AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 10: The Reagan Era – Separation of Powers

Dames & Moore v. Regan, 453 U.S. 654 (1981)

In 1979, the American Embassy in Iran was seized and the American diplomatic staff taken hostage. Consistent with the International Emergency Economic Powers Act (IEEPA), President Jimmy Carter declared a national emergency and froze all assets of the Iranian government held in the United States. The Secretary of the Treasury issued regulations specifying that any decree or lien against such assets (unless otherwise authorized by the federal government) was henceforth null and void. The president then issued an order granting a general license authorizing judicial proceedings against Iran but barring any decrees regarding those assets. Dames & Moore, an American corporation, filed suit against the Iranian government in federal district court to recover what it was owed by that government in payment for studies it had conducted for a proposed nuclear power plant. The district court found in favor of the company and issued an order of attachment against the Iranian funds. In 1981, the hostages were released and an executive agreement was put into place redirecting all legal claims on assets to an international tribunal. Upon taking office, President Ronald Reagan "suspended" all outstanding claims that were in American courts and could not be presented to the international tribunal. In response, Dames & More sought an injunction against the Secretary of the Treasury, Donald Regan, to prevent Reagan's executive order from being implemented and to allow the company to recover the funds that had been awarded to it. The district court denied that petition but blocked the government from transferring the Iranian assets to the Federal Reserve Bank. The U.S. Supreme Court accepted the case as an emergency appeal. In a 8–1 decision, the Court upheld the authority of the president to issue these orders.

How does the Court read the relationship between the president and Congress on this matter? Does the president rest on his own authority, or does he rely on the power of Congress to sustain his action? How much support did Congress give the president to take this particular action? Is this sufficient to satisfy the standard in Justice Robert Jackson's Youngstown *concurrence that constitutional authority is at its maximum when Congress and the president act together?*

JUSTICE REHNQUIST delivered the opinion of the Court.

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This Court has previously recognized that the congressional purpose in authorizing blocking orders is "to put control of foreign assets in the hands of the President . . . ." Such orders permit the President to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency. The frozen assets serve as a "bargaining chip" to be used by the President when dealing with a hostile country. Accordingly, it is difficult to accept petitioner's argument because the practical effect of it is to allow individual claimants throughout the country to minimize or wholly eliminate this "bargaining chip" through attachments, garnishments, or similar encumbrances on property. Neither the purpose the statute was enacted to serve nor its plain language supports such a result.

Because the President's action in nullifying the attachments and ordering the transfer of the assets was taken pursuant to specific congressional authorization, it is "supported by the strongest of

presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Youngstown Sheet & Tube Co. v. Sawyer* (1952). Under the circumstances of this case, we cannot say that petitioner has sustained that heavy burden. A contrary ruling would mean that the Federal Government as a whole lacked the power exercised by the President, and that we are not prepared to say.

Although we have concluded that the IEEPA constitutes specific congressional authorization to the President to nullify the attachments and order the transfer of Iranian assets, there remains the question of the President's authority to suspend claims pending in American courts. Such claims have, of course, an existence apart from the attachments which accompanied them. . . .

We conclude that although the IEEPA authorized the nullification of the attachments, it cannot be read to authorize the suspension of the claims. The claims of American citizens against Iran are not in themselves transactions involving Iranian property or efforts to exercise any rights with respect to such property. An *in personam* lawsuit, although it might eventually be reduced to judgment and that judgment might be executed upon, is an effort to establish liability and fix damages and does not focus on any particular property within the jurisdiction. The terms of the IEEPA therefore do not authorize the President to suspend claims in American courts. This is the view of all the courts which have considered the question. . . .

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Although we have declined to conclude that the IEEPA or the Hostage Act directly authorizes the President's suspension of claims for the reasons noted, we cannot ignore the general tenor of Congress' legislation in this area in trying to determine whether the President is acting alone or at least with the acceptance of Congress. As we have noted, Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, "especially . . . in the areas of foreign policy and national security," imply "congressional disapproval" of action taken by the Executive. *Haig v. Agee* (1981). On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to "invite" "measures on independent presidential responsibility." At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President. It is to that history which we now turn.

Not infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are "sources of friction" between the two sovereigns. . . . [T]he United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries. Though those settlements have sometimes been made by treaty, there has also been a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate. . . . [I]t is also undisputed that the "United States has sometimes disposed of the claims of its citizens without their consent, or even without consultation with them, usually without exclusive regard for their interests, as distinguished from those of the nation as a whole." . . .

Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement. . . .

In addition to congressional acquiescence in the President's power to settle claims, prior cases of this Court have also recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate. . . .

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In light of all of the foregoing -- the inferences to be drawn from the character of the legislation Congress has enacted in the area, such as the IEEPA and the Hostage Act, and from the history of acquiescence in executive claims settlement -- we conclude that the President was authorized to suspend pending claims pursuant to Executive Order No. 12294. As Justice Frankfurter pointed out in *Youngstown*,

"a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President by § 1 of Art. II." Past practice does not, by itself, create power, but "long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent . . . ." Such practice is present here and such a presumption is also appropriate. In light of the fact that Congress may be considered to have consented to the President's action in suspending claims, we cannot say that action exceeded the President's powers.

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Just as importantly, Congress has not disapproved of the action taken here. Though Congress has held hearings on the Iranian Agreement itself, Congress has not enacted legislation, or even passed a resolution, indicating its displeasure with the Agreement. Quite the contrary, the relevant Senate Committee has stated that the establishment of the Tribunal is "of vital importance to the United States." S. Rep. No. 97-71, p. 5 (1981). We are thus clearly not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority.

Finally, we re-emphasize the narrowness of our decision. We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities. . . . [W]here, as here, the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims.

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The judgment of the District Court is accordingly *affirmed* . . . .

JUSTICE STEVENS, concurring in part.

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JUSTICE POWELL, dissenting in part.

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