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The Nature and Extent of Executive Power to Espouse the International Claims of United States Nationals

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NOTES

THE NATURE AND EXTENT OF EXECUTIVE POWER TO ESPOUSE THE INTERNATIONAL CLAIMS OF UNITED STATES NATIONALS

I. INTRODUCTION

International law is generally considered to be law[1] that governs the conduct of sovereign states only.[2] While individual private persons, both natural and juridical, undoubtedly are third-party beneficiaries of the rights and duties created by international law, those rights and duties, in the classical analysis, run only among sovereigns.[3] Because rules of international law and treaties constitute obligations among or between sovereign states, a violation of international law imposes international responsibility not to the private parties who are injured by the violation but to the sovereign states of which they are members. Private parties, therefore, generally have no standing to assert a violation of international

1. Under the currently more popular theory of intenational law, the "positivist" approach, the basis of obligation in international law is consent. The term "law," therefore, might appropriately be replaced by "consensual standards of state conduct." For excellent discussions of the basis of internaional law see J. BRIERLY, THE BASIS OF OBLIGATION IN INTERNATIONAL LAW 1-67 (1958); 1 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1-67 (1958); 1 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1-35 (1963). For an example of the application of the positivist approach in the resolution of an actual international controversy see Case of the S.S. "Lotus," [1927] P.C.I.J., ser. A, No. 9.

2. *See* 1 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 1-12 (1940); P. HEILBORN, DAS SYSTEM DES VOLKERRECHES ENTWICKELT AUS DEN VOLKERRECHTLICHEN BEGRIFFEN 58 (1896); 1 J. MOORE, DIGEST OF INTERNATIONAL LAW 1-9 (1906); 1 L. OPPENHEIM, INTERNATIONAL LAW 19-20, 107-08 & 362-66 (2d ed. 1912). *But cf.* note 3 *infra*.

3. Several recent international developments, however, have signalled a new trend in international law extending international legal rights and obligations to entities that are not sovereign states, including in some instances private individuals. *See, e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms, in COUNCIL OF EUROPE, CONVENTION OF HUMAN RIGHTS: COLLECTED TEXTS (6th ed. 1969). The European Convention on Human Rights established an international system of judicial and quasi-judicial institutions for the adjudication of both governmental and private complaints seeking relief for violations of the human rights guaranteed by the convention. *See also* note 19 *infra*; 1 M. WHITEMAN, *supra* note 1, at 35-58.

law.[4] The injured private party's legal recourse directly[5] against a foreign sovereign is generally[6] limited to the remedies available within the framework of the particular foreign sovereign's municipal legal system. When these remedies have been exhausted[7] and

4. *See, e.g.*, Sei Fujii v. State, 38 Cal.2d 718, 242 P.2d 617 (1952). In *Sei Fujii*, the treaty obligation asserted by the private party plaintiff, the human rights provisions of the United Nations Charter, were held not to be self-executing and therefore not a part of the municipal law of the United States that the private party could invoke in his behalf. Note, however, that if the treaty provisions were self-executing, it would not be the international legal obligation that would give the private party his right, but the municipal one.

5. There are several "indirect" procedures available to the private international claimant. First, of course, the private party may attach property of the foreign sovereign within his own state's jurisdiction and obtain thereby an in rem jurisdiction for the assertion of his claim. Successful recovery under this procedure, however, depends on the applicability of the doctrines of "act of state" and "sovereign immunity" in that jurisdiction. For an excellent discussion of these two doctrines in the United States and how each might affect the success of such an "indirect" procedure in United States courts see Cheatham & Maier, *Private International Law and Its Sources*, 22 VAND. L. REV. 27, 83-94 (1968). Secondly, the private party may proceed against property of the foreign sovereign in foreign courts other than those of the defendant foreign sovereign's municipal legal system. This practice, of recent notoriety because of Kennecott Copper's multiplicity of law suits throughout the world against Chilean copper (in retaliation against the Chilean Government's expropriation without compensation of Kennecott's mines located in Chile), is a proven method of annoyance, but its success in terms of recovery in favor of the private injured party still is conditioned on varying constructions of the "act of state" and "sovereign immunity" doctrines in those jurisdictions. *See, e.g.*, N.Y. Times, Oct. 5, 1972, at 67, col. 3 (France); *id.*, Oct. 17, 1972, at 57, col. 4 (France); *id.*, Oct. 19, 1972, at 82, col. 11 (Netherlands); *id.*, Oct. 21, 1972, at 45, col. 1 (Netherlands); *id.*, Oct. 31, 1972, at 65, col. 4 (Sweden); *id.*, Nov. 9, 1972, at 65, col. 6 (Sweden); *id.*, Nov. 30, 1972, at 63, col. 3 (France). Subsequently, the Overseas Private Investment Corporation (OPIC) and Kennecott agreed to a $66,900,000 settlement of Kennecott's investment guaranty claim. N.Y. Times, Dec. 15, 1972, at 69, col. 1. *See generally* note 18 *infra*.

6. *But cf.* materials cited note 3 *supra*.

7. Generally, in international law, local remedies that are still available to the private claimant within the foreign sovereign's municipal legal system must be exhausted before his government may represent his injury or claim internationally. 5 G. HACKWORTH, *supra* note 2, at 501-26; 6 J. MOORE, *supra* note 2, at 656-77; 8 M. WHITEMAN, *supra* note 1, at 769-807. When the local remedies still available to the private claimant are insufficient, have been superseded, or when "justice is wanting," however, exhaustion of local remedies is not a condition precedent to international espousal. 5 G. HACKWORTH, *supra* note 2, at 501-26; 6 J. MOORE, *supra* note 2, at 677-93; 8 M. WHITEMAN, *supra* note 1, at 769-807. *See also* RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 206-10 (1965); Bagge, *Intervention on the Ground of Damage Caused to Na-*

there remains a possibility that the foreign sovereign's actions concerning the injured private party are in violation of a duty imposed by international law, it is only the state of which the private party is a national[8] that may demand redress by the foreign sovereign for the alleged violation of its international duty. Moreover, in demanding redress, the claimant state neither represents its national who has sustained the injury nor gives effect to his "right"; rather, the claimant state represents its own right—*i.e.* its right to have its citizens treated by other states in the manner prescribed by international law.[9]

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tionals, With Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders, 34 BRIT. Y.B. INT'L L. 162 (1958); Mummery, *The Content of the Duty to Exhaust Local Judicial Remedies*, 58 AM. J. INT'L L. 389 (1964); Schwebel & Wetter, *Arbitration and the Exhaustion of Local Remedies*, 60 AM. J. INT'L L. 484 (1966).

8. For a discussion of the concept of nationality see 8 M. WHITEMAN, *supra* note 1, at 1-187. While the conferral of nationality status is a question of municipal law, it is valid vis-a-vis other states only when such conferral is in accordance with international legal standards, which, in the case of private natural persons, require some minimal substantive contacts between the individual and state in question. *See* Nottebohm Case (Liechtenstein v. Guatemala), [1955] I.C.J. 8. In the case of corporations, however, the International Court of Justice has held that international law recognizes only—with certain limited exceptions—the state under whose laws the corporation was created as that entity's valid international representative. Barcelona Traction, Light & Power Co. Case (Second Phase), [1970] I.C.J. 3. This narrow approach concerning corporate nationality has been severely criticized. *See, e.g.*, Barcelona Traction, Light & Power Co. Case (Second Phase), [1970] I.C.J. 170 (concurring opinion of Judge Jessup); Comment, 4 VAND. INT'L 52 (1970).

9. Mavrommatis Palestine Concessions, [1924] P.C.I.J., ser. A, No. 2. The state represents internationally the "denial of justice" to its nationals. *See* 5 G. HACKWORTH, *supra* note 2, at 526-55; 6 J. MOORE, *supra* note 2, at 651-56; 8 M. WHITEMAN, *supra* note 1, at 697-769. The *Mavrommatis* principle that by espousing its national's claim a state makes the claim its own has several significant implications. First, jurisdictional provisions of international tribunals, which often provide that only states may be parties (*e.g.*, I.C.J. STAT. art. 34, para. 1), are satisfied. Secondly, it follows that if the state is the party conducting the litigation, it may also decide whether to compromise the claim or abandon the action altogether. *See* note 30 *infra* and accompanying text. Thirdly, any money judgment recovered by the action is paid to the state. While the United States, when a successful claimant state, normally will distribute the amount recovered to the injured national or nationals whose claim or claims it has successfully represented, the Government has, on occasion, refused to pay over such an award to a private claimant whom it regards as not entitled to compensation. *See, e.g.*, La Abra Silver Mining Co. v. United States, 175 U.S. 423 (1899). The procedure usually followed in the United States, however, provides for the payment of the funds recovered into the Treasury, which disburses them to the private claimant

Correspondingly, each state has, in international law, an absolute right[10] to represent internationally injuries to its nationals that result from actions by other states in violation of international law. The nature and extent of the sovereign's duty or obligation in the espousal of the international claims of its nationals, however, is not so clear.

While an obligation of the sovereign to represent its nationals internationally might derive from either international or municipal law, the question whether there is an international duty as well as a right of diplomatic protection is a purely theoretical one.[11] The more practical and relevant inquiry, therefore, is the nature and extent of the sovereign's obligation to its nationals under its own municipal law in the presentation of their claims internationally.[12]

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or claimants on certification by the Secretary of State. *See* 31 U.S.C. § 547 (1970). *See generally* 5 G. HACKWORTH, *supra* note 2, at 763-801. Fourthly, the implications of the *Mavrommatis* principle for ascertaining the appropriate measure of damages in international law are less clear. While the damages asserted customarily will bear a close relationship to the injury to the national, one arbitral tribunal, in an arbitration case concerning the illegal seizure of a British flag vessel by an American cruiser on the high seas, awarded damages of $25,000 to the Canadian Government for the insult to the flag, and awarded nothing for the loss of the ship, which was owned and controlled by a group of American rum-runners. The I'm Alone Case (Canada v. United States), in 2 G. HACKWORTH, *supra* note 2, at 703-08.

10. Mavrommatis Palestine Concessions, [1924] P.C.I.J., ser. A, No. 2. Moreover, attempts to limit the sovereign's right to represent internationally "denials of justice" to its nationals, by the municipal legislation of defendant states, have not been successful; nor can this right be waived by the state's national for whose injury it demands redress. *See* North American Dredging Co. of Texas Case (United States v. United Mexican States), 4 U.N.R.I.A.A. 26 (1926). *See generally* 5 G. HACKWORTH, *supra* note 2, at 635-54; 8 M. WHITEMAN, *supra* note 1, at 916-33.

11. Early international legal theorists considered the diplomatic protection of nationals an international duty as well as right of the sovereign. H. GROTIUS, DE JURE BELLI AC PACIS LIBRIS TRES, Book II, Ch. XXV, §§ 1-2, at 578-79 (F. Kelsey transl., Oxford University Press ed. 1925); G. LOMONACO, TRATTATO DI DIRITTO INTERNAZIONALE 212 (1905); 1 G. DE MARTENS, TRAITE DE DROIT INTERNATIONAL 444 (1883); E. DE VATTEL, THE LAW OF NATIONS, Book I, Ch. II, §§ 13-16, at 13-14 (J. Chitty & E. Ingraham eds. 1855). Later prominent international legal scholars, however, argued that there cannot be any international legal duty of the sovereign to represent internationally the injuries and claims of its citizens, because the interests of the nation as a whole might demand otherwise in a particular situation. P. HEILBORN, *supra* note 2, at 70; 1 L. OPPENHEIM, *supra* note 2, at 395-97. The question is, however, purely theoretical because even assuming *arguendo* the existence of such a duty internationally it could be only a moral and not a legal duty since there is no means of internationally enforcing its fulfillment.

12. The general rule is that under their own municipal law states are under

The question whether such an obligation of the sovereign exists under the municipal law of the United States, and the nature and extent of it if it does, is the inquiry undertaken by this note.

The Constitution of the United States contains no express provision concerning the duty of the sovereign to represent internationally its nationals who are injured by a foreign sovereign's act in violation of international law.[13] The question whether such an obligation exists in the United States, therefore, and the nature and extent of it if it does, can be answered only by an analysis of the relationship between the Executive's broad and plenary power in the area of foreign afairs[14] and the limitations imposed by the

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no legal duty to represent internationally the claims of their nationals. *See* E. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 29 (1928). While the constitution of the German Empire, art. 3, § 6, expressly accorded subjects of the Empire the right to diplomatic protection, no legal remedy or means of enforcing the right was granted. *See id.*, at 29 n.5, 30 & n.2. Interestingly, this right was not expressly recognized in the subsequent constituion of the Federal Republic of Germany (the Bonn Constitution). *See* GRUNDGESETZ arts. 1-19 (1949) (W. Ger.). The right continued, however, in modified form, in the 1949 constitution of the German Democratic Republic: "Every citizen of the German Democratic Republic has the right to legal protection by the organs of the German Democratic Republic when abroad." CONSTITUTION OF THE GERMAN DEMOCRATIC REPUBLIC art. 29 (1949) (E. Ger.). Again, however, no legal remedy or means of enforcing the right was provided.

13. *Cf.* Constitution of the German Democratic Republic, note 12 *supra*.

14. *See* United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936). *Curtiss-Wright* is the leading case concerning the power of the Executive over foreign affairs. In *Curtiss-Wright* the President, acting pursuant to specific authorization by Congress, was challenged on his prohibition of the sale of arms to an unsettled South American country. In upholding the President's action, the Court found, first, that his power was an attribute of sovereignty possessed by the federal government: "It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. . . . As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family." 299 U.S. at 318. The opinion has been criticized for its statement that sovereignty passed directly from Great Britain to the Government of the United States, since that theory ignores the existence of the Articles of Confederation. As a good constitutional holding that the United States Government does in fact have these powers of sovereignty, however, it is now unquestioned.

Furthermore, the Court found that the President alone had the power to operate as the international representative of the nation: "In this vast external realm, with its important, complicated, delicate, and manifold problems, the President

Constitution on its exercise, the most pertinent constitutional limitation for this purpose being the fifth amendment.[15] This relationship is explored and analyzed in this note by a consideration of those instances in which Congress and the courts have had occasion to comment on it, and through an examination of practice in the area that has come to be customary and accepted over the years, a method of constitutional doctrinal development whose validity is well recognized.[16] It is the examination of international claims practice in the United States that is undertaken first, to provide not only an understanding of the practices by the Executive that have come to have accepted constitutional validity but also a conceptual orientation to the problems that are characteristic of the general area of international claims practice.

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alone has the power to speak or listen as a representative of the nation." 299 U.S. at 319. The Court based its holding not merely on the legislative delegation of power to the President but also on "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations. . . ." 299 U.S. at 320.

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

In discussing United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936), Louis Henkin observed that "*Curtiss-Wright* itself exempts foreign relations only from the rigors of limitations on delegation inherent in the separation of powers; it did not suggest that other constitutional limitations were also inapplicable, and it expressly said that the President's plenary power in foreign affairs, 'of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.' [299 U.S. at 320.]" L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 253 (1972).

16. Justice Frankfurter, for example, has observed: "The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (concurring opinion of Frankfurter, J.) (dictum). For an instance of judicial recognition of this method of constitutional doctrinal development see United States v. Midwest Oil Co., 236 U.S. 459 (1915).

II. International Claims Practice in the United States

When the private United States international claimant has exhausted the remedies available within the framework of the defendant foreign sovereign's municipal legal system, or when the exhaustion of such remedies is not required,[17] and prospects for a successful and adequate recovery under alternate methods[18] are unfavorable, normally the only recourse remaining to the aggrieved national is to look to the Executive to present the claim internationally.[19] In these circumstances the injured private party must

17. *See* note 7 *supra*.

18. *See* note 5 *supra* and accompanying text. In addition, the claimant who is insured by the Overseas Private Investment Corporation (OPIC), pursuant to the provisions of 22 U.S.C. §§ 2191-2200a (1970), may seek recovery on his insurance or guaranties on a showing that the foreign government expropriated his enterprise. OPIC, the successor to the Investment Guaranty Program, makes available protection, in the form of insurance and "guarantees" against certain risks, to American firms of their foreign investments. 22 U.S.C. § 2194(a)-(b) (1970). The provisions apply to new investments, including expansion or modernization of existing investments, in designated underdeveloped countries. OPIC may issue the insurance or guaranties to United States citizens, to domestic corporations "substantially beneficially owned" by United States citizens, and to wholly owned subsidiaries of such corporations. Investors pay specified fees for the insurance, which can protect them against any or all of the following risks: "(A) inability to convert into United States dollars other currencies, or credits in such currencies, received as earnings or profits from the approved project, as repayment or return of the investment therein, in whole or in part, or as compensation for the sale or disposition of all or any part thereof; (B) loss of investment, in whole or in part, in the approved project due to expropriation or confiscation by action of a foreign government; and (C) loss due to war, revolution, or insurrection." 22 U.S.C. § 2194(a) (1970). The guarantees may be issued to insure "against loss due to such risks and upon such terms and conditions as the corporation [OPIC] may determine: *Provided, however*, that such guarantees on other than loan investments shall not exceed 75 per centum of such investment." 22 U.S.C. § 2194(b) (1970). *See generally* Adams, *The Emerging Law of Dispute Settlement Under the United States Investment Insurance Program*, 3 Law & Pol. Int'l Bus. 101 (1971).

19. In those few instances in which the *compromis* establishing an international tribunal or treaty establishing an international court has expressly authorized such procedures, private parties have been able to prosecute their own claims before international tribunals. Examples are the Mixed Arbitral Tribunals that were established to settle claims at the end of World War I, the tribunal set up by Poland and Germany in 1922 to handle controversies over the treatment of minorities in Upper Silesia, and the Central American Court of Justice. *See* P. Jessup, A Modern Law of Nations 18 (1952). In addition, the Permanent Court of Arbitration adopted in 1962 rules that permit agreements between states and private parties to provide for arbitration under its auspices. For the text of these rules see 57 Am. J. Int'l L. 500 (1963). Similarly, the Convention on the Settle-

formulate a request to the Department of State that it espouse his claim against the foreign state.

Within the Department, international claims are handled by the Office of the Legal Adviser.[20] Because the formulation of precise rules for the presentation to the Office of international claims by private parties is infeasible given the diversity of circumstances from which international claims arise, the Office does not use forms for preparing and documenting claims against foreign states. Rather, the Office requires generally that all claims be prepared and documented in accordance with international practice and custom.[21] To assist aggrieved nationals to prepare and document their international claims in accordance with this requirement, the Office has prepared various memoranda containing suggestions for the preparation of international claims.[22]

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ment of Investment Disputes Between States and Nationals of Other States, *adopted* March 18, 1965, [1966] 2 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159, establishes a framework for arbitration between states and nationals of other states. Also, the Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 3, established an international system of judicial and quasi-judicial institutions for the adjudication of both governmental and private complaints seeking relief for violations of the human rights guaranteed by the convention.

It must be emphasized, however, that in these instances jurisdiction over such private party-foreign state disputes is only by the state's own consent to the jurisdiction of the arbitral tribunal or court in question.

20. In addition to performing for the Department the advisory functions implied by its title, the Office of the Legal Adviser furnishes drafting and negotiating skills in connection with international agreements and domestic laws that concern foreign affairs. The Office also represents the United States before international tribunals. While the Department of Justice normally represents the Department of State or the United States before domestic courts, the Office of the Legal Adviser may be called on by judges or parties to submit opinions concerning customary international law, treaty interpretation, United States foreign policy on a particular issue, and similar matters. *See generally* Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633 (1962).

21. Letter from Fabian A. Kwiatek, Assistant Legal Adviser for International Claims, to authors, March 10, 1973.

22. *See* Appendices A, B and C. The memorandum set out in Appendix A deals with claims concerning personal injury or loss of life; the memorandum set out in Appendix B deals with claims concerning loss of or damage to property, real or personal; and, the memorandum set out in Appendix C deals with claims concerning seizure of vessels in internaional waters. Note that unlike the usual complaint before domestic courts the claim at this stage must not only assert a basis for protection by the United States but also be accompanied by affidavits and documents that establish the claimant's case.

The process of deciding whether to recommend governmental action in behalf of the claimant is a balancing process in which the Office weighs a variety of considerations—legal, equitable and political—such as respect for the claimant's interests and rights, the degree of divergence from principles of international law of the action by the foreign state, the effect of United States governmental action on political relations with the foreign country, and the influence that espousal of the claim in question may have as a precedent in future cases.[23] The Department, therefore, as the political agent of the Executive in the area of foreign affairs, might well decide in its discretion that it is not in the interests of United States foreign policy to espouse an international claim or set of claims in a particular case.[24] While it is settled law that the decision reached by the Office or Department not to espouse is not subject to judicial review,[25] such a decision does not preclude the

23. *See* 8 M. WHITEMAN, *supra* note 1, at 1217. In 1949, Congress authorized the establishment of the Foreign Claims Settlement Commission to adjudicate American claims and determine their validity and amount. International Claims Settlement Act of 1949, ch. 54, § 3, 64 Stat. 12 (1950), *as amended*, 22 U.S.C. §§ 1621-27 (1970). The Commission has jurisdiction over claims of nationals of the United States included within the terms of any claims agreement on or after March 10, 1954, concluded between the United States Government and a foreign government, that provides for the settlement and discharge of claims of United States nationals arising out of the nationalization or other taking of property by the agreement of the United States Government to accept a lump sum settlement. 22 U.S.C. § 1623(a) (1970).

24. *See* 8 M. WHITEMAN, *supra* note 1, at 1216. "The government of the United States has discretion as to whether to espouse the claim of a United States national for injury caused by conduct attributable to a foreign state that is wrongful under international law. This discretion is vested in the President and exercised on his behalf by the Secretary of State." RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES § 212 (1965).

25. The decision whether to press the claim of an American on a foreign government "is political in nature within the province of the Executive and the writ of mandamus cannot issue against him." 8 M. WHITEMAN, *supra* note 1, at 1216. In this area of decision making, the Department considers itself to be exempt from the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551-706 (1970), especially from the provisions for judicial review of agency action in § 702, because § 701 excepts agency action that "is committed to agency discretion by law." While private parties have on occasion attempted to obtain court orders directing the Secretary of State to enter into negotiations with a foreign country to assist an aggrieved American citizen, these actions have been unsuccessful. *See, e.g.*, United States *ex rel.* Keefe v. Dulles, 222 F.2d 390 (D.C. Cir. 1954). In *Keefe*, the court found that the Secretary "was not under a legal duty to attempt through diplomatic processes to obtain Keefe's release. Quite to the contrary, the commencement of diplomatic negotiations with a foreign power is

private party from pursuing his rights under alternate direct and indirect approaches.[26]

If the Department decides to espouse the claim, however, different consequences accrue. Procedurally, the Department notifies the foreign government and sends it copies of the claim. The Government might then proceed to espouse the claim through informal discussions with the foreign government, through formal diplo-

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completely in the discretion of the President and the head of the Department of State, who is his political agent. The Executive is not subject to judicial control or direction in such matters [citing United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936)]. Accordingly we hold the petition [which the court regarded as seeking affirmative injunctive relief against the Secretary of State] was properly dismissed. . . ." 222 F.2d at 394. *But cf.* 22 U.S.C. § 1732 (1970), which provides: "Whenever it is made known to the President that any citizen . . . has been unjustly deprived of his liberty by . . . [a] 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 [demand] is . . . refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain . . . the release; and all the facts and proceedings relative thereto shall . . . be communicated by the President to the Congress." This statute, originally drafted in 1868, is of questionable validity under the supremacy clause since the Supreme Court's opinion in *Curtiss-Wright*.

26. Until and unless espoused by the United States, and except as otherwise provided by law, a claim for reparation that results from a foreign state's injury to a national of the United States is subject to the control of the national who has suffered the injury, and he is entitled to any reparation paid to him by the foreign state. RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES § 211 (1965). Comment *a* of § 211 provides further: "Although, the United States has generally followed the traditional theory of international law that a claim for injury to an alien is a claim of the state of nationality, the United States cannot, under normal conditions, restrain a United States national who has been injured by conduct attributable to a foreign state, from seeking reparation from the appropriate agency of the foreign state before the United States espouses the claim. There appears to be no case where the government of the United States has questioned the right of the national to accept reparation directly from a foreign state. A statute [18 U.S.C. § 953 (1970)] that makes it a crime to engage in private negotiations with foreign states "in relation to any disputes or controversies with the United States expressly recognizes the right of a citizen to apply . . . to any foreign government . . . for redress of any injury which he may have sustained from such government."

Note, however, that there is a class of claims that survives private settlement between the injured private party and the defendant foreign sovereign, for which, and regardless of such settlement, the sovereign state of which the injured private party is a national may still demand redress for the direct injury to the sovereign. *See* E. BORCHARD, *supra* note 12, at 362-63.

matic protests, or through any combination of these approaches.[27] If an acceptable settlement is not forthcoming, the Government might be in a position to exert economic and political pressures against the foreign state, such as a suspension of benefits accruing to that country under the foreign assistance programs, or quota limitations on imports from that country. Recourse to international tribunals may be an alternative at this point, but in many cases this approach is unavailable since the "respondent" state might not submit to the jurisdiction of such a tribunal. Substantively, when the claim is espoused by the Government, the private claim becomes "merged" or "immersed" in the public demand of the Government.[28] By espousing an international claim of one of its nationals, the Government, acting in its sovereign capacity, makes the claim its own and is thus said to act neither as agent nor as trustee for the private party claimant.[29] Accordingly, and regardless of which procedural approach the Government has taken in espousing the claim, the Executive asserts the power not only to settle the claim but also to compromise or waive it altogether without the consent of the injured private party.[30] Moreover, while any recovery by the United States Government usually is paid over to the injured private party, such payment is considered not a matter of the private party claimant's legal right but rather a gratuity.[31]

The power of the Executive to espouse the international claims of United States nationals, therefore, is extensive. Indeed, it may be asked whether there are any limitations at all on the exercise of this power; this question is the subject of inquiry of the remainder of this note, which is concerned with those more notable instances in which the courts have had occasion to comment on the nature and scope of the Executive's power to espouse and settle the international claims of United States nationals.

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27. *See* E. BORCHARD, *supra* note 12, at 435.

28. United States *ex rel.* Boynton v. Blaine, 139 U.S. 306, 323 (1891). *See also* La Abra Silver Mining Co. v. United States, 175 U.S. 423 (1899); Frelinghuysen v. Key, 110 U.S. 63 (1884); E. BORCHARD, *supra* note 12, at 356-62.

29. La Abra Silver Mining Co. v. United States, 29 Ct. Cl. 432, 510 (1894), *aff'd,* 175 U.S. 423 (1899); The Great Western Ins. Co. v. United States, 19 Ct. Cl. 206, 216-18, *aff'd,* 112 U.S. 193 (1884).

30. *See* E. BORCHARD, *supra* note 12, at 366-77; 8 M. WHITEMAN, *supra* note 1, at 1216. *See also* RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES § 213 (1965).

31. *See* note 9 *supra.*

III. Limitations on Executive Power to Espouse International Claims of United States Nationals

A. *Generally*

The United States Government has been party to many international agreements settling claims of United States nationals against foreign sovereigns or nationals of foreign sovereigns, usually in exchange for a lump sum payment to the United States;[32] and never has it been successfully argued in the Supreme Court that in so disposing of the international claims of private nationals the Executive deprived the private party claimants of property without due process of law,[33] impaired the obligation of their contracts,[34] or appropriated "private property" for a public purpose raising an obligation to pay just compensation for the loss.[35] In lower courts, however, there have been several notable instances in which the Constitution has been held to limit executive power in the area of espousal and settlement of international claims.

B. *The French Spoliation Claims*

1. *Historical Background of the Claims.*—On February 6, 1778, the Continental Congress ratified a treaty of alliance with France, pursuant to which France give military support to the United States during the American Revolution in return for the promise of the United States to protect the American territorial possessions of France.[36] In addition, a treaty of amity and commerce with

32. *See* M. Hudson, International Tribunals 196 (1944). In some cases private claims were adjudicated by joint claims commissions. *See, e.g.,* Convention with the Republic of Mexico for the Adjustment of Claims, July 4, 1868, art. II, 15 Stat. 682, T.S. No. 212; *cf.* Agreement with Canada Concerning the Establishment of an International Arbitral Tribunal to Dispose of United States Claims Relating to Gut Dam, March 25, 1965, [1966] 2 U.S.T. 1566, T.I.A.S. No. 6114.

33. *See* L. Henkin, *supra* note 15, at 265.

34. "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. Const. art. I, § 10. While this provision is directed to the States, similar limitations have been held to apply to the federal government by virtue of the due process clause of the fifth amendment.
See, e.g., Perry v. United States, 294 U.S. 330 (1935); Lynch v. United States, 292 U.S. 571 (1934).

35. *Cf.* Alling v. United States, 114 U.S. 562 (1885); Meade v. United States, 76 U.S. (9 Wall.) 691 (1869); Comegys v. Vasse, 26 U.S. (1 Pet.) 193 (1828).

36. Article XI of the treaty provided: "The two parties guarantee mutually from the present time, and forever against all other powers, to wit: The United States to his Most Christian Majesty, the present possessions of the crown of

France was signed and ratified on the same date,[37] granting all ships of war and privateers of either party the exclusive privilege to carry their prizes into the ports of the other freely and without any examination of the lawfulness of the prize.

France faithfully performed her obligations under these treaties during the American Revolution by helping the United States to secure its independence from England. Moreover, the costs incurred by France in performing her obligations were not insubstantial—some 280 million dollars in arms, munitions and loans, in addition to the loss of many French lives.[38] After American independence had been secured, relations between France and England grew increasingly hostile, and war was declared in early 1793. Clearly, the time had arrived when it was necessary for the United States to repay its debt to France by protecting French territorial possessions in America pursuant to the 1778 treaties. The Government of the United States, however, declared neutrality and was indifferent to England's occupation of substantial areas of France's American territorial possessions. In addition, and also contrary to the treaties of 1778, the Government of the United States signed the Jay Treaty with England, which allowed English privateers to use American ports to the exclusion of French vessels.[39]

In turn, the French Government declared that all United States ships and cargos bound for England were to be considered contraband and therefore subject to capture and confiscation by French privateers.[40] The French privateers, however, did not concern themselves with such technicalities as the destination of American ships and cargos, and as a consequence a substantial portion of the American merchant fleet was seized and condemned in violation of principles of international law. In August of 1793, President Washington directed Thomas Jefferson, his Secretary of State, to reassure the injured private American merchants that the United States would press their resulting international claims against

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France in America, as well as those which it may acquire by the future treaty of peace: And his Most Christian Majesty guarantees on his part to the United States, their liberty, sovereignty and independence, absolute and unlimited . . . ." Treaty of Alliance with France, Feb. 6, 1778, 8 Stat. 6, 10, T.S. No. 82.

37. Treaty of Amity and Commerce with France, Feb. 6, 1778, 8 Stat. 12, T.S. No. 83.

38. SUMNER, REPORT ON THE FRENCH SPOLIATION CLAIMS, S. REP. No. 10, 41st Cong., 2d Sess. 13 (1870) [hereinafter cited as SUMNER REPORT].

39. Treaty of Amity, Commerce and Navigation with Great Britain, Nov. 19, 1794, 8 Stat. 116, T.S. No. 105.

40. 1 AMERICAN STATE PAPERS, FOREIGN RELATIONS 739, 741, 745 (1832).

France,[41] and, ultimately, the Ellsworth Mission[42] was sent to France in 1798 to obtain twenty million dollars[43] compensation for the French spoliation claimants.[44]

While France did not question the validity of these claims,[45] it

41. The executive proclamation issued read as follows: "Gentlemen, complaint having been made to the Government of the United States of some instances of unjustifiable vexation and spoliation committed on our merchant vessels by the privateers of the Powers at War, and it being possible that other instances may have happened, of which no information has been given to the Government, I have it in charge from the President to assure the merchants of the United States, concerned in foreign commerce or navigation, that due attention will be paid to any injuries they may suffer on the high seas, or in foreign countries, contrary to the law of nations, or to existing treaties: and that, on their forwarding hither well authenticated evidence of the same, proper proceedings will be adopted for their relief. . . ." S. Doc. No. 102, 19th Cong., 1st Sess. 216 (1826).

The apparent purpose of the reassurance was to avoid more formal hostilities between France and the United States, which might have resulted if the merchants had taken independent measures to arm and protect their ships instead of relying on the diplomatic protection of the United States Government. In 1798, however, after the seizures had continued despite diplomatic efforts to reach an agreement, Congress authorized private merchant ships to arm themselves and resist capture. Act of July 9, 1798, ch. 68, 1 Stat. 578. Related acts were also passed, which provided for the arming of the merchant marine, the creation of a marine corps, and the use of a naval force to capture any privateer attempting the illegal seizure of an American trading vessel. Act of June 25, 1798, ch. 60, 1 Stat. 572. Accordingly, armed American ships, pursuant to these statutory provisions, captured approximately 85 French privateers. These captures were within the international legal status of retorsion for which no international claim arises. H.R. Doc. No. 67, 83d Cong., 1st Sess. 66 (1953).

42. The Ellsworth Mission, appointed by President Adams, consisted of Oliver Ellsworth, William R. Davie and William V. Murray. Letter from John Adams to Timothy Pickering, Secretary of State, 1799, in 2 AMERICAN STATE PAPERS, FOREIGN RELATIONS 301 (1832).

43. The figure of $20,000,000 was an estimate of the aggregate loss of individual American shippers made by the Department of State. The estimate was carried to the negotiations by Charles C. Pinckney, John J. Marshall and Elbridge E. Gerry, all of whom later augmented the Ellsworth Mission in France. SUMNER REPORT, *supra* note 38, at 43.

44. The major objective of the Ellsworth Mission was set out in Instruction I to the mission: "At the opening of the negotiation you will inform the French ministers, that the United States expect from France, as an indispensable condition of the treaty, a stipulation to make to the citizens of the United States full compensation for all losses and damages which they shall have sustained, by reason of irregular or illegal captures or condemnations of their vessels and other property . . . ." Letter from John Adams to Timothy Pickering, 1799, in 2 AMERICAN STATE PAPERS, FOREIGN RELATIONS 302 (1832).

45. For an excellent and brief historical account of the French response to the Ellsworth Mission see Gray v. United States, 21 Ct. Cl. 340, 378-88 (1886).

countered by presenting its own claims for the loss of its possessions in the West Indies and for other American breaches of the 1778 treaties. France offered to settle the controversy finally if both nations would renounce their respective claims, and this offer was accepted by the United States Government on December 19, 1801, when the Senate adopted and ratified the proposal.[46]

Thus the Government had restored friendly relations with France, but because the consequence of the renunciation in the treaty of 1801 was the Government's waiver of any right of action the individual private American claimants had against France, the domestic situation was not so peaceful. Since their valid and acknowledged claims against France had been used to buy off the French claims against the United States Government that arose out of its breaches of the 1778 treaties, the claimants petitioned Congress, pleading their right to compensation for "public purpose" takings under the fifth amendment.[47]

It was not until 1885, after nearly 85 years of frustrating battles both in Congress and between the Congress and the President,[48] that Congress finally sought the assistance of the judiciary in determining the validity of these claims. Congress referred the French spoliation claims to the Court of Claims and authorized the court to report all findings of fact and law on each claim to Congress.[49]

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46. Convention with France, Sept. 30, 1800, 8 Stat. 178, T.S. No. 85, *as amended,* Feb. 18, 1801, 8 Stat. 192, T.S. No. 85 (effective Dec. 19, 1801).

47. For the relevant portions of the fifth amendment see note 15 *supra.*

48. For an excellent discussion of the history of the French spoliation claims during this intervening 85 years see Note, *The French Spoliation Claims—An Unanswered Question,* 12 VA. J. INT'L L. 120, 124-29 (1971).

49. Act of January 20, 1885, ch. 25, 23 Stat. 283. The Act did not confer on the court power to order payment to the claimants; rather, it limited the status of the court's decisions to that of advisory opinions.

In response to this legislation, petitions concerning some 3,000 vessels and approximately 6,000 cases were filed. 6 J. MOORE, *supra* note 2, at 1024. In 1915, after having completed its consideration of the French spoliation claims, the Court of Claims reported having reviewed 6,479 claims. S. DOC. No. 451, 64th Cong., 1st Sess. 51 (1916). The court had found for the claimant in 1,853 cases, yielding an aggregate award of $7,149,306.10; the remaining 4,626 claims were dismissed for lack of proof. *Id.*

Note, in contrast, that presently the Court of Claims has jurisdiction over all claims for just compensation under the fifth amendment, and Congress has been automatically appropriating funds to satisfy its judgments. 28 U.S.C. § 1491 (1970). There is, however, an ambiguous limitation on the court's jurisdiction barring it from hearing any claim against the United States "growing out of or dependent upon any treaty." 28 U.S.C. § 1502 (1970). *Cf.* Alling v. United States, 114 U.S. 562 (1885).

2. *The Legal Status of the French Spoliation Claims.*—In *Gray v. United States*,[50] the first French spoliation case considered pursuant to congressional referral, the Court of Claims found that the vessel in question had been seized in contravention of principles of international law,[51] that the United States Government had promised to press this valid international claim on behalf of the injured private claimant,[52] that France did not dispute the validity of the American claims under international law and had acknowledged that compensation was due and would be paid,[53] and that the United States Government had exchanged these same claims for a release of the French national claims against the United States that arose out of the unfulfilled obligations of the United States under the treaties of 1778.[54] Accordingly, the Court of Claims held that this was a fifth amendment taking of private property for public use and for which just compensation was due.[55] While the court did not consider the claims in themselves as " 'property' in the ordinarily accepted and in the legal sense of the word," the court did consider the claims to be "rights which had value, a value inchoate, to be sure, and entirely dependent upon adoption and enforcement by the Government; but an actual money value capable of ascertainment the moment the Government had adopted them and promised to enforce them, as it did in August, 1793, and constantly thereafter."[56] This conclusion of law was adopted for all the French spoliation claims subsequently accepted as valid by the Court of Claims,[57] and for more than 30 years the court did not change its opinion that the French spoliation claimants were due compensation as a matter of law under the fifth amendment.[58]

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50. 21 Ct. Cl. 340 (1886).
51. 21 Ct. Cl. at 401-02.
52. 21 Ct. Cl. at 393.
53. 21 Ct. Cl. at 378-88.
54. 21 Ct. Cl. at 392-93.
55. 21 Ct. Cl. at 393.
56. 21 Ct. Cl. at 393.
57. "[T]hese claims (as a class) were valid obligations from France to the United States, that the latter surrendered them to France for a valuable consideration benefiting the nation, and that this use of the claims raised an obligation founded upon right, and upon the Constitution (which forbids the taking of private property for public use without compensation), to compensate the individual sufferers for the losses sustained by them." Cushing v. United States, 22 Ct. Cl. 1, 31 (1886).
58. Furthermore, well prior to the consideration of the claims by the Court of Claims, several prominent statesmen had expressed their opinion that a fifth

C. *The Development of Related Constitutional Limitations*

1. *Generally.*—Two cases that followed the *Gray* decision are important to an analysis of the Executive's power to espouse and settle international claims of private nationals because they establish two principles of constitutional law that expand the legal basis of any claim of a fifth amendment violation in an executive decision to abandon or renounce a private claim in return for some other public advantage. The first of these cases, *Turney v. United States*,[59] was the first judicial determination that the fifth amendment standard of just compensation applies extraterritorially—that is, to the taking of property located abroad. The second case of importance was *Seery v. United States*,[60] in which an executive agreement that would eliminate plaintiff's claim against the United States for a foreign taking was held unconstitutional. From these decisions two principles may be derived: first, the Government's power to take private property, wherever it may be located, for a public purpose is subject to fifth amendment limitations; secondly, an executive agreement may not impair individual constitutional rights. Because these are such crucial points in the development of a constitutional limitation on the power of the Executive, each of these cases is examined in detail.

2. *Turney.*—Two former servicemen were engaged in the import-export business after World War II and were successful bidders on a lot of surplus Air Force property in the Philippines.[61] The sale of the material was made "as is,"[62] and after making final payment

amendment taking had occurred. For example, Timothy Pickering, Secretary of State under President Adams and who was personally responsible for instructing the Ellsworth Mission, stated: "It seems clear that, as our Government applied the merchants' property to buy off those old treaties, the sums so applied should be reimbursed." 46 CONG. REC. 355 (1910) (reprint of comment by Timothy Pickering). Similarly, Chief Justice John J. Marshall, one of the envoys who helped negotiate the 1800 agreement, stated to William C. Preston of South Carolina that "[h]aving been connected with the events of the period and conversant with the circumstances under which the claims arose, he was, from his own knowledge, satisfied that there was the strongest obligation on the Government to compensate the sufferers by the French spoliations." 46 CONG. REC. 355 (1910) (reprint of comment by William C. Preston).

59. 115 F. Supp. 457 (Ct. Cl. 1953).

60. 127 F. Supp. 601 (Ct. Cl. 1955).

61. The property consisted of all supplies and materials, except for some specified quonset huts, on the United States Leyte Air Depot.

62. Article 2 of the sales contract provided: "The property is sold 'as is'; the United States makes no guaranty, warranty, or representation, express or implied, as to the kind, size, weight, quantity, quality, character, description, or

for the goods the partners formed a corporation under Philippine law to resell these assets.[63] One month later classified radar was discovered by employees of the corporation to be among the items purchased, although there was a standing Air Force policy that no such equipment was to be sold at any time. Both parties were unaware of the presence of the radar equipment in the supplies at the time of the sale, but negotiations for the return of the radar to the Air Force were slow and protracted. The Air Force offered to exchange commercial type communications equipment for the radar on a pound for pound basis; plaintiff offered to accept machine or hand tools on the same basis.

After some six months of negotiations, the local Air Force commanding general informed plaintiff that the United States was prepared to use governmental pressure to seize the radar, at which point plaintiff offered to sell the radar to the Air Force at a price equivalent to its fair market value. Plaintiff also offered to sell the radar to the Philippine Government and had entered into negotiations earlier with the Nationalist Chinese Air Force. Pursuant to a request by the United States, the Philippine Government then placed an embargo on the exportation of any of the materials plaintiff had purchased. When plaintiff agreed to sequester the radar from the rest of the items and to allow military personnel to stand watch over it,[64] this ban was lifted and replaced by an embargo on exporting only the radar. The radar unit remained under guard, and plaintiff brought an action for breach of contract or, in the alternative, just compensation under the fifth amendment.

The Court of Claims, after finding that title to the radar had passed to the corporation,[65] discussed the question whether the

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condition of any of the property, or its fitness for any use or purpose, or otherwise, except warranty as to title; this is not a sale by sample." 115 F. Supp. at 459.

63. The shareholders included K.H. Khoong and his son, C.Y. George Khoong, who later intervened in plaintiff's suit to seek recovery for the taking. Plaintiff, trustee for the liquidating alien corporation, successfully demonstrated that the claim against the United States and title to the radar were not transferred to the Khoongs in a sale that took place after the controversy arose. 115 F. Supp. at 461-63.

64. "No person of intelligence would have expected that anything would emerge from this sequestration, except a possible claim against the Government." 115 F. Supp. at 461.

65. The court noted that the directive prohibiting the sale of radar equipment was not disclosed to the public and that the contract did contain a warranty of title. *See* note 62 *supra*. Moreover, § 25 of the Surplus Property Act of 1944, 58 Stat. 780, provided in part: "A deed, bill of sale, lease, or other instrument executed by or in behalf of any Government agency purporting to transfer title

repossession was a "taking" under the fifth amendment. The court determined that the effect of the embargo was to return the radar to the United States Government. The essence of the court's reasoning was that the United States had placed such tremendous pressure on plaintiff to place the radar under United States control, by using the general embargo to prevent plaintiff from disposing of any of its property, as to constitute a "taking" under the fifth amendment.

The Government went on to argue, however, that the fifth amendment did not have extraterritorial effect.[66] The court noted that this was a case of first impression, but nonetheless concluded that the protections of the fifth amendment did apply in foreign countries[67] and awarded plaintiff damages in the amount of 75

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or any other interest in property under this Act shall be conclusive evidence of compliance with the provisions of the Act insofar as title or any other interest of any bona fide purchasers for value, or lessees, as the case may be, is concerned." 115 F. Supp. at 463.

66. The United States Supreme Court had earlier held that a seaman's murder conviction by a consular court in Japan pursuant to a congressional authorization of such tribunals was not unconstitutional as violative of the seaman's right to trial by jury. *In re* Ross, 140 U.S. 453 (1890). The Court in *Ross* concluded that "[t]he Constitution can have no operation in another country." 140 U.S. at 464. The legal concept that the Constitution has no extraterritorial effect has subsequently lost its vitality. *See* Reid v. Covert, 354 U.S. 1 (1957). In *Reid v. Covert,* the Court held that Congress could not provide for trial by court martial abroad for wives of members of the armed services, because Congress had no power to deprive a civilian of the constitutional right to a jury trial and procedural safeguards. Writing for the plurality of the Court, Justice Black distinguished *Ross* as "a relic from another era." 354 U.S. at 12. Accordingly, Justice Black concluded that whenever the Government of the United States acts, it "can only act in accordance with all the limitations imposed by the Constitution." 354 U.S. at 6. *See also* L. HENKIN, *supra* note 15, at 266-69.

67. Plaintiff argued that the just compensation provision of the fifth amendment had been applied to the taking of property within the United States that belonged to a resident alien. Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931). Plaintiff argued also that earlier decisions had established a duty to compensate private parties whose foreign property was taken or destroyed abroad for a public purpose, citing Wiggins v. United States, 3 Ct. Cl. 412 (1867).

In *Wiggins,* a classic example of 19th century American gunboat diplomacy, a United States warship was dispatched to Greytown (San Juan), Nicaragua, to demand reparations from the local authorities for injuries to United States business interests and for insulting an American ambassador who had traveled through the region. When the local government ignored the demand, the ship bombarded the municipal buildings and sent troops ashore to burn the area. The ship's commander then learned that a large quantity of gunpowder was stored across the river in Costa Rica in a warehouse that was located among several buildings owned by United States interests. When rumors flared that the powder

thousand dollars. The court concluded that when constitutional rights, such as the right to just compensation for property taken for public use, can be protected without inconvenience or particular difficulty, such rights should be protected even when the "taking" occurs abroad.[68]

3. *Seery.*—Plaintiff, a famous opera singer who was a naturalized United States citizen, owned a luxurious Austrian country estate that was taken over as an officers' club by the United States Army in 1945. When plaintiff returned to her home in 1948, she found that most of the furnishings had been stolen and that extensive damage had been done to the house itself. When the Army refused to pay her claim for damages, plaintiff brought an action for compensation under the fifth amendment, arguing that the use by the military personnel constituted a taking for public purposes. The Government presented three defenses: first, that the fifth amendment did not apply to property taken outside the United States; secondly, that the house was "enemy property" and therefore could be taken without compensation; and thirdly, that an executive agreement between the United States and Austria had extinguished plaintiff's right to sue the United States and that her only right to recover was against the Austrian Government. The Court of Claims rejected each of these defenses. Because the court's reasoning in rejecting these defenses is important to an understanding of constitutional limitations on the Government, the court's rejection of each defense is examined in detail.

(a) *Extraterritorial Application of the Fifth Amendment.*—The *Seery* decision was the first to hold expressly that the fifth amendment applies to protect American citizens when their property abroad is taken by the Government.[69] The Court of Claims noted that the only difference between the facts in *Turney* and those in *Seery* relevant to the question of the extraterritorial application of the fifth amendment was that plaintiff in *Turney* was an alien

would be detonated in reprisal, Commander Hollins ordered that it be dumped in the river. The Commander was praised on his return by the President for his initiative. The Court of Claims granted recovery for the value of the powder to the American owners, citing its earlier decision in Grant v. United States, 1 Ct. Cl. 41 (1863), as controlling. *Grant* had concerned the destruction of buildings surrounding a United States military installation that was being abandoned to prevent them from falling into the hands of Confederate sympathizers among the local population of Tucson, who were termed "lawless adventurers" by the court. 1 Ct. Cl. at 41.

68. 115 F. Supp. at 464.

69. This was the implicit holding of the *Wiggins* case. *See* note 67 *supra.*

corporation, while plaintiff in *Seery* was an American citizen: "If that fact is material, it is to her [plaintiff Seery's] advantage."[70] The court restated its holding in *Turney* and endorsed it as follows: "[S]ince the Constitutional provision [the fifth amendment] could be applied, without inconvenience, to such a situation, it ought to be so applied."[71]

(b) *Enemy Property.*—The Government next sought to establish that the property taken by the Army was "enemy property" and therefore subject to the traditional rule of international law that allows the confiscation or use, without compensation, of all property within the enemy's territory.[72] The rule had become clearly established as a part of the United States constitutional law as well.[73] In *Young v. United States*,[74] an 1878 Supreme Court decision, the Court articulated this rule in the following manner: "All property within enemy territory is in law enemy property, just as all persons in the same territory are enemies. A neutral [or anyone], owning property within the enemy's lines, holds it as enemy property, subject to the laws of war . . . ."[75]

The Court of Claims first suggested that even if the property were taken in enemy territory a right to compensation might exist. The court noted that the traditional rule for nonhostile property,[76] *i.e.* items without military value, was that temporary appropriation for use as a barracks or hospital was noncompensable, but that these principles "would hardly seem to be applicable to the taking of a luxurious estate, at a remote location in a resort area, for use as an officers' club some months after hostilities had ended."[77] The court then held, however, that Austria was not enemy territory

70. 127 F. Supp. at 603.

71. 127 F. Supp. at 603.

72. The right of killing enemies in a public war and other violence against the person extends "not only to those who actually bear arms, or are subjects to him that stirs up the war, but in addition to all persons who are in the enemy's territory." H. GROTIUS, *supra* note 11, Book III, ch. iv, § vi, at 646.

73. *See* United States v. Caltex (Philippines) Inc., 344 U.S. 149 (1952); Juragua Iron Co. v. United States, 212 U.S. 297 (1909); Young v. United States, 97 U.S. 39 (1877); Lamar v. Browne, 92 U.S. 187 (1875); Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191 (1815); Green v. United States, 10 Ct. Cl. 466 (1874); Perrin v. United States, 4 Ct. Cl. 543 (1868).

74. 97 U.S. 39 (1877).

75. 97 U.S. at 60.

76. The court cited Oppenheim and Wheaton for the proposition that, even during war, private property generally may not be taken for nonmilitary reasons. 127 F. Supp. at 605.

77. 127 F. Supp. at 605.

within the meaning of the term in international law and therefore plaintiff's property could not be taken under the "enemy property" rule. Austria, the court explained, was considered by the United States Government to be a liberated country, like France or Holland, rather than an enemy.[78]

(c) *Effect of an Executive Agreement.*—The final defense presented by the Government was that plaintiff's right to sue the United States had been extinguished by an executive agreement between the United States and Austria.[79] Under the agreement the United States paid Austria approximately fifteen billion dollars as total settlement of all obligations incurred by United States forces, and Austria agreed to adjudicate all claims for damage done to property in Austria, whoever the owners might be, and to pay those claims found to be valid.[80]

The Court of Claims had held earlier that a formally ratified treaty that relegated the claims of foreign nationals against the United States to diplomatic procedures was, in effect, a constitutionally permissible withdrawal of consent to be sued by the

78. The United States, as a party to the Moscow Conference Agreement and Declaration of Nov. 1, 1943, recognized that Austria was a victim of aggression by Germany and therefore was not an enemy country. The Moscow Agreement is reproduced in H.R. Doc. No. 351, 78th Cong., 1st Sess. (1943). The court went on to say that "[t]he fact that the Allies chose to maintain occupation forces in Austria to prevent possible pro-Nazi uprisings, and perhaps to keep watch over each other, seems to us not to be material." 127 F. Supp. at 606.

79. Agreement with Austria, June 1, 1947, 61 Stat. 4168, T.I.A.S. No. 1920, 67 U.N.T.S. 89. The agreement was negotiated between Lt. Gen. Geoffrey Keyes, United States High Commissioner in Austria, and Leopold Fige, Chancellor of the Federal Government of Austria.

It is interesting to note that the opinion fails to mention whether plaintiff had sought recovery from the Austrian Government before bringing this action.

80. The relevant portion of the agreement, art. I, § 6, reads as follows: "The Austrian Government guarantees the Government of the United States to adjudicate individual claims, pay to individuals and settle with individuals, both Austrian nationals and others owning property, rendering service or residing in Austria, *and to guarantee full protection to the United States against any claims* for services, supplies, or other obligations of whatever nature which occurred during the period 9 April 1945 to 1 July 1947." (Emphasis added.)

At the time the case was decided only one commentator raised the possibility that the agreement was not intended to be a discharge of United States obligations to individual claimants. By contrasting the language used in the Austrian agreement with that used in various other settlement agreements negotiated at the end of World War II, he argued effectively that discharge was not intended and therefore an unnecessary constitutional question was raised. *See* Cardozo, *Attempts to Transmute Indemnity into Discharge of Claims in Executive Agreements,* 49 AM. J. INT'L L. 560 (1955).

United States.[81] Moreover, only three years before *Seery* the court had said in its *Etlimar Societé Anonyme v. United States*[82] decision that an executive agreement "is the type of agreement which has been recognized as a treaty within the meaning of Article VI, Clause 2, of the Constitution and thus is a part of the supreme Law of the Land."[83]

The Government argued that *United States v. Pink*,[84] *United States v. Belmont*,[85] and *B. Altman & Co. v. United States*[86] had established the proposition that an executive agreement has the same constitutional effect as a formally ratified treaty. Plaintiff pointed out that the constitutional rights of American citizens were not in question in any of these earlier executive agreements,[87] and that in any event even a formally ratified treaty could not deprive a citizen of constitutionally protected rights.[88]

The court recognized the constitutional question and held di-

81. Hannevig v. United States, 84 F. Supp. 743 (Ct. Cl. 1949). On several occasions the Supreme Court has held that the United States consent to be sued is not a vested right and such consent may be modified or withdrawn at will. *See* Maricopa County v. Valley National Bank, 318 U.S. 357, 362 (1943); Lynch v. United States, 292 U.S. 571 (1934); *In re* Hall, 167 U.S. 38, 42 (1897); De Groot v. United States, 72 U.S. (5 Wall.) 419, 432 (1866).

82. 106 F. Supp. 191 (Ct. Cl. 1952).

83. 106 F. Supp. at 195. The precise holding of *Etlimar*, however, was that when a French Commission had made an award to plaintiff for requisitioned property after plaintiff had submitted its claim to the Commission, the court was bound to accept the finding of the Commission on the reasonable value of the property taken.

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

85. United States v. Belmont, 301 U.S. 324 (1937).

86. B. Altman & Co. v. United States, 224 U.S. 583 (1912).

87. In *Pink*, Justice Douglas, writing for the Court, noted that "[t]he contest here is between the United States and creditors of the Russian corporation who, we assume, are not citizens of this country and whose claims did not arise out of transactions with the New York branch . . ." of the Russian corporation. 315 U.S. at 227.

88. Plaintiff cited Geofroy v. Riggs, 133 U.S. 258, 267 (1890), The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 620-21 (1870), and Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1853). This point seemed so obvious to Justices Field, Swayne, and Taney, who wrote for the Court in these decisions, that none felt the need to cite any authority for their conclusions.

Nonetheless, continuing fear that an executive agreement or treaty could be used to deprive citizens of their constitutional rights was one of the prime factors that motivated attempts to pass the "Bricker Amendment." *See* Sutherland, *Comment: The Bricker Amendment, Executive Agreements, and Imported Potatoes*, 67 HARV. L. REV. 281 (1953); Sutherland, *Restricting the Treaty Power*, 65 HARV. L. REV. 1305 (1952).

rectly that "[w]hatever may be the true doctrine as to formally ratified treaties which conflict with the Constitution, we think that there can be no doubt that an executive agreement, not being a transaction which is even mentioned in the Constitution, cannot impair Constitutional rights."[89] The court then repudiated its apparent holding in *Etlimar*, but conceded that Congress could have elected to pass a statute withdrawing the Government's consent to be sued. Since Congress had not withdrawn such consent, however, the court concluded that an executive act alone was insufficient to "not only nullify the Act of Congress consenting to suit on Constitutional claims, but, by nullifying that Act of Congress, destroy the Constitutional rights of a citizen."[90]

D. *The Aris Gloves Case*

The Court of Claims' 1970 decision in *Aris Gloves, Inc. v. United States*[91] is the most recent judicial consideration of constitutional limits on the Executive in the area of negotiating settlement of nationals' international claims against foreign sovereigns. Plaintiff owned properties in Germany and Czechoslovakia when World War II began. When the United States entered the war in 1941 these properties were seized by the German Government on the ground that they were enemy property. In 1945 the areas surrounding the plants were liberated by elements of the United States Army,[92] which retained control over the area until, under the terms of the Potsdam Agreement,[93] the portion of Germany in which plaintiff's factory was located was placed under the control of the Soviet Union. The United States returned control over the Czechoslovakian territories to that country's government, which had

89. 127 F. Supp. at 606. *Cf.* McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181 (1945).

90. 127 F. Supp. at 607. The court also noted that in United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), an executive agreement that conflicted with an act of Congress was held invalid. The *Seery* decision was handed down before the Supreme Court affirmed the *Capps* decision on other grounds. *See* United States v. Guy W. Capps, Inc., 348 U.S. 296 (1955).

91. 420 F.2d 1386 (Ct. Cl. 1970).

92. Plaintiff's factory was located in Johanngeorgeenstadt, Saxony. United States forces never occupied this particular town, but they did occupy cities immediately to the north and south. Plaintiff introduced extensive evidence at trial to demonstrate that the United States Army had at least constructively occupied the town in which the factory was located. *See* Plaintiff's Exhibits A, B and C.

93. The Agreement is reproduced in 13 DEP'T STATE BULL. 153 (1945).

agreed to restore such property to the former owners. The communist takeover and subsequent nationalization of all industrial facilities, however, prevented any resumption of plaintiff's activities at those sites. Meanwhile, the Soviet occupation forces dismantled and removed plaintiff's German factory and other industrial facilities from the sectors they occupied, as they were entitled to do under the Potsdam Agreement.[94]

Plaintiff received partial compensation for its loss of the Czech factories in 1958,[95] but recovery was limited to a pro rata share that paid about five and one-half cents on each dollar lost. No award for lost profits was made. Plaintiff also received an award for the German factory in 1962;[96] the award was for the full value of the physical plant at the time it was seized by the Germans in 1942, but no compensation was made for either lost profits or interest.[97]

Plaintiff brought this action[98] seeking recovery of interest and lost profits on the German plant,[99] alleging that the effect of the

94. At the Yalta Conference in February 1945, the Allies agreed to divide Germany into sectors or "zones of occupation." The Allies also agreed to remove all industrial facilities and items of industrial value to destroy Germany's power to make war. 420 F.2d at 1388 n.1.

95. An amendment in 1958 enabled plaintiff to recover for claims against the Government of Czechoslovakia under the International Claims Settlement Act of 1949. Plaintiff was awarded $685,452.03, which included interest, but because the claims fund was inadequate to meet all the awards a pro rata share of $37,302.25 was paid. 420 F.2d at 1388-89.

96. The 1962 amendment to the War Claims Act of 1948 allowed plaintiff to seek compensation for the destruction of property located in Germany and Czechoslovakia. Plaintiff sought full recovery for its losses, but the Czech taking was ruled to be a postwar nationalization rather than a loss due to the war. 420 F.2d at 1389.

97. Plaintiff was awarded $462,528.52 for the German plant and was paid this amount in full because it was found to be a "small business concern" under the terms of the Act. 420 F.2d at 1389.

98. Plaintiff originally brought a declaratory judgment action in the district court in Washington, D.C., in 1967. Plaintiff's request for a three-judge panel was denied. Aris Gloves, Inc. v. Re, Civil No. 929-67 (D.D.C. May 1, 1967), *aff'd sub nom.* Aris Gloves, Inc. v. Walsh, No. 20,984 (D.C. Cir. May 16, 1967). The original action was dismissed for lack of subject matter jurisdiction. Aris Gloves, Inc. v. Re, Civil No. 929-67 (D.D.C. Sept. 8, 1967). Plaintiff then filed this action on November 21, 1968.

99. The original complaint sought compensation for the taking of all the plants, but the claim for the Czech plant was later dropped on oral argument. The court noted that the instant decision was made "without prejudice to the right of plaintiff to file another action in this court for the recovery of the value of its property located in Czechoslovakia." 420 F.2d at 1390 n.11. In light of the decision of the War Claims Commission, however, plaintiff probably would not

Potsdam Agreement was a taking without compensation by the United States Government. Plaintiff argued that the United States had earlier agreed to allow the Soviets to dismantle all industrial plants in the sectors that were turned over to them without demanding that the Soviets compensate those United States nationals whose facilities were seized. Moreover, the United States knew that the Soviets had in fact been removing such facilities from the areas they occupied. Plaintiff insisted that by turning the area over to the Soviets without making a demand for compensation, and even going so far as authorizing the Soviets to remove these facilities, the United States had "taken" its property for a public purpose and was required by the fifth amendment to pay full compensation.[100]

The United States argued that the taking was done by the Soviet Union, and that the United States could not be held responsible for the acts of another sovereign. Moreover, the United States contended that the property was "enemy property" and that therefore the taking was justified.

The decision of the Court of Claims turned on its essential finding that "at the time of the taking . . . the United States was engaged in a war;"[101] since this was found to be the case, the taking was not compensable under the fifth amendment[102] and the Government's motion for summary judgment was granted.

Plaintiff had argued that at the time of the Potsdam Agreement, which was reached in August 1945, hostilities had already ceased—Germany had agreed to unconditional surrender in May of that year. The court determined, however, that "the mere cessation of hostilities does not necessarily terminate the war power,"[103]

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seek to relitigate this issue. *See* note 96 *supra.*

100. Plaintiff sought alternative recovery on the basis of an implied contract theory, but conceded in its motion for summary judgment that the implied contract claim would fail unless the Potsdam Agreement were held to be an unlawful taking under the fifth amendment. 420 F.2d at 1394. Two other bases for the implied contract, the Paris Reparations Agreement and the War Claims Act, were rejected by the court on statutory construction grounds. 420 F.2d at 1394.

101. 420 F.2d at 1391.

102. The court relied heavily on the decision in Juragua Iron Co. v. United States, 212 U.S. 297 (1909). The court found that the "same basic elements" were present in both cases and therefore concluded that although "in both cases there was an exercise of control by defendant over plaintiff's property, such that each plaintiff lost control of its property, . . . there was no taking compensable under the fifth amendment." 420 F.2d at 1392.

103. 420 F.2d at 1392. The court cited Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111 (1947), for this proposition and concluded that the war

and noted that a formal declaration of an end to hostilities did not occur until December 1946.[104]

The court distinguished *Turney* on the ground that that case did not involve a wartime taking.[105] The court did not discuss whether the war power still existed at the time Mrs. Seery's house was taken in 1945; that decision was distinguished on the ground that Austria was never considered "enemy" territory.[106] In dictum the court questioned the validity of the *Gray* decision, commenting that "the opinion by the court was strictly an advisory opinion which was not binding upon either of the parties and cannot be binding upon subsequent courts."[107]

Although the result of the case was now clear, the court went on to express its uncertainty over "just how far the Government must go to protect the claims of its citizens."[108] By posing a series of hypothetical actions by the Government and asking "would this [be enough] to satisfy plaintiff?,"[109] the court clearly indicated that it was not at all certain of the constitutional requirements in this area. While the court's determination that this specific taking was not compensable comports with precedent, albeit a bit roughly, this complete uncertainty on the part of the court is both disturbing and unnecessary. The problem of "where to draw the line" is, in most cases, not nearly so uncertain a question of constitutional law as the Court of Claims seemed to think.

E. *Synthesis of Decisions on Constitutional Limitations*

From the decisions discussed above one may fairly establish

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power "continues past the end of hostilities and into that period during which the evils that gave rise to the hostilities are sought to be remedied." 420 F.2d at 1392.

104. Proclamation No. 2714, 61 Stat. 1048 (1947).

105. 420 F.2d at 1393.

106. 420 F.2d at 1392-93.

107. 420 F.2d at 1393. Judge Nichols, concurring, argued that the *Gray* decision remained valid precedent and was in no way inconsistent with the result reached by the majority. 420 F.2d at 1395-97.

108. 420 F.2d at 1394.

109. 420 F.2d at 1394. The court questioned whether the following actions would be sufficient to meet plaintiff's standard: (1) United States presentation of the claim; (2) incorporation of an agreement to compensate in the Potsdam Agreement when the United States knew the Russians would likely violate such an agreement; (3) direct United States action to seek to enforce any agreement that might have been incorporated. The court clearly felt that there was no answer. "In other words, what steps should defendant have taken in order not to be guilty of the alleged taking of plaintiff's property? Where does one draw the line? It could be argued that there was always one more step the Government could have taken to protect the property of its citizens." 420 F.2d at 1394.

several specific constitutional restrictions on the Executive's power to negotiate a settlement of a private national's international claim. For the sake of perspective, however, one must remember that several of the most significant questions are answered on the basis of an international legal regime that places virtually all decisions solely in the discretion of the sovereign.[110] The decision whether to espouse the claim at all is within the absolute discretion of the Executive, who acts as the sovereign in foreign relations matters. Moreover, the exercise of this discretion generally is not subject to judicial review.[111] When a claim is satisfied the Government has no obligation under international law to transmit the award to the claimant it successfully represented internationally, since the Government files the claim for the injury done to it rather than for that done to the individual.[112] Finally, the Executive is not, and cannot be, a guarantor of the collectibility of nationals' international claims, even after an award has been announced by an appropriate tribunal.[113]

If the Executive admittedly has such broad powers in this area, on what basis were the claimants in *Gray, Turney* and *Seery* allowed recovery from the Government for an exercise of Executive discretion? The answer from all these cases is the same: the fifth amendment requires compensation whenever a private claim that has the status of a "property interest" is sacrificed for a public purpose. More specifically, the following principles of United States constitutional law may be deduced from these decisions:

(1) An international claim may be of such character as to constitute a "property right" under the fifth amendment.[114]

110. *See* notes 17-31 *supra* and accompanying text.

111. *See* note 25 *supra* and accompanying text.

112. *See* note 9 *supra* and accompanying text.

113. The lack of an effective means to insure payment of awards made by any international tribunal remains a serious obstacle to widespread resort to such tribunals for dispute settlement. The fear of being branded an international outlaw for failure to comply has on occasion been outweighed by internal political considerations. Moreover, fears of reprisal through economic or political pressure are sometimes not enough to insure compliance. *See, e.g.,* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16; Brown, *The 1971 I.C.J. Advisory Opinion on South West Africa (Namibia),* 5 VAND. J. TRANSNAT'L L. 213 (1971). While the political factors that prompted the response to the *Namibia* decision may not be present in a typical commercial dispute, the lack of effective means to enforce a judgment remains.

114. *See* notes 54-56 *supra* and accompanying text.

The basic requirements for such status are that the claim be for a specific amount and that the claim be recognized as valid by the foreign sovereign or be of such character that one may assume a recognition of validity;

(2) The fifth amendment applies to "takings" outside the United States.[115] An agreement that extinguishes a private claim that the foreign sovereign would have paid will necessitate compensation, whether the situs of the claim is the United States or the place where the agreement is reached;[116] and,

(3) An executive agreement cannot extinguish the constitutional rights of citizens, including the right to compensation under the fifth amendment.[117]

In summary, the Government may not bargain away certain classes of claims of its nationals without incurring an obligation to pay just compensation under the fifth amendment. This is not to say that a good faith effort to negotiate a settlement, even on a small pro rata share of the total claim, would constitute a compensable taking. Moreover, a foreign government's refusal to accept international responsibility or recognize a claim espoused by the United States Government would not give rise to a fifth amendment taking. What is prohibited, most simply, is the use of a private claim the foreign sovereign is likely to pay as a bargaining tool in negotiating an agreement on disputes of a different nature.

This is, of course, a quite narrow restriction that may have limited practical effect. The theoretical and technical legal distinction may prove to be important, however, particularly in light of the expanding recognition of individual rights in international law.[118] The effect of renouncing a claim against a foreign government is

115. *See* notes 67-68 *supra* and accompanying text.

116. The situs of a claim against a foreign sovereign could arguably be one of three locations: the state of the individual whose property was taken, which for the purposes of this note would usually be the United States; the state where the property was taken; or the state whose agents took the property. In most cases the property taken would be within the territory of the state whose agents seized the property—the most common exception occurring when property was taken on the high seas, as in *Gray*. The *Gray* case did not discuss directly the question of the situs of the claim but implicitly held that the claim was located in the United States. The *Turney* decision rendered discussion of this intellectually interesting question moot by holding that the fifth amendment's compensation requirement applies to extraterritorial takings.

117. *See* notes 80-90 *supra* and accompanying text.

118. *See* note 3 *supra* and accompanying text.

not simply to relegate the claimant to other, probably meager, possible avenues of recovery.[119] As discussed earlier, the claim of the individual is extinguished once his government presents the claim internationally. Therefore, when the claim is bargained away or renounced, both the claim itself and the right to present the claim are lost.[120] This is true even when the foreign sovereign is otherwise prepared to pay the claim, as in the *Gray* case. Recognition of this dual aspect of the rights lost may explain the "quasi-property right" analysis of the *Gray* decision, because the right to bring the claim for property taken is in the nature of a property right. It is only the right to present a claim for the taking of a "quasi-property interest" that the Government may not bargain away without incurring a duty to pay just compensation under the fifth amendment.

IV. CONCLUSION

The salient point from the foregoing analysis is that Executive power in the area of espousal and settlement of nationals' international claims is extensive; his decision whether to espouse is not subject to judicial review at all; and, his power to settle or renounce altogether claims that are espoused is subject to constitutional limitations only by implication in those rare instances in which the defendant foreign sovereign acknowledges the validity of the claim, indicates an intention to pay it, and the United States barters the claim away in exchange for some other national, or "public," advantage. To a large measure, therefore, the Executive virtually is entitled to consider such private claims as national assets and instruments of international diplomatic leverage, to be used as counters in international claims bargaining or for the advancement of friendly relations with a particular foreign sovereign or for other international political advantage.[121]

119. *See* notes 5 & 26 *supra.*

120. *See* notes 27-31 *supra* and accompanying text.

121. The Executive enjoys a similar broad measure of unchecked power in the area of sovereign immunity. *See* Republic of Mexico v. Hoffman, 324 U.S. 30 (1945). Since the decision of the Supreme Court in *Hoffman* the Executive has had virtually unrestricted power to decide whether immunity will be extended to a sovereign who is sued in a United States court. *See* Cheatham & Maier, *supra* note 5, at 83-86; Note, *Statutory Reform in Claims Against Foreign States: The Belman-Lowenfeld Proposal,* 5 VAND. J. TRANSNAT'L L. 393, 394-400 (1972). The extent of the Executive's power in the area of sovereign immunity is demonstrated vividly by the decision of the Second Circuit in Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir.), *cert. denied,* 404 U.S. 985 (1971), *noted*

The Executive's continued enjoyment of such a broad measure of unchecked power in the area of espousal is at the expense of both individual equities and the international commercial activities of United States nationals. There is no equity on the individual level, for instance, when the Department of State espouses the claim of one national against a particular foreign sovereign one day, and the next day declines to press precisely the same type of claim on behalf of another national against a different foreign sovereign—due not to the demerits of the latter claim, but to some overriding political policy. Moreover, this measure of unchecked executive power over the presentation of nationals' international claims militates against predictability in private international commercial intercourse, for if the Executive were held to a stricter standard of accountability in its presentation and settlement of nationals' international claims it would be more diligent in their prosecution, which in turn would lead ultimately to a greater degree of vindication of individual "rights" internationally. Furthermore, because of the political nature of the decision to espouse, the

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in 5 VAND. J. TRANSNAT'L L. 264 (1971). In *Isbrandtsen,* the court followed the State Department's suggestion of immunity notwithstanding the commercial nature of the transaction from which the claim arose (a type of case the State Department had earlier classified in the now famous "Tate letter" as not entitled to immunity), a contractual waiver of immunity by the sovereign, and the foreign sovereign's general appearance in court. Note the similarity to the *Gray* case: a valid private claim against a foreign sovereign and imminence of satisfaction by the foreign sovereign but for the interposition of the Executive to defeat the private party claimant's recovery. Accordingly, it has been suggested that there may be a substantive right to compensation when, in the interest of achieving national foreign policy objectives, one is compelled to release an attachment of the property of a foreign sovereign. *See* Leigh & Atkeson, *Due Process in the Emerging Foreign Relations Law of the United States,* 22 BUS. LAW. 3, 23-26 (1966).

For a sample of the interesting discussion among legal writers on whether sovereign immunity should be applied on the basis of political considerations and comity or of the type of transaction involved in the individual case see Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?,* 48 CORNELL L.Q. 461 (1963); Note, *The Jurisdictional Immunity of Foreign Sovereigns,* 63 YALE L.J. 1148 (1954); *cf.* P. JESSUP, THE USE OF INTERNATIONAL LAW 77-83 (1959); Bishop, *New United States Policy Limiting Sovereign Immunity,* 47 AM. J. INT'L. 93 (1953); Dickinson, *The Law of Nations as National Law: "Political Questions",* 104 U. PA. L. REV. 451, 467-79 (1956); Franck, *The Courts, the State Department and National Policy: A Criterion for Judicial Abdication,* 44 MINN. L. REV. 1101, 1123 (1960); Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law,* 44 N.Y.U.L. REV. 901, 906 (1969). This dispute may well be resolved by the enactment of the proposed federal statute discussed in note 124 *infra.*

presentation of the claim is tainted by an atmosphere of political controversy and of unfriendly action.[122] The promotion of orderly international trade and intercourse, which has been stated to be the basis for the international law of diplomatic protection of nationals,[123] would be better served if decision-making power over the presentation and settlement of nationals' international claims were disassociated, either wholly or partially, from the political level of governmental decision making and moved in the direction of normal channels of national or international judicial process.[124]

This movement away from the national political level of decision making in the espousal of private nationals' international claims may be effected over the long term by a changing international legal structure. The promising trend in international law of recognizing the international legal status of the individual, independent of his nationality, and of conferring on the individual direct inter-

122. *Cf.* note 124 *infra.* Note especially the reasons cited by the Executive for recommending the passage of the proposed legislation on sovereign immunity.

123. Dunn, *The International Rights of Individuals,* 35 PROC. AM. SOC'Y INT'L L. 14, 15 (1941).

124. A movement in this direction already is taking place in the area of sovereign immunity. On January 26, 1973, draft legislation that would significantly revise the doctrine of sovereign immunity in the United States was submitted to the Senate. For the text of this draft legislation and the accompanying explanatory letter of the Department of State and the Department of Justice see *Draft Legislation on the Jurisdictional Immunities of Foreign States,* 12 INT'L LEGAL MATERIALS 118-62 (1973). As the accompanying letter recommending consideration and passage of the bill explained, one of the intended effects of the bill is to transfer "wholly to the courts" the task of determining whether a foreign state is entitled to immunity, "and the Department of State would no longer express itself on requests for immunity directed to it by courts or foreign states." Letter from Richard G. Kleindienst, United States Attorney General, and William P. Rogers, Secretary of State, to the President of the Senate, January 22, 1973, *id.* at 118. Interestingly, the Executive felt that the existence at the political level, or in the State Department, of this broad measure of decision-making power concerning sovereign immunity was more of a burden than a blessing: "The transfer of this function to the courts will also free the Department from pressures by foreign states to suggest immunity and from any adverse consequences resulting from the unwillingness of the Department to suggest immunity. The Department would be in a position to assert that the question of immunity is entirely one for the courts." *Id.* at 120. It is interesting to speculate on the constitutionality of the proposed statute, and whether it can succeed, under the supremacy clause, in divesting the Executive of his power over sovereign immunity in light of the Court's opinion in *Hoffman;* perhaps it is intended merely as a smokescreen to hide the nature of the Executive's real decision-making power in this area from foreign sovereigns in view of the diplomatic pressures that flow naturally from the general international knowledge that the United States Executive has such power.

national legal rights vis-à-vis sovereign states,[125] may ultimately free the presentation of private parties' international claims from national political considerations.[126] In the contemporary community of nations, however, which does not see its nation members submit to compulsory jurisdiction over disputes even among or between themselves as sovereigns, the sovereigns' submission to compulsory jurisdiction over disputes that arise between themselves and individuals must be viewed as a long-term proposition.

In the more immediate future, however, a movement away from the political nature of and toward a stricter standard of accountability in the decision-making process concerning the espousal and settlement of private nationals' international claims may be effected within the framework of our municipal legal system. There are at least two possibilities by which this movement could be accomplished domestically. First, the Supreme Court's relatively recent willingness to read the words "take" and "use" in the fifth amendment more "realistically" may enable it to find such takings for public use in various classes of international claims settle-

125. *See* materials cited note 3 *supra.* The denial of international legal status to the individual is recognized to cause government officials in claims cases to "gravely [overemphasize] the importance of the political relations of states at the expense of the activities of men as human beings." Dunn, *supra* note 123, at 16, 17.

126. It has been argued that the traditional rule of international law that a state by espousing an international claim of its national becomes the party claimant and has the beneficial effect of compensating for the tendency of private individual claimants to press tenuous and grossly exaggerated claims for any loss sustained in a foreign country. 8 M. WHITEMAN, *supra* note 1, at 1223. On the other hand, Brierly has argued effectively that the recognition of the international status of the individual would promote international peace, since the claims of the individual would not automatically be raised to the diplomatic level where they become inextricably intertwined in "that mysterious but potent abstraction, 'national honor'." Moreover, recognition of the international status of the individual would have the beneficial effect of checking the promotion by states of private economic interests with which they identify national interests. Brierly, *Le Fondement du Caractère Obligatoire du Droit International,* 23 RECUEIL DE COURS 467, 531 (1928). Accordingly, Jessup submits that "the old Vattelian fiction of the injury to the state through the injury to its national, should in the ordinary claims case, be abandoned." Jessup, *Responsibility of States for Injuries to Individuals,* 46 COLUM. L. REV. 903, 923 (1946). Jessup argues for a more intermediate alternative: the state should retain its international right to represent its national, but is empowered only to act as the national's agent for "collective bargaining" in the international arena, subject at all times to the consent of the individual. *Id.* at 923. *See also* Lauterpacht, *The Subjects of the Law of Nations,* 63 L.Q. REV. 438, 454-57 (1947).

ments.[127] Secondly, it has been argued effectively that claims settlements negotiated by the Executive be submitted to the Senate for ratification, thus affording private claimants an opportunity to be heard there.[128]

Until such a change in the structure of the international legal system, and until and even after such developments in the municipal legal system, the wisest course for the private practitioner is to take all preventative measures available to him to keep the international claims of his clients from reaching the political level at all. In the case of international commercial transactions and contracts with foreign sovereigns or their nationals, such measures include choice-of-law provisions,[129] arbitration clauses,[130] and a more recent addition to the private practitioner's bag of protective devices, choice-of-forum clauses.[131] Moreover, if the recently proposed draft legislation on sovereign immunity[132] is passed by Con-

127. *See* L. HENKIN, *supra* note 15, at 265.

128. *See* Leigh & Atkeson, *Due Process in the Emerging Foreign Relations Law of the United States,* 21 BUS. LAW. 853, 875-76 (1966).

129. The municipal law of the various sovereigns involved in an international contract may prescribe different definitions and approaches to questions of substantive law that might prove to be decisive in the event a dispute should arise, *e.g.,* whether impossibility of performance excuses a contractual obligation. It seems likely, however, that practitioners will tend to use a choice-of-law clause less often now that the possibility of using a choice-of-forum clause seems to be permissible in light of the Supreme Court's decision in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), because of the added predictability of result possible through the ability to specify a forum and thereby both the choice of law rules and substantive and procedural rules that will govern the litigation. *See* materials cited in note 131 *infra.*

130. This has been the most popular method used in the past. *See* note 19 *supra.* Note, however, the extreme care that must be used to insure that the sources of law to be used by the arbitral panel and the questions that are to be submitted for resolution are precisely and thoroughly drafted. Problems of interpretation may cause serious difficulties. *See, e.g.,* Arbitration Between Saudi Arabia and the Arabian American Oil Company (ARAMCO), August 23, 1958, 27 INT'L L. REP. 117 (1963). This decision is reproduced in part in H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 376 (1968).

131. *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972), *noted* in 6 VAND. J. TRANSNAT'L L. 309 (1972); *id.* at 363-98. By selecting a forum that will apply the choice-of-law rules and substantive law rules that will allow recovery, a party can effectively predict the result of litigation arising from contractual disputes. As in all of these methods, however, insuring that property of the foreign sovereign is available for payment of a judgment is often a problem. A commonly used technique to meet this need is to have an escrow account or surety bond in the hands of a third party in the selected forum.

132. *See* materials cited note 124 *supra.*

gress, the validity of contractual waivers of sovereign immunity both from jurisdiction and from attachment for purposes of execution will be recognized by United States courts.[133]

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133. *See Draft Legislation on the Jurisdictional Immunities of Foreign States,* 12 INT'L LEGAL MATERIALS 118, 124 (§ 1605(1)) (waiver of immunity from jurisdiction), 128 (§ 1610(a)(2)) (waiver of immunity from attachment for purposes of execution) (1973); *cf.* Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir.), *cert. denied,* 404 U.S. 985 (1971).

APPENDIX A*

SUGGESTIONS FOR PREPARING CLAIMS FOR PERSONAL INJURY OR LOSS OF LIFE

First: Claim should be prepared in form of sworn statement, in triplicate. It should contain in narrative form a clear chronological statement of the essential facts relating to:

a. American citizenship of the claimant. If the claim is based upon loss of life the American citizenship of both the claimant and the deceased must be established.
b. The relationship of the claimant to the deceased in death cases.
c. Time, place, and circumstances under which the injury or death occurred, including the identity of persons, officials, or agencies causing the injury or death.
d. Nature and extent of damages sustained.

Second: Statements of claimants in support of claims, even when under oath, must be corroborated by other evidence. Accordingly, there should be attached to the sworn statement of claim, documentary evidence consisting of original documents or certified copies of originals, affidavits, etc., to support all material allegations in the sworn statement. The documents filed as evidence should be numbered consecutively and cited by number immediately after the allegations in the sworn statement in support of which the documents are filed.

All documents filed as evidence, as well as the affidavit of claimant, should be in triplicate.

Documents in other than the English language of which use is made, must be accompanied by authentic English translations.

Third: Nature of evidence required.

I. Nationality.

1. If native-born:

Certified copy of birth certificate. If such certificate is unobtainable, and absence thereof is explained, claimant should furnish baptismal certificate or the affidavits of at least two persons (if affidavit of parent not obtainable) having personal knowledge of the facts, stating date and place of claimant's birth and basis of affiant's knowledge. Since citizenship of an American woman married prior to September 22, 1922 followed that of her husband, proof of the latter's American citizenship must be furnished in such cases, together with a copy of the marriage certificate.

2. If naturalized:

Date and place of naturalization, designation of court and certificate number should be supplied.

Claimant should furnish same information to Immigration and Naturalization Service, Department of Justice, Washington 25, D.C., and request that Service to send to the Department of State a statement concerning such naturalization. Claimants having had communications from the Department of State with respect to their claims should also inform the Immigration and Naturalization Service of the Department's file number indicated on such correspondence, and request the Service to refer to such file number when furnishing this Department with information regarding the naturalization.

II. Acts causing injury or death.

1. Affidavits of eye-witnesses to the commission of the acts or of persons

having personal and reliable knowledge of the circumstances surrounding the commission thereof, and identifying as far as possible the responsible persons, officials, or agencies.

2. Any other evidence tending to support claimant's allegations with reference to the cause of the injury or death, such, for example, as records of court proceedings or other public records.

III. Proof of damages sustained.

1. Injury cases.

The evidence filed in support of a claim based upon personal injuries should establish in as convincing manner as possible the following:

a. The age of the claimant and his earning capacity at the time of injury.
b. Extent of medical and hospital expenses occasioned by the injury.
c. Extent of injuries and physical suffering resulting therefrom.
d. Loss of time from gainful employment.
e. Extent of temporary or permanent impairment of earning capacity.
f. Amount of insurance or other indemnity, if any, collected or payable on account of the injury.

2. Death cases.

Claims based upon loss of life should be supported by evidence to establish the following:

a. Age of deceased and of the claimant and the earning capacity of each.
b. Relationship of claimant to the deceased.
c. Extent of contributions made by the deceased toward support of claimant.
d. Expenses incurred by claimant in connection with the death of the deceased, such as medical and hospital care, etc.
e. Amount of insurance or other indemnity collected or payable by reason of death of the deceased.

The foregoing should not be understood to comprehend all essential requirements in the preparation of a claim. The suggestions are offered simply as a guide for that purpose. Variation in the facts of particular cases may require special treatment and methods of proof. For example, claims based upon alleged mistreatment of American nationals while in the custody of authorities of a foreign government, should, of course, disclose clearly the nature of the treatment complained of, the place or places where it occurred and the duration of the period over which the mistreatment was suffered. All material allegations of a claimant must be supported by convincing evidence; otherwise, the claim may be disallowed for lack of proof.

So far as concerns the amount of damages or losses claimed, it should be observed that the making of claims in exaggerated amounts, which cannot be substantiated by satisfactory evidence or otherwise justified, usually has a prejudical effect and should, therefore, be avoided.

A careful observance of these suggestions in preparing claims will facilitate, to a great extent, consideration of the claims by such agency as may be entrusted with that responsibility. It should be clearly understood that the responsibility for preparing their claims and obtaining appropriate evidence in support of allegations rests entirely with the claimants.

In cases in which claimants are represented by an attorney, the latter should file a power of attorney evidencing his authority to act in such capacity.

APPENDIX B*

SUGGESTIONS FOR PREPARING CLAIMS FOR LOSS OF OR DAMAGE TO PROPERTY— REAL OR PERSONAL

First: Claim should be prepared in form of sworn statement, in triplicate. It should contain in narrative form a clear chronological statement of the essential facts relating to:

a. Date and manner in which claimant became a citizen of the United States.
b. Full description of the property in question and its exact location when loss occurred.
c. Date and manner of acquisition of claimant's ownership of the property or other interest therein.
d. The action taken against the property which is considered as giving rise to a claim against a foreign government.
e. Identification of laws, decrees, governmental agencies and officials taking the property, and the date the action was taken.
f. The nature and amount of damage.

Second: Statements of claimants in support of claims, even when under oath, must be corroborated by other evidence. Therefore, there should be attached to the sworn statement of claim, documentary evidence consisting of original documents or certified copies of originals, affidavits, etc., to support every essential allegation in the sworn statement. The documents filed as evidence should be numbered consecutively and cited by number immediately after the allegations in the sworn statement in support of which the documents are filed.

All evidence, as well as sworn statement, should be filed in triplicate.

Documents filed in other than the English language must be accompanied by authentic English translations.

Third: Nature of evidence required.

I. Nationality.

A. Of Individuals.

1. If native-born:

Certified copy of birth certificate. If such certificate is unobtainable, and absence thereof is explained, claimant should furnish baptismal certificate or the affidavits of at least two persons (if affidavit of parent not obtainable) having personal knowledge of the facts, stating date and place of claimant's birth and basis of affiant's knowledge. Since citizenship of an American woman married prior to September 22, 1922 followed that of her husband, proof of the latter's citizenship must be furnished in such cases, together with a copy of the marriage certificate.

2. If naturalized:

Date and place of naturalization, name of court and certificate number should be supplied.

Claimant should also apply to the Immigration and Naturalization Service, Department of Justice, Washington 25, D.C., for a special certificate of naturalization to obtain recognition as a United States citizen by a foreign state. When issued, the special certificate of naturalization will be forwarded by the Attorney General to the Secretary of State for transmission to the proper authority in such foreign state. In writing to the Immigration and Naturalization Service, claimant should state the file number indicated on his

correspondence with the Department of State and request the Immigration and Naturalization Service to refer to such file number when sending the certificate to the Department of State. (The cost of the certificate is $5.00).

B. Of American corporations, partnerships, or other forms of associations.

1. Certified copy of charter or articles of incorporation, and of amendments thereto.

2. Certified copy of partnership agreement, and of amendments thereto.

3. Names of all officers and directors of corporations or of partners must be stated and evidence of citizenship of those who are citizens of the United States must be supplied in manner indicated under I-A above.

4. Affidavit of officer of corporation as to percentage of all classes of stock owned by citizens of the United States, or if citizenship is not known the percentage of stock owned by residents of the United States.

If 50 per cent or more of the stock of claimant corporation is owned by another corporation, similar evidence should be furnished with respect to such corporation.

II. Ownership of Property (or other interest therein).

1. Certified copy of deeds, extracts from property registers, contract of purchase or other muniment of title should be submitted.

2. If obtained by inheritance, a certified copy of the decree of distribution and/or such other document or documents as may be necessary to establish succession should be furnished.

3. Any other evidence of a pertinent nature.

III. Wrongful Acts Affecting the Property.

1. Certified copy of any specific decree or order taking or interfering with claimant's ownership of the property should be supplied.

2. Affidavits of persons having personal knowledge of wrongful action with respect to the property, setting out fully nature and date of such acts and by whom taken, should be supplied also.

3. Any other documentary evidence to establish action taken, such as laws, resolutions, requisition order, receipts for property taken, etc., should be included.

IV. Proof of Damages Sustained.

1. Contracts, deeds, vouchers, etc., showing original cost of property to claimant, constitute valuable evidence.

2. Same with respect to nature and cost of subsequent improvements.

3. Proof of nature and amount of income derived from the property for several years preceding the acts complained of.

4. Value of property at time of loss, including appraisals and insured and tax valuations.

5. Extent to which depreciation has been taken into account in arriving at actual value.

6. Photographs, duly authenticated, where available, showing property and damage thereto.

7. Carefully itemized statement of losses sustained.

8. Affidavits of persons having personal knowledge of the property, the nature and amount of damages sustained and who are qualified to express reliable opinions as to the extent of damage.

9. Where a foreign currency enters into calculations mentioned above, the equivalent thereof in terms of U.S. currency should be stated, based upon the rate of exchange in effect at the time the loss occurred.

10. The amount, if any, claimant has recovered through insurance or otherwise for property lost, destroyed, or damaged.

The foregoing should not be understood to comprehend all essential requirements in the preparation of a claim. The suggestions are offered simply as a guide for that purpose. Variation in the facts of particular cases may require special treatment and methods of proof. In general, all material allegations of a claimant must be supported by convincing evidence; otherwise, the claim may be disallowed for lack of proof.

A careful observance of these suggestions in preparing claims will facilitate, to a great extent, consideration of the claims by such agency as may be entrusted with that responsibility. It should be clearly understood that the responsibility for preparing their claims and obtaining appropriate evidence in support of allegations rests entirely with the claimants.

In cases in which claimants are represented by an attorney, the latter should file a power of attorney evidencing his authority to act in such capacity.

APPENDIX C*

SUGGESTIONS FOR PREPARING CLAIMS ARISING OUT OF SEIZURES OF VESSELS IN INTERNATIONAL WATERS

1. Claim should be prepared in the form of a sworn statement, in triplicate, and should contain in narrative form a clear chronological statement of the following facts:

a. Name and address of claimant.
b. Date and manner in which claimant became a national of the United States.
c. Date and manner in which claimant acquired vessel or other property involved.
d. Name of home port of vessel at time of seizure and date of last documentation.
e. Date and time of seizure and foreign government making the seizure.
f. Detailed circumstances of the seizure, including the exact place of seizure and how determined; activities of the vessel when seized; actions of seizing vessel; etc.
g. Names of official and agency seizing the vessel and description of seizing vessel.
h. Hearings afforded the captain of the vessel, defenses interposed and determination of the tribunal, including the amount of the fine paid, and/or the license fee, registration fee and other direct charges exacted as a condition of release.
i. Name of agency to which amounts in item h. paid.
j. Date vessel released and sailed.
k. Nature and amount of other losses sustained as a result of the seizure.

2. The sworn statement of the claimant must be corroborated by other documentary evidence. Therefore, there should be attached to one sworn statement of claim, documentary evidence consisting of original documents or certified copies of origi-

nals, affidavits, etc., to support every essential allegation in the sworn statement. Copies of such documents should be attached to the other sworn statements of claim.

The documents filed as evidence should be numbered consecutively and cited by number immediately after the allegations in the sworn statement in support of which the documents are filed.

Documents filed in other than the English language must be accompanied by authenticated English translations.

3. Nature of evidence required.
   a. Nationality.
      (1) Of individuals.
         (a) If native-born:
         Birth certificate. If such certificate is unobtainable, the reason should be given in the sworn statement of claim and claimant should furnish a baptismal certificate or the affidavit of a parent or the affidavits of at least two persons (if affidavit of parent not obtainable) having knowledge of the facts, stating date and place of claimant's birth and basis of affiant's knowledge. Since citizenship of an American woman married prior to September 22, 1922, followed that of her husband, proof of the latter's citizenship must be furnished in such cases, together with a certified copy of the record of marriage.
         (b) If naturalized:
         Claimant should apply to Immigration and Naturalization Service, Department of Justice, 119 D Street N.E., Washington, D.C. 20536, for a special certificate of naturalization to obtain recognition as a United States citizen by a foreign state. When the special certificate of naturalization is issued it will be forwarded by Immigration and Naturalization Service to the Department of State. In writing to the Immigration and Naturalization Service, claimant should state the file number indicated on letters from the Department of State, if any, and request the Immigration and Naturalization Service to refer to such file number when sending the certificate to the Department of State.
      (2) Of American corporations, partnerships, or other forms of associations.
         (a) Certified copy of charter or articles of incorporation, and of amendments thereto, or certificate issued by the state of incorporation, establishing incorporation by such state.
         (b) Certified copy of partnership agreement, and of amendments thereto.
         (c) Names of all officers and directors of corporations or of partners must be stated and evidence of citizenship of those who are citizens of the United States should be supplied.
         (d) Affidavit of appropriate officer of corporation as to percentage of all classes of stock owned by citizens of the United States, or if citizenship is not known, the percentage of stock owned by residents of the United States. If 50 per cent or more of the stock of claimant corporation is owned by another corporation, similar evidence should be furnished with respect to the nationality of such corporation.

b. Ownership of Vessel (or other interest).
   (1) Certificate of ownership issued by United States Coast Guard, Department of Transportation, subsequent to date of seizure.
   (2) Abstract of title showing name of owner on date of seizure.

c. Seizure of Vessel.
   (1) Sworn statement by captain and members of crew regarding the exact location and activity of vessel when seized.
   (2) Certified copies of hearings and findings of authorities of the government seizing the vessel.

d. Amount Paid.
   Certified copy of receipt showing the date and amount paid for fines imposed, the purchase of a license fee and/or registration fee, and/or other direct charges exacted as a condition of release.

e. Other Losses.
   (1) Carefully itemized statement regarding the amount and value of shrimp, tuna, and equipment confiscated and other losses sustained.
   (2) Sworn statements of qualified persons having knowledge of the value of the property taken and other losses sustained.
   (3) The amount, if any, claimed through insurance contracts or guarantee programs or otherwise for losses sustained and the result thereof.

The foregoing does not necessarily include all essential requirements for the preparation of a claim. The suggestions are offered as a guide. After the facts are known, additional evidence may be requested. In general, all material allegations of a claimant must be supported by evidence; otherwise, the claim may be disallowed for lack of proof.

If a claimant is represented by an attorney, the latter should file a power of attorney evidencing his authority to act in such capacity.

Claims should be filed with the Office of the Legal Adviser, Department of State, Washington, D.C. 20520. Attention: Office of the Assistant Legal Adviser for International Claims.

* The memoranda contained in Appendices A, B and C were obtained from the Office of the Assistant Legal Adviser for International Claims, Department of State.