for the plaintiff's claims;[49] 2) the importance of the requested documents in illuminating key elements of the claim;[50] and 3) the degree of flexibility in the foreign nation's application of its non-disclosure laws.[51]

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order to seek a waiver from the Canadian regulation that prohibited compliance with a subpoena. *Id.* There would, however, have been a basis for finding that Rio Algom had not acted in good faith if appellant had either fled to Canada to avoid discovery resulting from the controversy in question or had influenced the Canadian Government to promulgate the law prohibiting compliance with the subpoena. *Id.* In State v. Arthur Anderson & Co., 570 F.2d 1370 (10th Cir. 1978), the Tenth Circuit upheld the lower court's finding of contempt and imposition of a sanction for noncompliance because the record supported the lower court's finding that Arthur Anderson & Co. had not acted in good faith. *Id.* at 1373-75.

45. *In re* Westinghouse, 563 F.2d at 998.

46. *Id.* at 999. In de-emphasizing the weight of the United States interest in enforcing the subpoena, the Tenth Circuit noted "that Westinghouse's defense in the Virginia litigation does not stand or fall on the present discovery order." *Id.* The court found that the lower court's finding of contempt and imposition of sanctions for noncompliance was not justified. *Id.*

47. 480 F. Supp. 1138 (N.D. Ill. 1979).

48. *Id.* at 1148.

49. Because *Societe* indicated that failure to order production would be contrary to congressional policy buttressing plaintiff's claim for relief, the policies underlying the United States statute must be considered. *Id.* at 1146.

50. This second factor is based on the district court's finding that *Societe* required a much higher relevancy standard than required for normal discovery. *Id.* The Supreme Court in *Societe* did not state that any express standard for materiality must be satisfied; yet, there was a specific finding by the district court that the records "might prove to be crucial" to the outcome of the case. Societe Internationale v. Rogers, 357 U.S. at 201.

51. *In re* Uranium Antitrust Litig., 480 F. Supp. at 1148. The third factor stems from the district court's interpretation that *Societe* was correct in holding that the party asserting the foreign illegality excuse was in the best position to

Again relying on *Societe*, the court created a second level of analysis to determine the appropriate sanction for noncompliance: a balancing of any good faith efforts to comply with the order against the severity of the penalty involved and the probability that the penalty will indeed be imposed.[52] The *In re Uranium* court specifically rejected the section 40 test,[53] which required United States courts to balance United States interests against identified interests of a foreign country, because it found the two sets of interests to "display an irreconcilable conflict on precisely the same plane of national policy."[54] The court also indicated that the judiciary was not qualified to weigh the interests of foreign countries.[55] In two recent cases, the Ninth[56] and Third Circuits[57] balanced interests to determine whether United States antitrust laws should be enforced extraterritorially,[58] although the courts balanced different factors to reach their conclusions.[59] The cur-

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negotiate an alternative means of complying with the production order. *Id.* at 1146.

52. *Id.* at 1147-48.

53. *See supra* notes 35 and 36 and accompanying text.

54. *In re* Uranium Antitrust Litig., 480 F. Supp. at 1148.

55. *Id.* Specifically, the court stated that "the judiciary has little expertise, or perhaps even authority, to evaluate the economic and social policies of a foreign country."

56. Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597 (9th Cir. 1976).

57. Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1976).

58. *Id.* at 1290; *Timberlane Lumber Co.*, 549 F.2d at 600-01. Although these two cases involve the extraterritorial application of antitrust laws rather than an order to produce documents located in a foreign country, the factors considered by the court should be similar, because in both situations the court must make an initial decision whether to exercise extraterritorial jurisdiction.

59. In determining whether to exercise this jurisdiction, the *Timberlane* court, expanding on the § 40 factors, states:

> The elements to be weighed include the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

549 F.2d at 614. The *Mannington* court balanced ten factors, including most of the *Timberlane* factors, and also considered the impact of the exercise of jurisdiction on foreign relations and whether an applicable treaty was involved. 595 F.2d at 1297-98.

rent confusion concerning application of the balancing test creates decisions that are facially inconsistent. For example, the Second Circuit in *First National City Bank* utilized the section 40 factors and found that a subpoena duces tecum should be enforced,[60] but in *Trade Development Bank v. Continental Insurance Co.* the Second Circuit considered an additional relevancy requirement and upheld the lower court's refusal to compel disclosure.[61] Thus, a court has freedom to choose the factors it wants to employ when balancing United States interests against the interests of foreign countries.[62]

## III. Instant Opinion

In the instant opinion the Ninth Circuit considered four issues,[63] two of which create interesting implications for future interpretations of *Societe* and its progeny.[64] First, the Ninth Circuit

60. United States v. First Nat'l City Bank, 396 F.2d 897, 902-05 (2d Cir. 1968).

61. 469 F.2d 35, 40-42 (2d Cir. 1972); *see supra* note 42 and accompanying text.

62. A court has tremendous control over the degree of difficulty involved in establishing the defense of foreign illegality because it can vary the factors it considers in reaching its conclusion on whether jurisdiction should be exercised. For example, to increase the degree of difficulty, a court, in addition to balancing § 40 factors, could consider whether a party had established that it had acted in good faith, as it did in the instant case. *See* United States v. Vetco, Inc., 644 F.2d 1324 (9th Cir. 1981).

63. *Id.* at 1327.

64. The Ninth Circuit also considered whether the district court's failure to enter findings of fact or conclusions of law was reversible error and whether the issuance of a production order to DH&S violated due process. *Id.* In determining that it was not necessary for the district court to enter findings of fact, the Ninth Circuit relied on its ruling in Brunswick Corp. v. Doff, 638 F.2d 108 (9th Cir. 1981). The Ninth Circuit in *Brunswick* held that rule 52(a) of the Federal Rules of Civil Procedure did not require findings or conclusions in cases in which a motion for an order of contempt initiated the proceedings. *Id.* at 111. The Ninth Circuit bolstered its argument in the instant case by stating that even if rule 52(a) required findings of fact, the lower courts might have issued a production order, thus obviating the need for such findings. United States v. Vetco, Inc., 644 F.2d at 1327. In *Brunswick* the court indicated that it did not remand the case for specific findings of fact, because the record clearly supported a contempt order. 638 F.2d at 111. In *Vetco,* the Ninth Circuit indicated that specific findings were not required because it was presented only with questions of law. 644 F.2d at 1327. *But see, e.g.,* Williamson v. Tucker, 632 F.2d 579, 589 (5th Cir. 1980) (dismissal for lack of subject matter jurisdiction requires specific findings of fact); Black Diamond Coal v. Local Union No. 8460, UMW,

confronted Vetco's argument that the IRS's use of summonses to obtain documents located in Switzerland was prohibited by treaty. Without addressing the international law component of Vetco's argument,[65] the court cited parts of article XVI of the Swiss-United States Tax Treaty[66] and determined that the treaty

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597 F.2d 494, 495-96 (5th Cir. 1979) (findings of fact necessary for an appellate review of lower court's contempt order); Hobbs & Co., Inc. v. Am. Inv. Mgmt., 576 F.2d 29, 36 (3rd Cir. 1978) (order to pierce corporate veil requires specific findings of fact). In the amended opinion, the Ninth Circuit attempted to alleviate the lack of findings of fact by indicating that the record was sufficient to allow determinations of law. The court, however, cited no new evidence on the good faith issue. United States v. Vetco, Inc., Nos. 79-3756 to 79-3758, 79-3786, 80-5276, 80-5327, slip op. at 2018, 2022, 2025 (9th Cir. Oct. 22, 1981). The Ninth Circuit avoided the due process problem by interpreting the district court's production order to mean that only documents located in Switzerland were requested, rather than "all" of the documents described in the IRS summonses. United States v. Vetco, Inc., 644 F.2d at 1333.

65. Vetco claimed that since extraterritorial use of summonses was prohibited as a matter of law, there was no need to specifically prohibit extraterritorial use in text treaties. Reply Brief of Appellant and Intervenor at 15, United States v. Vetco, Inc., 644 F.2d 1324 (9th Cir. 1981) [hereinafter cited as Reply Brief]. Relying on The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 135 (1812), Laurtizen v. Larsen, 345 U.S. 571, 578 (1953), and several sections of the RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW, Vetco claimed that the United States did not have "the power to compel an act within a foreign country or extend statutory powers extraterritorially *unless* that foreign country has given express or implied permission." Reply Brief at 15. Thus, Vetco argued that tax "treaties afforded a new power to obtain foreign information when there was no American point of contact and eliminated disputes when there was an American point of contact." Reply Brief at 16-17.

66. The Ninth Circuit quoted the following portions of article XVI:

> (1) The competent authorities of the contracting States shall exchange such information (being information available under the respective taxation laws of the contracting States) as is necessary for carrying out the provisions of the present Convention or for the prevention of fraud or the like in relation to the taxes which are the subject of the present Convention . . . . No information shall be exchanged which would disclose any trade, business, industrial or professional secret or any trade secret or any trade process . . . .
>
> (3) In no case shall the provisions of this Article be construed so as to impose on either of the contracting States the obligation to carry out administrative measures at variance with the regulations and practice of either contracting State or which would be contrary to its sovereignty, security or public policy or to supply particulars which are not procurable under its own legislation or that of the State making application.

United States v. Vetco, Inc., 644 F.2d at 1328 (citing Convention on Double Taxation of Income, Sept. 27, 1951, United States-Switzerland, 2 U.S.T. 1751,

neither prohibited the IRS from using summonses to acquire information, nor provided an exclusive procedure for the exchange of information.[67] Second, the Ninth Circuit considered the impact of a possible violation of article 273 of the Swiss Penal Code.[68] The court asserted that *Societe* did not stand for the proposition that enforcement was prohibited in every instance in which compliance would lead to a violation of foreign law, but that *Societe* merely prohibited the dismissal "where plaintiff had made extensive good faith efforts to comply."[69] Citing the five factors listed in section 40 of the Restatement as elements of the necessary balancing test, the court first weighed the "vital national interests" of each state and found that the United States interest should prevail over the Swiss interest because an essentially private Swiss interest was being used to shield a United States parent corporation.[70] In assessing the hardship caused by compliance, the court de-emphasized the threat of criminal sanctions because Vetco had potential defenses to an article 273 violation.[71] Consid-

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1760-61, T.I.A.S. No. 2316.

67. *Vetco*, 644 F.2d at 1328.

68. *See supra* note 5 and accompanying text.

69. 644 F.2d at 1329-30. Specifically, the court stated that there was no finding of good faith in the present case. *Id.* at 1330. Furthermore, the court implied that noncompliance in the present case would benefit Vetco in contrast to the situation in *Societe* where noncompliance handicapped petitioner. *Id.*

70. *Id.* at 1331. The Ninth Circuit focused on two factors diminishing the Swiss interest. First, the court found that the Swiss interest was lessened because the production order was directed to a United States corporation and its subsidiary. *Id.* Second, the court noted that the Swiss interest in maintaining secrecy of business records would have been stronger had it been a public rather than a private interest. *Id.* The Ninth Circuit, however, did not consider the importance of business and banking secrecy to Switzerland. The importance the Swiss place on bank secrecy is demonstrated by "the case and dominant opinion of legal authors in Switzerland," which views both professional and banking secrecy as having precedence over tax matters. Dagon, *Swiss Treaty Provisions on Disclosure of Professional and Bank Secrets*, 29 BULL. INT'L FISCAL DOCUMENTATION 417, 418 (1975).

71. 644 F.2d at 1331-32. First, the Ninth Circuit found that there was no significant danger of the Swiss Government actually bringing criminal charges against Vetco for violation of article 273, since duress is an affirmative defense to a violation of article 273. *Id.* at 1331-32. The court failed, however, to consider the expense of asserting this defense. Second, the court indicated that hardship did not figure very strongly in the balance since Vetco was at fault for not keeping copies of records of its foreign subsidiaries in its offices in the United States. *Id.* at 1332. The hardship was, in this sense, self imposed. The court failed to describe, however, the manner in which Vetco could have main-

ering briefly the other three factors listed in section 40, the Ninth Circuit concluded that the United States interest in obtaining production of the documents by use of summonses should prevail.[72]

## IV. COMMENT

In the instant opinion, the court compartmentalized its analysis and thus neglected to fully consider the interrelationship between the district court's failure to enter findings of fact or conclusions of law, the Swiss-United States Tax Treaty, and the Swiss law prohibiting compliance with the production order. First, the Ninth Circuit did not discuss the significance of the lower court's failure to make findings of fact on the application of the balancing of interests test, contrary to earlier decisions indicating that this was necessary.[73] The lower court's failure to make findings of

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tained copies of documents in its United States offices without violating article 273.

72. *Id.* at 1333. First, the court indicated that the Swiss corporation's status as a subsidiary of a United States corporation was of more importance than the location of the documents. *Id.* at 1332-33. Second, in discussing the importance of the requested documents, the Ninth Circuit noted that the documents sought were relevant and that appellants did not show the documents to be "cumulative of records already produced." *Id.* Third, the court rejected all six of the proposed alternative means of production, because none of the proposals constituted "a substantially equivalent alternative." *Id.*

73. The *Mannington* court remanded the case because it held "that it was error to dismiss the plaintiff's complaint without the preparation of a record which will allow an evaluation of the factors counseling for or against the exercise of jurisdiction." Mannington Mills v. Congoleum Corp., 595 F.2d 1287, 1298 (3rd Cir. 1979). In *Timberlane,* the court vacated the dismissal and remanded the action because the lower court neither analyzed the conflict with Honduran law or policy nor balanced the connections and interests of the United States and Honduras. Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 615 (9th Cir. 1976). The Ninth Circuit's amended opinion in the instant case does not discuss the lower court's failure to make findings of fact on either the balancing test issue or the good faith issue. United States v. Vetco, Inc., Nos. 79-3756 to 79-3758, 79-3786, 80-5276, 80-5327 (9th Cir. Oct. 22, 1981). Instead, the Ninth Circuit merely indicated that the factual questions were either immaterial or adequately addressed by the district court's on-the-record statements." *Id.*, slip op. at 2022. This holding may reconcile the instant case with *Mannington* and *Timberlane,* but the Ninth Circuit failed to consider that the failure to make a specific finding of fact on the good faith issue affects the burden of proof borne by the party claiming foreign illegality as a defense. *See infra* notes 74-77 and accompanying text.

fact also allowed the Ninth Circuit to add another nuance to *Societe*'s analysis. In holding that the *Societe* analysis was not applicable because the district court made no findings of fact concerning good faith efforts to comply with the production order, the Ninth Circuit implied that *Societe* requires an affirmative finding of good faith.[74] This introduces another element of uncertainty because the Ninth Circuit places a greater burden on the party seeking to establish a defense of foreign illegality than do other circuits.[75] For example, the Tenth Circuit's *Westinghouse* analysis did not focus on whether appellant Rio Algom Corporation had established that it had acted in good faith; rather, the court's concern was whether appellant's bad faith had been proven.[76] This is the correct interpretation of *Societe.* Although the *Societe* court cited the Special Master's finding of good faith, its holding that "willfullness, bad faith, or . . . fault" would trigger sanctions is not a requirement that good faith be proven.[77] Thus, if there is any burden, *Societe* suggests it is a burden on the party seeking the documents to prove an absence of bad faith, not the existence of good faith. Second, the court's separate treatment of the tax treaty issue made it impossible to weigh and balance the significance of the Swiss-United States Tax Treaty.[78] The treatment of the tax treaty issue is the greatest weakness in the instant decision. While emphasizing the United States interest in collecting taxes, the court stated that the Swiss interest in

74. United States v. Vetco, Inc., 644 F.2d at 1329-30. The Ninth Circuit in the instant case held that *Societe* did not control because there was no finding that appellants made good faith efforts to comply with the summonses. *Id.*

75. In *State v. Arthur Andersen & Co.*, the Tenth Circuit upheld a finding of contempt and the imposition of sanctions in a case involving a specific finding by the lower court that Andersen had not acted in good faith. 570 F.2d 1370, 1373-75 (10th Cir. 1978). The *Vetco* court, in contrast, upheld a contempt order and sanctions in a situation in which the lower court did not make any findings as to Vetco's good faith efforts. 644 F.2d at 1330. The *Vetco* court did not apply *Societe* and quash the contempt order because the lower court did not find that appellants had acted in good faith. *Vetco,* 644 F.2d at 1329-30. Thus, the Ninth Circuit indicated that a party has the burden of establishing that it has acted in good faith rather than merely establishing an absence of bad faith in complying with a production order. *See infra* notes 77-78 and accompanying text.

76. *In re* Westinghouse, 563 F.2d at 998.

77. *Societe,* 357 U.S. at 201, 212.

78. 644 F.2d at 1330-34. Furthermore, the court found that the treaty had no effect on the IRS's use of summonses to secure documents located in Switzerland. *See supra* notes 65-69 and accompanying text.

bank secrecy was diminished because the corporation involved was merely the subsidiary of a United States corporation. Yet, the court failed to consider the importance of bank secrecy to Switzerland vis-a-vis the importance of tax collections to the United States; the banking industry is a mainstay of the Swiss economy.[79] Furthermore, the court ignored the possibility that article XVI of the Swiss-United States Tax Treaty,[80] which states that "No information shall be exchanged which would disclose any . . . business . . . secret,"[81] might impose an obligation on the United States to avoid circumventing the Swiss prohibition on the disclosure of business secrets. This balancing of national interests and policy is a task particularly suited to the executive and legislative branches. As the end product of long and detailed executive branch bargaining to conclude the treaty, the exchange of information clause in the Swiss-United States Tax Treaty represents the most viable compromise of conflicting national interests.[82] While the Second Circuit's comity approach[83] has not received widespread support, the more prevalent practice of applying a balancing test does accord a certain measure of deference to the interests of foreign nations. Such deference is integral to the smooth maintenance of international relations. In the instant case, the district court's failure to enter findings of fact, the existence of the Swiss-United States Tax Treaty, and the Swiss penal prohibitions should have been more seriously evaluated in the "balancing" process. Competing national interests need not be balanced at all if courts want to ignore the role that judicial decisions play in the evolution and development of international law and relations. The actual decision to balance interests thus

79. *See supra* note 70 and accompanying text. The court ignored the *In re Uranium Antitrust Litig.* admonishment that the judiciary is ill-suited to weigh the interests of a foreign country against the interests of the United States; *see supra* note 55 and accompanying text.

80. *See supra* note 66 and accompanying text.

81. Convention on Double Taxation of Income, Sept. 27, 1951, United States-Switzerland, 2 U.S.T. 1751, 1760-61, T.I.A.S. No. 2316, *quoted in* United States v. Vetco, Inc., 644 F.2d at 1328.

82. During negotiations of a treaty "delegates remain in touch with their Governments, they have with them preliminary instructions which are not communicated to other parties, and at any stage they may consult their Governments and if necessary, obtain fresh instructions." 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW, 20 (1963) (quoting J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 251-52 (2d ed. 1950)).

83. *See supra* notes 12, 20-38 and accompanying text.

suggests some inclination to consider the interests of other nations—a comity-type concern. But a mere acknowledgement of the existence of foreign interests, absent a true balancing of interests, denigrates foreign concerns and may hamper the development of a workable system of international law.

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