INTRODUCTION AND SUMMARY

On November 4, 1979, at about 10:30 a.m. local time, several hundred militant demonstrators overran the United States embassy compound in Tehran, Iran, and took 63 American citizens hostage. Thus began what one court later described as "a foreign policy crisis of the gravest proportions," *American International Group, Inc.* v. *Islamic Republic of Iran,* 657 F.2d 430, 433 (D.C. Cir. 1981). During the next 444 days, before the final release of the 52 American citizens still held hostage, the United States government responded to rapidly changing events by drawing upon virtually every lawful political and economic measure available to it. These included the declaration of a national emergency, the proclamation and enforcement of an international "freeze" of nearly $6 billion of Iranian assets, contentious litigation against Iran before the International Court of Justice, participation in wide-ranging domestic litigation involving the frozen assets, and an unsuccessful attempt to rescue the hostages by military force. These events culminated on January 19, 1981, in the initialing by the United States and the Islamic Republic of Iran of a complex series of international agreements principally set out in two declarations of the Democratic and Popular Republic of Algeria, the nation which had served as the intermediary during their negotiation. Those agreements, the so-called Algiers Accords, authorized the freeing of the hostages the following day and the creation of an international arbitral tribunal to resolve certain claims outstanding between the two governments and their citizens in exchange, *inter alia,* for the release of the frozen Iranian assets.

The extraordinarily broad range of legal questions raised and resolved during the course of the Iranian Hostage Crisis makes it a seminal legal event, unique in our Nation's history, whose domestic and international repercussions will be felt for years to come. In the area of domestic law, the Hostage Crisis raised complex questions relating to the President's constitutional authority to conduct foreign affairs and the President's statutory authority to take emergency measures in times of crisis, questions that "touch fundamentally upon the manner in which our Republic is to be governed," *Dames & Moore* v. *Regan,* 453 U.S. 654, 659, (1981). In the area of international and foreign relations law, the Hostage Crisis raised in rapid succession more issues than any

other political event in recent memory—regarding extraterritoriality, treaty law, extradition, deportation, recognition, state succession, foreign sovereign immunity, the act of state doctrine, the permissible use of force under international law, the legality of various nonmilitary reprisal measures, diplomatic and consular rights and immunities, and practice and procedure before the International Court of Justice.

The 25 legal opinions that follow, issued over the 15-month period that encompassed the Hostage Crisis, address most of these domestic and international legal issues. These opinions were prepared by the Office of Legal Counsel (OLC) in carrying out its assigned function of assisting the Attorney General in the performance of his functions as chief legal adviser to the President and the Cabinet.[1] Two of these opinions were issued as formal opinions of the Attorney General. Although not all of these opinions were issued in 1980, we have chosen to publish them together in the 1980 volume, both to preserve for the reader the continuity of the historical events to which they relate, and to illustrate the complex interrelationship between their numerous issues of private and public, domestic and international law. The following account of historical events is intended to illustrate the factual background of each of these opinions, to illuminate their relationship to one another, and to indicate whether and how the issues discussed in them were later resolved through domestic or international litigation.

A. Background of the Seizure

For 30 years after World War II, the governments of Iran and the United States encouraged the development and growth of commercial relationships between their two countries under a network of formal agreements that included the 1955 Treaty of Amity, Economic Relations, and Consular Rights, United States-Iran, Aug. 15, 1955, 8 U.S.T. 899, T.I.A.S. No. 3853, 284 U.N.T.S. 93 (Treaty of Amity). Pursuant to these international agreements, the Iranian government, headed by Shah Mohammed Reza Pahlavi, adopted national development plans designed to attract United States companies to invest in wholly owned Iranian companies or joint ventures. The Shah's government granted oil concessions to American companies, developed a substantial military force, borrowed extensively from United States banks, and contracted with numerous private American contractors. Iran financed much of its ambitious program of industrial modernization through oil exports, which by 1978 amounted to more than 5 million barrels per day, or more than $20 billion per year in foreign exchange. *See* Staff of the

[1] See 28 U.S.C. §§ 510, 512, 513 (1982); 28 C.F.R. § 0.25(a) (1984). The opinions published here represent only the most visible portion of the Office of Legal Counsel's total work product relating to the Hostage Crisis. In addition to these formal opinions, the Office was called upon throughout the Hostage Crisis to render informal written and oral legal advice that was never reduced to final opinion form, as well as to assist in the research, drafting, and editing of numerous other legal documents produced by the United States government.

Joint Economic Comm., 96th Cong., 1st Sess., *Economic Consequences of the Revolution in Iran* 111 (Comm. Print 1980).

In 1978, however, relations between the two countries became strained. Within Iran, political opposition to the Shah's regime grew and civil strife became increasingly frequent. In January 1979, after weeks of angry demonstrations directed against both the United States and the Shah's government, the Shah—his health failing—fled Iran and sought refuge successively in Egypt, Morocco, the Bahamas, Mexico, and, finally, the United States. Within two weeks of the Shah's departure, the Ayatollah Ruhollah Khomeini, a fundamentalist Islamic leader living in exile in France, returned to Iran and became its *de facto* ruler.

On November 4, 1979, shortly after the deposed Shah arrived in New York to receive medical treatment, armed Iranian demonstrators attacked the United States embassy compound in Tehran, seized embassy property and archives, and took hostage all United States diplomatic and consular personnel present. Although the militants purported to act in a private capacity, the Ayatollah's government implicitly endorsed the seizure by its failure to respond to it. Within hours of the seizure, the Office of Legal Counsel was asked by the Attorney General, on an urgent basis, to identify, consider, and resolve various legal issues associated with the seizure.

B. The Assets Freeze and the Trade Embargo

On November 7, 1979, three days after the seizure of the United States embassy in Tehran, the Office of Legal Counsel (OLC) sent the Attorney General an opinion concerning "Presidential Powers Relating to the Situation in Iran." That opinion reached four conclusions: (1) that the President was authorized to block all assets of Iran and Iranian nationals in the United States upon the declaration of a national emergency pursuant to the International Emergency Economic Powers Act, (codified at 50 U.S.C. §§ 1701–1706 (Supp. III 1979)) (IEEPA);[2] (2) that even without declaring such an emergency, the President could, under the Export Administration Act of 1979, 50 U.S.C. app. §§ 2401 *et seq.* (Supp. III 1979) (EAA), prohibit or curtail the export of goods and technology subject to the jurisdiction of the United States in a situation such as this, where American national security and stated foreign policy goals were threatened; (3) that under international law, the United States was entitled to restrict the movement of Iranian diplomatic and consular personnel in the United States and to take appropriate nonforcible reprisal actions against them; [3] and (4) that the President

[2] In passing, the opinion expressed the view that § 207(b) of IEEPA, 50 U.S.C. § 1706(b) (Supp. III 1979), which authorizes Congress to terminate the exercise of the President's emergency authority by a concurrent resolution not submitted to the President pursuant to Article I, § 7 of the Constitution, was unconstitutional. Three and one-half years later, the Supreme Court held all such "legislative veto" provisions unconstitutional. *See INS* v. *Chadha*, —— U.S. ——, 103 S. Ct. 2764 (1983).

[3] The opinion cautioned, however, that absent a declaration of war, the President lacked statutory authority to intern or expel Iranian nationals.

not only possessed the constitutional power to send troops to aid American citizens abroad, but also that his use of this power was not necessarily constrained in these circumstances by the consultation and reporting provisions of the War Powers Resolution, 50 U.S.C. §§ 1541–1548 (1976) (WPR).

On November 11, 1979, OLC expanded upon these initial conclusions in an opinion for the Attorney General entitled "Supplementary Discussion of the President's Power Relating to the Seizure of the American Embassy in Iran." That opinion concluded that although under the Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Apr. 18, 1961, 500 U.N.T.S. 95, 23 U.S.T. 3227, Iranian diplomats in the United States were not liable to any form of arrest or detention, this prohibition could possibly be mitigated by placing those diplomats in protective custody; by restricting their movements as a reciprocal response to the restrictions placed on the movements of the American diplomats in Tehran; by suspending the operation of the Convention on the ground that Iran had materially breached its treaty obligation to protect the United States embassy and its diplomats; or by restricting Iranian diplomatic movements as a nonforcible reprisal for Iran's massive treaty violations. Second, the opinion reviewed the provisions of the WPR and concluded that, while only the legislative veto provision of the WPR, 50 U.S.C. § 1544(c), was facially unconstitutional, *cf.* note 2, *supra,* the consultation and reporting requirements of the WPR might also be applied in ways that would unconstitutionally interfere with the President's power as Commander-in-Chief. *See* U.S. Const., Art. II, § 2, cl. 1.[4] Finally, the opinion outlined the detailed steps that the President would have to take to issue immediately a lawful executive order under IEEPA blocking Iranian assets in the United States.

On November 12, acting on national security grounds under § 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862 (1976 & Supp. III 1979), President Carter ordered the discontinuation of all oil purchases from Iran for delivery to the United States in a proclamation that was drafted and issued with the Office of Legal Counsel's assistance. Two days later, apparently in anticipation of a United States assets freeze, Iran announced its intent to withdraw all of its funds from American banks and their overseas branches and to transfer them to other countries. *See* N.Y. Times, Nov. 15, 1979, § A, at 1, col. 5. On the same day, President Carter declared a national emergency pursuant to IEEPA and the National Emergencies Act, 50 U.S.C. §§ 1601–1651 (1976 & Supp. III 1979), and by executive order blocked the removal and transfer of "all property and interests in property of the Government of

[4] The Office of Legal Counsel later expanded upon its analysis of the WPR in a February 12, 1980, opinion for the Attorney General, which preceded the American attempt to rescue the hostages by force. That opinion is discussed in greater detail in Part F, *infra.*

Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United States." "Blocking Iranian Government Property," Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979), *reprinted in* 50 U.S.C. § 1701 note (Supp. V 1981).[5] In retaliation, Abolhassan Bani-Sadr, the Acting Foreign Minister of Iran, announced the following day, November 15, that all American assets in Iran had been nationalized.

Executive Order No. 12,170 froze all assets located in the United States, or in the possession of persons subject to United States jurisdiction, in which the government of Iran or any of its instrumentalities had any interest. The freeze had an extraterritorial aspect, since it not only purported to reach Iranian deposits held in banks located in the United States, but also Iranian dollar deposits held in the overseas branches of United States banks.[6] The freeze did not extend, however, to assets owned entirely by private Iranian citizens.

Six days later, on November 21, 1979, OLC sent to the Attorney General an opinion entitled "Presidential Implementation of Emergency Powers under the International Emergency Economic Powers Act." That opinion examined the President's authority under IEEPA to act not only with respect to foreign government property, but also to limit or prohibit the transfer of property subject to United States jurisdiction in which any foreign national had an interest. *See* 50 U.S.C. § 1702(a) (Supp. III 1979). The opinion concluded that the President was entitled to issue a single executive order invoking the remainder of his powers under IEEPA in response to the situation in Iran, and thereby to

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[5]According to one account, a Treasury Department watch officer read a French wire service transmission at 4:45 A.M. on November 14, 1979, which stated that Iran was planning imminently to withdraw its assets from American banks. After determining that no such withdrawals had yet been made, Treasury Secretary William Miller woke President Carter at 5:45 A.M. and recommended that the President sign the executive order. The order was signed at 8:00 A.M. *See Escalating the Iranian Drama*, Bus. Wk., 31 (Nov. 26, 1979).

Drafting of the executive order had actually begun several days earlier. Although primary drafting responsibility for this and later executive orders was located in the Department of the Treasury, the Office of Legal Counsel played a role in drafting this order as well as all subsequent executive orders issued to deal with the Hostage Crisis. The Office of Legal Counsel also performed its customary role of reviewing this executive order prior to its execution both as to form and legality. *See* 28 C.F.R. § 0.25(b) (1984); § 2(b) & (c) of Exec. Order No. 11030, 27 Fed. Reg. 5847 (1962) (delegating this authority to the Assistant Attorney General, Office of Legal Counsel).

[6]A number of American banks proceeded to engage in major litigation in French, English, and German courts over the extraterritorial effect of the President's freeze order. That litigation was ultimately mooted in January 1981 by the conclusion of the Algiers Accords. *See generally* Hoffman, *The Iranian Assets Litigation*, Private Investors Abroad—Problems and Solutions in International Business in 1980 at 329, 343–46, 356–60 (1980). Fourteen days after the freeze went into effect, the United States Government informed the International Monetary Fund (IMF) of its action, and thereafter took the position that the extraterritorial application of the freeze order was not invalid under international law because it comported with Art. VIII, §§ 2(a) & (b) of the Articles of Agreement of the IMF as amended, Apr. 1, 1978, 29 U.S.T. 2203, T.I.A.S. No. 89372. *See generally* Edwards, *Extraterritorial Application of the U.S.-Iranian Assets Control Regulations*, 75 Am. J. Int'l L. 870 (1981).

effectuate a complete trade embargo against Iran by blocking the property of Iranian citizens as well as that of their government.[7]

Before invoking the option of unilateral trade sanctions, however, the United States first tried and failed to secure multilateral economic sanctions against Iran through the United Nations. After waiting for a number of months to avoid complicating possible negotiations for the release of the hostages, on April 7, 1980, President Carter again invoked his emergency powers under § 203 of IEEPA, 50 U.S.C. § 1702 (Supp. III 1979), and § 301 of the National Emergencies Act, 50 U.S.C. § 1631 (1976), to impose a broad ban on all exports to Iran by any person subject to United States jurisdiction, as well as on any new service contracts and certain financial transactions. *See* "Prohibiting Certain Transactions with Iran," Exec. Order No. 12,205, 45 Fed. Reg. 24,099 (1980), *reprinted in* 50 U.S.C. § 1701 note (Supp. V 1981).

An opinion sent by the Office of Legal Counsel to the Attorney General shortly thereafter, entitled "Legality of Certain Nonmilitary Actions Against Iran" (April 16, 1980), discussed the legality of ten nonmilitary sanctions that could be applied against Iran. The opinion concluded that IEEPA plainly authorized the President to impose an embargo on all imports from Iran, and to order the closure of offices located in the United States of both private Iranian businesses and Iranian government instrumentalities. This opinion also found that, subject to certain conditions, IEEPA authorized the President to prohibit commercial exports of food and medicine to Iran, and that, at least with respect to food exports, that statutory authority could be supplemented by invocation of the EAA. The opinion advised that IEEPA authorized the President broadly to prohibit all transactions between Americans relating to Iran, so long as the transactions were not "purely domestic" and Iran had at least an indirect interest in them. In addition, the opinion found no bar to the United States government's diversion of equipment from suspended foreign miltiary sales contracts between Iran and the United States, most of which had already been either suspended or cancelled by Iran.

The April 16 opinion was more equivocal, however, with respect to five other possible nonmilitary options. Two major unresolved questions under IEEPA were whether, and to what extent, the statute authorized "secondary boycotts," i.e., actions directed against foreign countries or nationals of countries other than the country which had

[7]The opinion further concluded that because such an order could be based upon an ongoing national emergency, a new declaration of emergency was unnecessary; that such an order need not be accompanied by an immediate report to Congress; and, that the President could delegate to the Secretary of the Treasury the discretionary exercise of all powers necessary to implement the order. In fact, since November 1979 the President has periodically issued notices of the continuance of the national emergency in connection with his reports on the activities of the Iran-United States Claims Tribunal. *See, e.g.*, 50 U.S.C. § 1701 note (Supp. V 1981) (notice of Nov. 12, 1980, continuing national emergency); 20 Weekly Comp. Pres. Doc. 640 (May 3, 1984) (same). As of this writing, the national emergency declared on November 14, 1979, is still in effect. *See* Part K, *infra.*

created the national emergency. Under the circumstances here, the opinion concluded, IEEPA could be supplemented by the President's inherent constitutional authority respecting foreign affairs and the so-called "Hostage Act of 1868," Act of July 27, 1868 ch. 249, 93, 15 Stat. 223 (codified at 22 U.S.C. § 1732 (1976)).[8] If supplemented by these sources, the opinion concluded, subject to applicable bilateral aviation treaties and maritime statutes, IEEPA might authorize certain secondary boycotts against those trading with Iran through, for example, denial of landing rights or fuel purchases in the United States to foreign airlines serving Iran, or denial of access to United States ports or fueling facilities to vessels or companies serving Iran.

The opinion also concluded that, while neither the Communications Satellite Corporation (COMSAT) statute, 47 U.S.C. § 731 (1976), nor the Hostage Act clearly authorized the President to block international satellite communications from Iran to the United States, *indirect* restrictions on satellite communications might be lawful. Thus, the opinion suggested, restraints could be imposed upon satellite communications from Iran via United States-based satellite ground stations, if those restraints were part of a more general ban on all transactions with Iran. The opinion expressed serious concerns, however, that any blocking action would implicate First Amendment concerns by infringing upon United States citizens' rights to receive ideas from abroad.[9] Similarly,

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[8] This provision, also known as the "Citizens in Foreign States Act," states in pertinent part that "[w]henever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government . . . , the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release" of such citizen.

The Hostage Act had previously been mentioned in passing as a possible source of presidential statutory authority in a January 8, 1980 OLC opinion to the Attorney General entitled "Presidential Power Concerning Diplomatic Agents and Staff Personnel of the Iranian Mission," discussed in Part D, *infra*. The Act was also discussed in some detail in the Supreme Court's decision regarding the President's constitutional and statutory authority to conclude and implement the Algiers Accords. *See Dames & Moore* v. *Regan*, 453 U.S. 654, 675-78 (1981), discussed in Part J, *infra*.

[9] In an earlier opinion, dated December 27, 1979 and entitled "The President's Authority to Take Certain Actions Relating to Communications From Iran," The Office of Legal Counsel had examined in greater detail the First Amendment issues raised by executive action that would have the effect of prohibiting the importation of certain types of television messages or transmissions from Iran. This opinion concluded that the President has statutory and constitutional authority, subject to First Amendment limitations, to limit selectively or to embargo altogether video or audio communications from Iran which might aggravate the Hostage Crisis. The opinion also suggested that the President might exercise that authority either unilaterally or in compliance with United Nations Security Council sanctions under Article 41 of the United Nations Charter (1977 Y.B.U.N. 1181).

At the same time, however, the opinion recognized that the First Amendment requires that any executive action taken to limit communications from Iran be narrowly tailored and sweep no more broadly than the underlying justification required. A noncontent-based restriction that severed all communications links with Iran, the opinion suggested, would be subject to less exacting First Amendment scrutiny than a more limited restriction based in whole or in part on the contents of the communications.

In his December 27, 1979, cover memorandum transmitting this opinion to the Attorney General, Acting Assistant Attorney General Larry A. Hammond cautioned that "two critical points . . . may not have emerged with sufficient prominence from this memorandum." These were:

> First, the precise factual details of any proposed program are critically important, and we will need to be cautious about giving advice either to the State Department or to interested people at the White House until the facts and the supporting rationale have

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the opinion suggested that access to the Satellite Communications Systems of the International Telecommunications Satellite Organization (INTELSAT) could be denied, so long as that action were taken in accordance with the terms of the Agreement Relating to the International Telecommunications Satellite Organization (INTELSAT Agreement), Aug. 20, 1971, 23 U.S.T. 3813, T.I.A.S. No. 7532. Finally, the opinion held that, under stated conditions, the President could limit travel by American citizens to Iran at particular times, but that the First Amendment might limit the exercise of that statutory authority with respect to journalists.[10]

On the following day, April 17, 1980, President Carter issued Executive Order No. 12,211, 45 Fed. Reg. 26,685 (1980), *reprinted in* 50 U.S.C. § 1701 note (Supp. V 1981), entitled "Prohibiting Certain Transactions With Iran." That order amended the export ban issued 10 days earlier to include a broad ban on Iranian imports. Consistent with the recommendations in the April 16, 1980 OLC opinion, the executive order forbade all direct or indirect imports of Iranian goods and services into the United States, other than news broadcasts or publication materials; broadened the prohibition against financial payments in, or financial transfers to persons within, Iran; prohibited travel-related transactions with Iran and authorized the Secretary of State to restrict the use of United States passports for travel to, in, or through Iran for all except Iranian citizens and journalists; and revoked existing licenses for transactions with Iran Air, the National Iranian Oil Company, and the National Iranian Gas Company.

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been carefully considered. Second, it is important not to lose sight of the fact that any action regulating the content of national television or radio news is virtually unprecedented. Actions in this area will be seen as affecting "pure speech" in a way that may impose more serious burdens than we encountered in regulating, for instance, the Iranian student demonstrations.

Memorandum from Larry A. Hammond, Acting Assistant Attorney General, Office of Legal Counsel, to the Attorney General (December 27, 1979).

[10] Subsequently, the Supreme Court twice took up the issue of the President's authority to limit the use of United States passports and international travel by American citizens. In *Haig* v. *Agee*, 453 U.S. 280 (1981), the Court upheld a regulation issued pursuant to the Passport Act, 22 U.S.C. § 211a (1976 & Supp. III. 1979), granting the Secretary of State broad discretion to revoke passports on national security or foreign policy grounds. In *Agee*, the Government had charged that a former CIA employee had offered to assist the Iranian captors of the American hostages in analyzing seized CIA documents. *See* Br. for the Petitioner 6–7, *Haig* v. *Agee*, 453 U.S. 280 (1981).

In *Regan* v. *Wald*, —— U.S. ——, 104 S. Ct. 3026 (1984), the Court held that the grandfather clause of IEEPA, Pub. L. No. 95–223, § 101(b), 91 Stat. 1625 (1977), preserved the President's authority under § 5(b) of the Trading with the Enemy Act of 1917, 50 U.S.C. app. § 5(b) (1976 & Supp. V 1981), to restrict travel-related economic transactions with Cuba. In *Regan*, the Treasury had issued an assets control regulation in 1982 that narrowed the terms of a general license for travel to Cuba that had been issued 5 years earlier. In addition to finding the regulation statutorily authorized, the Court held that, in light of the traditional judicial deference paid to executive judgment in the realm of foreign policy, restraints on travel-related transactions with Cuba aimed at curtailing the flow of hard currency to that country did not violate the freedom to travel protected by the Due Process Clause of the Fifth Amendment.

C. Domestic Litigation Brought by the Islamic Republic of Iran

While the United States was imposing these trade sanctions, the government of the Islamic Republic of Iran was taking its own legal steps to collect property owned by the deposed Shah and his family. Beginning in June 1979, the Islamic Republic had embarked upon a systematic program to nationalize its banking, metal production, shipbuilding, automotive, and aircraft industries, with the aim of redistributing wealth and eliminating Iran's dependence upon foreign capital. This program had attempted to identify and nationalize all of the Shah's assets. On November 28, 1979, the Islamic Republic filed suit against the Shah and his wife in the Supreme Court of the State of New York, claiming $56 billion in damages and charging that defendants had misappropriated Iranian governmental funds for their own use. *See Islamic Republic of Iran* v. *Pahlavi,* 94 A.D.2d 374 (1983).

Assisted by the United States Attorney's Office for the Southern District of New York and the Civil Division, OLC prepared an opinion for the Acting Associate Attorney General dated January 2, 1980, concerning "Possible Participation by the United States in *Islamic Republic of Iran* v. *Pahlavi.*" That opinion analyzed the Government's two principal litigation options: to request a stay or dismissal of Iran's suit without prejudice until the hostages were released, without intimating any position on the merits, or to intervene and cross-claim for relief against the Islamic Republic of Iran.

The January 2 opinion reached five conclusions: (1) that if the United States withdrew diplomatic recognition from Iran, the suit would be dismissed, but that so long as the Islamic Republic remained a government recognized by the United States, it was still entitled to maintain a lawsuit in any federal or state court of competent jurisdiction; (2) that the United States had a sufficient interest in the case, based on the impact of the litigation on its foreign policy interests, to support the United States' standing to participate in the suit in some fashion; (3) that a substantial argument could be made, based on both federal common law and state law, that the New York state court should defer to a request by the United States to refrain from adjudicating the merits, at least temporarily; (4) that the United States could, if it wished, intervene and bring unrelated cross-claims against Iran (limited, perhaps, by the value of the Shah's assets); but (5) that if the suit survived these initial procedural hurdles, a strong prospect would nevertheless exist that either the act of state doctrine or the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330(c), 1332, 1391(f), 1441(d), 1602–1611 (1976) (FSIA), would bar Iran's ultimate recovery against the Shah.

In February 1980, through their New York counsel, the Shah and Empress of Iran moved to dismiss Iran's complaint for want of personal jurisdiction, *forum non conveniens,* and as a nonjusticiable political ques-

tion. After oral argument on defendants' motion to dismiss, the United States government filed a Suggestion of Interest in the action requesting that the court defer decision on the issues pending before it to avoid prejudice to the continuing United States efforts to resolve the Hostage Crisis. In response to the Suggestion of Interest, the parties agreed to a temporary adjournment.

One month after the conclusion of the Algiers Accords in January 1981, discussed in Part H, *infra,* the United States filed another Suggestion of Interest on behalf of Iran, citing ¶14 of the Algiers Accords, Declarations of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, *reprinted in* 20 I.L.M. 224 (1981). In that provision, the United States had agreed to "make known, to all appropriate U.S. courts, that in any litigation[brought by Iran in United States courts to recover the Shah's assets] the claims of Iran should not be considered legally barred either by sovereign immunity principles or by the act of state doctrine and that Iranian decrees and judgments relating to such assets should be enforced by such courts in accordance with United States law."

On September 14, 1981, the New York Supreme Court (Kirschenbaum, J.) denied defendants' motions to dismiss the complaint for want of *in personam* jurisdiction or as a nonjusticiable political question, but granted their motion to dismiss on grounds of *forum non conveniens.* That ruling was affirmed first by the Appellate Division, First Department, in June 1983, and ultimately by a 5–1 vote of the New York Court of Appeals. *See Islamic Republic of Iran* v. *Pahlavi,* 94 A.D.2d 374 (1983), *aff'd,* 62 N.Y.2d 474 (N.Y. Ct. App. 1984). The New York Court of Appeals ruled that the nexus between the plaintiff Iran and the forum, New York, was so insubstantial as to warrant a *forum non conveniens* dismissal, even in the absence of an alternative forum in which Iran could bring suit. Furthermore, the court held that the Algiers Accords did not bind either the United States government or the New York courts to guarantee the Islamic Republic an opportunity to prove its case on the merits.[11]

[11] The suit against the Shah and the Empress was not the only domestic litigation filed by Iran seeking to recover the assets of the deposed royal family. In February 1980, the Islamic Republic of Iran filed a companion action against the Shah's sister, Ashraf Pahlavi, charging that she had violated fiduciary obligations imposed upon her by Iranian law by conspiring with the Shah to divert to her own use funds and property belonging to the government and people of Iran. Iran sought to impress a constructive trust on any and all of the defendant's assets and to enjoin their transfer.

The Shah's sister moved to dismiss on three grounds: the doctrines of *forum non conveniens,* political question, and "unclean hands." Notwithstanding a February 1981 filing of a United States' Suggestion of Interest virtually identical to that filed in the Iranian suit against the Shah and his wife, the New York Supreme Court, Special Term (Fraiman, J.), ruled in November 1982 that the suit did not present a nonjusticiable political question and was not barred by either the unclean hands doctrine or *forum non conveniens. See Islamic Republic of Iran* v. *Ashraf Pahlavi,* 116 Misc.2d 590 (1982). On appeal, the Appellate Division, First Department concluded that this case, too, should be dismissed on *forum non conveniens* grounds. Accordingly, it reversed and dismissed Iran's complaint, finding its earlier decision in the case involving the Shah's own assets controlling. *See Islamic Republic of Iran* v. *Ashraf Pahlavi,* 99 A.D.2d 1009 (1984), *cert. denied.* — U.S. — (No. 84–672, January 7, 1985).

D. Action Against Iranian Nationals in the United States

As the events in Iran unfolded, the President took numerous other steps directed against Iranian nationals in the United States. Six days after the hostages were taken, President Carter directed the Attorney General to identify those Iranian students in the United States who were not in compliance with the terms of their entry visas and to take the necessary steps to commence deportation proceedings against them. On November 11, 1979, in consultation with the General Counsel's Office of the Immigration and Naturalization Service (INS), the Office of Legal Counsel transmitted an opinion to the Attorney General entitled "Immigration Laws and Iranian Students." That opinion concluded that the President possessed statutory authority pursuant to the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101 *et seq.* (1976 & Supp. III 1979), to halt entry of Iranians into the United States, and that, while the matter was not free from doubt, a reasonable reading of §§ 212(a)(27) & 241(a)(7) of that Act, 8 U.S.C. §§ 1182(a)(27) & 1251(a)(7) (1976 & Supp. III 1979), would also allow the Attorney General to conclude that the presence of certain Iranian aliens in the country was so "prejudicial to the public interest" and threatening to the conduct of foreign affairs as to render them deportable. It would, however, be constitutionally inappropriate to identify members of the class of deportable persons based solely on the fact that they had participated in marches or demonstrations against the Shah. Moreover, the opinion stated that the INA and the Constitution jointly require that all persons be given both a hearing and an opportunity for judicial review before being deported, therefore rendering it unlikely that the Iranians could be deported soon enough to have any practical impact on the situation in Iran. Since there were some 50,000 nonimmigrant Iranian students in the country at the time, the opinion suggested that the Attorney General could, under § 214 of the INA, 8 U.S.C. § 1184(a) (1976), promulgate a regulation requiring all Iranian nonimmigrant students to appear at INS offices and demonstrate that they had maintained their nonimmigrant student status. In light of the serious national security and foreign policy interests at stake, the opinion concluded, neither the INA nor the Due Process or Equal Protection components of the Fifth Amendment precluded either the Attorney General or Congress from taking action directed solely against these Iranian nationals.

Two days after the receipt of this opinion, the Attorney General promulgated regulations under § 214 requiring, *inter alia,* that all nonimmigrant alien post-secondary school students who were natives or citizens of Iran report to a local INS office or campus representative to provide information regarding their residence and maintenance of nonimmigrant status. *See* 8 C.F.R. § 214.5 (1979). With his or her report, each student was required to present a passport and evidence of his or

her student status. Although the United States District Court for the District of Columbia initially declared that regulation unconstitutional as a violation of the students' rights to the equal protection of the laws, *see Narenji* v. *Civiletti,* 481 F. Supp. 1132 (D.D.C. 1979), on appeal, the United States Court of Appeals for the District of Columbia Circuit reversed and upheld those regulations as within the Attorney General's statutory and constitutional authority. *See* 617 F.2d 745 (D.C. Cir. 1979), *cert. denied,* 446 U.S. 957 (1980).

At the same time as the Office of Legal Counsel was considering the questions whether and under what conditions the President could lawfully require Iranian students and diplomats to leave the country, the Office was considering whether the President had the legal authority to compel the ailing Shah to return to Iran. An opinion for the Attorney General entitled "The President's Authority to Force the Shah to Return to Iran" (November 23, 1979) answered that question in the negative. The opinion concluded that the President was not authorized to extradite the Shah to Iran because no treaty or statute specifically authorized him to do so. Turning to the INA, the opinion found that the same sections of that Act discussed in the November 11 opinion, 8 U.S.C. §§ 1182(a)(27), 1253(a) & 1257(a)(7) (1976 & Supp. III 1979), empowered the Attorney General to deport the Shah if his continuing presence in this country were determined to be prejudicial to the public interest, harmful to our foreign affairs, or dangerous to the welfare, safety, or security of the United States. Under § 243(h) of the INA, 8 U.S.C. § 1253(h) (Supp. III 1979), however, as well as Articles 1.2 and 33.1 of the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, which the United States had ratified in 1968, the opinion concluded that the Attorney General lacked discretion to deport or return any refugee to a country where he or she had a "well-founded fear" of being persecuted for reasons of his or her political opinion. Since the Shah would almost certainly be punished for his political opinions if returned to Iran, the opinion reasoned that the Attorney General lacked the authority to require the Shah's return.[12]

On December 12, 1979, the United States informed the Iranian Chargé D'Affaires in Washington that the number of personnel assigned to the Iranian embassy and consular posts in the United States

[12] For a more recent discussion of the standards for withholding deportation, *see INS* v. *Stevic,* —— U.S. ——, 104 S. Ct. 2489 (1984), where the Supreme Court subsequently addressed the question whether a deportable alien must demonstrate a "clear probability" or a "well-founded fear of persecution" in the country to which he would be deported in order to obtain relief from deportation under 8 U.S.C. § 1253(h), as amended by § 203(e) of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 107. The Court concluded that § 1253(h) did not incorporate the "well-founded fear" standard found in the United Nations Protocol on the Status of Refugees, at least with respect to an alien's request to withhold deportation. The *Stevic* Court carefully avoided, however, deciding whether the "well-founded fear" standard might nevertheless apply to an alien's request for discretionary asylum under the INA.

would henceforth be limited to a maximum of fifteen at the embassy and five at each consular post. The United States requested that Iran comply with such restrictions within five days, a request which Iran proceeded to ignore. The Office of Legal Counsel then provided the Attorney General with oral advice regarding the President's authority to act against the Iranian diplomatic personnel remaining in this country. On January 8, 1980, an opinion entitled "Presidential Power Concerning Diplomatic Agents and Staff of the Iranian Mission" formalized and expanded upon that advice. That opinion advised the Attorney General that constitutional and statutory authority existed for the President to control the presence and movement in this country of Iranian diplomatic and staff personnel by restricting their movement within the United States, including confining them to embassy grounds; preventing such persons from departing the country; and possibly subjecting them to prosecution for violations of the criminal provisions of the IEEPA. The opinion, however, cautioned that each option would raise serious questions under international law.

In particular, the January 8 opinion observed that the Vienna Convention on Diplomatic Relations, *supra,* (to which both the United States and Iran are parties); customary international law; the Diplomatic Relations Act, 22 U.S.C. §§ 254a–256 (Supp. III 1979); and the Foreign Relations Authorization Act of 1979, Pub. L. No. 95–426, 22 U.S.C. § 2691 note (Supp. III 1979), all immunized Iranian diplomats from being prosecuted criminally, even if done in reprisal for Iran's actions and accompanied by all applicable constitutional protections. The opinion therefore recommended against any formal assertion by the United States that Iranian diplomatic personnel are subject to United States criminal jurisdiction under IEEPA. The opinion also expressed serious doubt as to whether Iranian diplomats could be placed in circumstances tantamount to house arrest or be prevented from leaving the United States, even in reprisal for Iran's flagrant breaches of the diplomatic immunity of United States citizens. The traditional remedy against diplomats in such circumstances, the opinion pointed out, was not to arrest or detain them, but to declare them *persona non grata* and then to expel them from the country.

An opinion for the Deputy and Associate Attorneys General entitled "Presidential Power to Expel Diplomatic Personnel from the United States," issued three months later (April 4, 1980), expanded upon these conclusions. That opinion found that the President possessed inherent constitutional power, deriving from his authority to recognize foreign countries and to receive foreign ministers, U.S. Const., Art. II, § 3, to declare nonresident alien staff members of the Iranian diplomatic mission to be *persona non grata;* to expel them forcibly from the United States within a reasonable period of time thereafter; to take all steps reasonably designed to secure all Iranian diplomatic properties; and to

direct federal law enforcement officials, particularly the Secret Service, to limit the use of those properties to Iranian diplomatic personnel currently recognized and accredited by the President. This power, the opinion concluded, could be exercised consistently with customary international law generally, and with the Vienna Conventions on Diplomatic Relations and Consular Relations in particular.[13]

On April 7, 1980, three days after the OLC opinion was signed, President Carter announced that the United States was breaking diplomatic relations with the Islamic Republic of Iran. *See* 1980–81 Pub. Papers of Jimmy Carter 611–12 (1980). He proceeded to inform the government of the Islamic Republic that its embassy and consulates in the United States were to be closed immediately, to declare all Iranian diplomatic and consular officials *persona non grata,* and to require those officials to leave the country by midnight the following day. The President further instructed the Secret Service to control the movement of persons and property into and out of Iranian diplomatic facilities. *Id.* Finally, the President instructed the Secretary of State and the Attorney General to invalidate all visas issued to Iranian citizens for future entry into the United States, noting that new visas would not be issued and old visas would not be reissued, except for compelling humanitarian reasons. *See id.* at 612. In the only litigation of which OLC is aware involving the April 7 order, the President's action was sustained in an unpublished district court order denying two Iranian consular staff members' motions to obtain a temporary restraining order against their expulsion. *See Safari & Ali* v. *Carter,* Civ. No. C-80-1245-WWS (N.D. Cal. Apr. 11, 1980) (Order).

E. International Litigation Brought by the United States

At the same time as the Executive was undertaking these various nonmilitary reprisals against Iran, the United States was also actively engaged in international litigation before the International Court of Justice (ICJ) concerning the Hostage Crisis.[14] On November 29, 1979,

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[13] The April 4 opinion further found that, prior to their expulsion, Iranian diplomatic personnel who had been declared *persona non grata* could not assert any federal statutory right to remain in this country as a means of avoiding expulsion under the INA, particularly if the Secretary of State had revoked their visas. To permit a diplomat to frustrate or delay the execution of an expulsion order by renouncing his diplomatic status and invoking the INA, the opinion reasoned, would directly impinge upon the President's constitutional power to deal with diplomats as part of his conduct of foreign relations. The opinion also concluded that the President was authorized to call upon the full range of his resources—including military, state, or local law enforcement agencies—to carry out an expulsion order in this situation. The opinion cautioned, however, that under the Due Process Clause of the Fifth Amendment, any personnel actually expelled must be afforded procedures reasonably calculated to ensure that they had in fact been previously declared *persona non grata,* and that in this limited respect, an expulsion order would potentially be subject to judicial review by writ of habeas corpus.

[14] Articles 7 and 92 of the United Nations Charter, signed in June 1945, establish the ICJ as the principal judicial organ of the United Nations. The Court, which has its seat in The Hague, the Netherlands, had as its predecessor the Permanent Court of International Justice, which was instituted by the League of Nations in 1920 and dissolved in 1946. Under the Charter, the ICJ may exercise two types of jurisdictions: "contentious" jurisdiction over adversary litigation between nations, *see* U.N.

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shortly after the hostages were seized, the United States filed an Application (i.e. complaint) against Iran before the ICJ. That Application, which OLC helped to prepare, asked the Court to adjudge and declare that Iran had violated its international legal obligations to the United States under various provisions of the Vienna Convention on Diplomatic Relations; the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 261; the New York Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, opened for signature Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532; and the Treaty of Amity, Economic 9Relations, and Consular Rights Between the United States and Iran, discussed in Part A, *supra.* As relief, the United States requested that the ICJ order Iran to ensure the immediate release and safe departure of the hostages, to pay the United States reparations, and to prosecute those responsible for the seizure of the hostages and the embassy.[15]

Simultaneously, the United States filed a Request for Interim Measures of Protection (also known as a "Request for Indication of Provisional Measures") under Article 41 of the ICJ Statute, asking the Court, pending final judgment, to order the immediate release of the hostages, to facilitate their safe and prompt departure, to clear the embassy, to protect the U.S. diplomatic personnel and facilities, and to prevent the trial in Iran of any of the hostages.[16] Pursuant to 28 U.S.C. §§ 516 &

Charter, arts. 33, 36, & 94, and "advisory" jurisdiction over nonadversary questions referred to it by the General Assembly, the Security Council, and other authorized United Nations organs and agencies. *See id.*, art. 96. Article 92 of the U.N. Charter further specifies that the ICJ "shall function in accordance with the annexed Statute [of the ICJ], which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter." All of the 157 United Nations members are *ipso facto* parties to the Statute. *Id.*, art. 93, ¶ 1.

The ICJ consists of 15 judges, I.C.J. Stat., art. 3, ¶ 1, no two of whom may be nationals of the same country, who are elected by an absolute majority of votes in both the General Assembly and the Security Council, *id.*, art. 10, and are intended to represent "the main forms of civilization and of the principal legal systems of the world." *Id.*, art. 9. Judges are elected for nine-year terms, with five judges rotating off every three years (although judges may, and frequently do, stand for reelection). *Id.*, art. 13. Before 1984, a gentlemen's agreement prevailed whereby candidates were invariably elected from four of the five permanent Security Council members—France, the USSR, the United Kingdom, and the United States—with the fifth, the People's Republic of China (PRC), choosing not to participate. [Note: A judge from the PRC was finally seated in December, 1984. Ed.] At the time of the Hostage Crisis, the Court was composed of six judges from European countries (United Kingdom, France, USSR, Poland, Italy, and Federal Republic of Germany), four from Africa and the Middle East (Egypt, Nigeria, Senegal, and Syria), two from the Far East (India and Japan), and three from the Western Hemisphere (Argentina, Brazil, and the United States). The President of the Court, Sir Humphrey Waldock, was from the United Kingdom, and the Vice-President (at this writing, the ICJ's President), Taslim Olawale Elias, was from Nigeria.

[15]The Hostage Case marked the eleventh time that the United States had appeared before the ICJ in a contentious case, and the eighth time that it had appeared as an Applicant (*i.e.*, plaintiff). The most significant contentious case in which the United States had appeared prior to the Hostage Case was the *Interhandel Case* (*Switzerland* v. *United States*) (Interim Protection), Order of October 24, 1957, [1957] I.C.J. Rep. 105.

[16]Not infrequently, an applicant state before the ICJ accompanies its application with a request for provisional measures to preserve the respective rights of either party. Such a request, like a motion for a preliminary injunction in a United States court, is a request for an order preserving the *status quo ante* pending the Court's resolution of the merits of the case. Under Article 41 of the Court's statute, the Court has the power to "indicate provisional measures of interim protection" so long as "the

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519 (1976), which authorize the Attorney General to conduct and supervise all litigation to which the United States is a party, Attorney General Benjamin R. Civiletti, with the assistance and substantial participation of both the Office of Legal Counsel and the Legal Adviser of the Department of State, appeared for the United States and argued before the ICJ in support of the United States' request for provisional measures. Iran failed to appear at the hearing, and filed only a brief letter challenging the ICJ's competence to hear the suit.

On December 15, 1979, the ICJ unanimously indicated provisional measures against Iran pending its final decision on the merits. *See Case Concerning United States Diplomatic and Consular Staff in Tehran (United States* v. *Iran)* (Interim Protection), Order of Dec. 15, 1979, [1979] I.C.J. Rep. 7. The ICJ ordered Iran immediately to restore the embassy premises to the United States' control, immediately to release all hostages, and to afford all the United States diplomatic and consular personnel the protections, privileges, and immunities to which they were entitled under the treaties in force between the two countries and general international law.[17]

Shortly thereafter, the Legal Adviser of the Department of State sought clarification of the question whether the statutory provisions defining the Attorney General's litigation responsibility, 28 U.S.C. §§ 516 & 519, encompass contentious litigation before the ICJ as well as litigation before United States domestic courts. In a formal opinion dated April 21, 1980 ("Applicability of the Litigation Responsibility of the Attorney General to Cases in the International Court of Justice"), the Attorney General advised the Legal Adviser that litigated proceedings before the International Court of Justice do lie within the supervisory power over litigation involving the United States that is committed to the Attorney General by 28 U.S.C. §§ 516 & 519.

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provisions invoked by the Applicant appear, *prima facie,* to afford a basis on which the jurisdiction of the Court might be founded." *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States* v. *Iran)* (Interim Protection), Order of Dec. 15, 1979, ¶15, [1979] I.C.J. Rep. 7.

Because interim or provisional measures are considered to be matters of utmost urgency which take precedence over any other matter on the Court's docket, I.C.J. Rules of Court, art. 74, the ICJ has not been willing to postpone issuing an order until it has definitively resolved all objections to its jurisdiction, and has usually indicated such measures within two to three weeks from the Application (and sometimes in as little time as three days). In the *Interhandel Case, see* note 15, *supra,* Switzerland sought, but the Court declined to indicate, provisional measures against the United States.

[17] Article 94, ¶ 2 of the United Nations Charter authorizes a victorious party before the ICJ to seek Security Council enforcement of "a judgment rendered by the Court." Since the Court's "indication" of provisional measures was not a final judgment, however, it was not clear whether the Security Council could enforce it. Nevertheless, on December 31, 1979, with the Soviet Union abstaining, the United Nations Security Council adopted, by a vote of 11-0, a resolution calling upon Iran to release the hostages immediately and to allow them to leave Iran. Iran, which had not appeared at the ICJ hearing on provisional measures, refused to comply with that resolution. On January 13, 1980, the United States drafted a second resolution, which would have required all United Nations members to refrain from all further exports of goods and services to Iran, with the exception of food and medical supplies. The German Democratic Republic voted against the draft resolution, however, and the Soviet Union then vetoed it. These actions apparently led the United States to refrain from seeking Security Council enforcement of the ICJ's final judgment against Iran, which was subsequently delivered against Iran in May, 1980. *See* Janis, *The Role of the International Court in the Hostages Crisis,* 13 Conn. L. Rev. 263, 277 (1981).

On May 24, 1980, after a second hearing at which Iran again failed to appear, the ICJ delivered final judgment on the merits against Iran. The Court ruled: by a vote of 13–2, that Iran had violated and was continuing to violate obligations owed by it to the United States under the international conventions in force between the two countries, as well as general international law; by a unanimous vote, that Iran must immediately take all steps to terminate the unlawful detention of the hostages, to ensure that they have the means to leave the country, to turn over the embassy, and to ensure that the hostages are not subjected to judicial proceedings; and by a vote of 12–3, that Iran was under an international legal obligation to make reparation to the United States government for its actions against the hostages. *See Case Concerning United States Diplomatic and Consular Staff in Tehran (United States* v. *Iran)* (Merits), Judgment of May 24, 1980, [1980] I.C.J. Rep. 3. Iran again ignored the Court's ruling, and the United States did not subsequently ask the United Nations Security Council to enforce that judgment. *See* note 17, *supra.*

F. The Attempt to Rescue the Hostages by Force

Having failed to secure the early release of the hostages by nonmilitary means, in early 1980 President Carter began to consider a number of military options in Iran. An opinion for the Attorney General dated February 12, 1980, entitled "Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization," examined three of those options: (1) deployment of American troops in the Persian Gulf region; (2) a military expedition to rescue the hostages or to retaliate against Iran in the event that the hostages were harmed; and (3) an attempt to repel an external assault that threatened vital United States' interests in the region. The opinion concluded that the President had the constitutional authority to order all three of these options.

The opinion reasoned that the President's inherent constitutional authority to conduct foreign affairs recognized in *United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304 (1936), coupled with his enumerated power as Commander-in-Chief of the Armed Forces, U.S. Const., Art. II, §2, cl. 1, and his duty to take care that the laws be faithfully executed, U.S. Const., Art. II, §3, empowered him to deploy United States armed forces abroad in a situation of rescue or retaliation without a declaration of war by Congress or other advance congressional authorization. Noting the numerous instances of presidential initiative and congressional acquiescence in situations calling for immediate action, the opinion concluded that historical precedent confirmed the President's inherent power to act in an emergency without prior congressional approval. Turning to the President's statutory authority to deploy armed forces abroad, the opinion referred in passing to the Hostage Act, 22 U.S.C. §1732, *see* note 8 *supra,* and concluded that,

while the precise meaning of the Act was unclear, that provision did not amount to a congressional attempt to limit the President's constitutional powers in this situation.

The February 12 opinion then examined the effect of the War Powers Resolution (WPR), 50 U.S.C. §§ 1541–1548, on the President's power to use military force abroad without prior congressional authorization. The WPR provides that the "President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances" and regularly thereafter, *id.* § 1542; that the President shall send a report to Congress within 48 hours after such forces are introduced into hostilities or imminent hostilities, or sent "equipped for combat" into foreign territory, airspace, or waters, *id.* § 1543(a); that within 60 days after such a report is actually submitted or is required to be submitted, "the President shall terminate any use of United States Armed Forces with respect to which such report was submitted," unless Congress has authorized his action, *id.* § 1544(b); and that uses of armed forces covered by the WPR shall be terminated "if the Congress so directs by concurrent resolution." *Id.* § 1544(c).

With regard to threshold definitional issues, the opinion concluded that Congress did not necessarily intend the term "hostilities" in the WPR to include sporadic military or paramilitary attacks on our armed forces stationed abroad, which do not generally involve the full military engagements with which the Resolution is primarily concerned. Nor, the opinion concluded, would the WPR's consultation and reporting provisions be triggered where United States armed forces lawfully stationed abroad were fired upon and defended themselves, since such a situation would not meet the statutory precondition of "introduction" of armed forces—i.e., an active decision by the President to place forces into a hostile situation. On a third threshold issue, the opinion concluded that meaningful consultations with an appropriate group of congressional representatives would satisfy the statutory requirement that the President consult with "Congress." [18]

With respect to the constitutionality of the WPR's substantive provisions, the opinion concluded that the requirements of consultation in the WPR, while not facially unconstitutional, could raise constitutional questions depending upon how they were construed in a particular circumstance. The opinion also suggested that the 60-day limit on the

[18]The February 12, 1980, opinion also concluded, as a threshold matter, that the term "United States Armed Forces" in the War Powers Resolution does *not* include military personnel detailed to and under the control of the Central Intelligence Agency. That conclusion was expressly reconsidered and reversed by the Office of Legal Counsel in a subsequent opinion for the Deputy Attorney General dated October 26, 1983, entitled "War Powers Resolution: Detailing of Military Personnel to the CIA." This later opinion is published in this volume as an Appendix to the February 12, 1980 opinion at p. 197, *infra.*

use of armed forces, coupled with the provision in 50 U.S.C. § 1544(b) permitting the President to extend that deadline for up to 30 days in cases of "unavoidable military necessity," would not likely intrude unconstitutionally upon the President's responsibilities as Commander-in-Chief under the particular military scenarios under consideration there, but that the provision permitting Congress to require removal of armed forces by passage of a concurrent resolution not presented to the President was *prima facie* violative of Article I, § 7 of the Constitution. *Cf. INS* v. *Chadha,* 103 S. Ct. 2764 (1983), *discussed in* note 2, *supra.*[19]

On April 24–25, 1980, two months after the issuance of this opinion, the United States government attempted an unsuccessful military raid into Iranian territory aimed at rescuing the hostages. Eight American helicopters were dispatched from an aircraft carrier in the Indian Ocean to meet six cargo planes carrying commandoes for a military incursion into Tehran. Two of the helicopters developed mechanical troubles, however, and only six reached the desert site from which the rescue attempt was to be staged in operating condition. After another helicopter broke down, and before any further action was taken, President Carter ordered the mission terminated. As the aircraft departed from the desert site, a helicopter and a cargo plane collided and eight Americans were killed. *See* Taubman, *Months of Plans, Then Failure in the Desert,* N.Y. Times, Apr. 26, 1980, § A at 1, col. 2.

On April 26, the President sent a letter to the Speaker of the House and the President Pro Tempore of the Senate reporting on the failed rescue operation, consistent with the reporting provisions of the WPR.

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[19]Shortly after the Supreme Court's decision in *Chadha,* the Deputy Attorney General testified before Congress that § 5(c) of the War Powers Resolution, 50 U.S.C. § 1544(c), which would allow Congress by concurrent resolution to require the President to withdraw armed forces from hostilities, was unconstitutional. *See The Supreme Court Decision in INS* v. *Chadha and Its Implications for Congressional Oversight and Agency Rulemaking: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary,* 98th Cong., 1st Sess. 2, 37 (1983) (testimony of Edward C. Schmults, Deputy Attorney General, Department of Justice). *See also id.* at 127–31 (statement of Kenneth W. Dam, Deputy Secretary of State) (making same point). Both before and after *Chadha,* the constitutionality of the various provisions of the WPR has been the subject of extensive controversy and debate. *See generally* R. Turner, The War Powers Resolution: Its Implementation In Theory and Practice (1983) (arguing that the WPR is "unconstitutional, ineffective, and unwise"); Glennon, *The War Powers Resolution Ten Years Later: More Politics Than Law,* 78 Am. J. Int'l L. 571, 577 (1984) ("Section 5(c) of the resolution, allowing Congress by concurrent resolution to force the President to withdraw the armed forces from hostilities, is clearly invalid after *Chadha*"); Carter, *The Constitutionality of the War Powers Resolution,* 70 Va. L. Rev. 101 (1984) (arguing that the WPR remains valid after *Chadha*); Note, *A Defense of the War Powers Resolution,* 93 Yale L. J. 1330 (1984) (same); Note, *Congressional Control of Presidential War-Making Under the War Powers Act: The Status of a Legislative Veto After Chadha,* 132 U. Pa. L. Rev. 1217 (1984) (discussing the uncertain constitutionality of the WPR); Note, *The War Powers Resolution: An Act Facing "Imminent Hostilities" A Decade Later,* 16 Vand. J. Transnat'l L. 915 (1983) (same). *See also* the general historical discussion of the WPR in E. Keynes, Undeclared War: Twilight Zone of Constitutional Power (1982); and W. Reveley, III, War Powers of the President and Congress: Who Holds the Arrows and Olive Branch? (1981).

Although the February 12, 1980, opinion expressed some preliminary views regarding the unconstitutionality of the substantive provisions of the WPR other than § 5(c), OLC has not yet rendered an authoritative opinion, based upon a broad and detailed consideration of how the WPR might be applied in a wide range of situations, regarding the constitutionality *vel non* of any of these provisions. Nor, as of this writing, has the constitutionality of any of the WPR's provisions been decided by any court.

That letter was drafted based upon oral advice provided by OLC to the Counsel to the President, the Legal Adviser of the Department of State, and the General Counsel of the Department of Defense. The President informed Congress that the military operation had been ordered and conducted pursuant to his constitutional authority as Chief Executive and as Commander-in-Chief of the United States armed forces, as recognized in § 8(d)(1) of the WPR, 50 U.S.C. § 1547(d)(1). *See* 1980–81 Pub. Papers of Jimmy Carter 777–79 (1981).

Addressing the legality of the rescue attempt under international law, the President's report to Congress invoked the customary international law doctrine of "humanitarian intervention." The President observed that the United States had carried out the rescue operation "acting wholly within its right, in accordance with Article 51 of the United Nations Charter, to protect and rescue its citizens where the government of the territory in which they are located is unable or unwilling to protect them." *Id.* at 779.[20] Shortly thereafter, the United States also advised the ICJ of its view that its rescue mission had not been inconsistent with the ICJ's December 15, 1979, Order indicating provisional measures, which had directed both the United States and Iran to refrain from any acts, pending the Court's final judgment, that might aggravate the tension between the two countries or render the existing dispute more difficult of resolution. *See* pp. 84–87, *supra.*

The ICJ's final judgment, issued in May 1980, criticized the rescue attempt as action "of a kind calculated to undermine respect for the judicial process in international relations," [1980] I.C.J. Rep. at 44, ¶ 93. In ruling for the United States on the merits, however, that final judgment expressly disavowed any holding that the rescue attempt was unlawful under customary international law. *See id.* at 44–45, ¶ 94.[21]

G. Domestic Litigation Involving the Frozen Iranian Assets—Before the Algiers Accords

While the international litigation before the ICJ was proceeding, extensive litigation had also begun in United States federal courts over

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[20] More than three years later, the United States government invoked the same doctrine, without reference to Article 51 of the U.N. Charter, as one of three international law bases for its military action to evacuate 1,000 U.S. citizens from the Caribbean island of Grenada. *See* Statement by Kenneth W. Dam, Deputy Secretary of State, Before the House Comm. on Foreign Affairs, Nov. 2, 1983, at 8. The appropriate analysis of that action under international law has attracted considerable scholarly attention. *See, e.g.*, J.N. Moore, Law and the Grenada Mission (1984); Symposium, *The United States Action in Grenada,* 78 Am. J. Int'l L. 131 (1984) (articles by Christopher Joyner, John Norton Moore, Detlev Vagts, Francis Boyle, *et al.*); Special Report, *International Law and U.S. Action in Grenada,* 18 Int'l Law 331 (1984); Robinson, *Letter from the Legal Adviser, U.S. Department of State,* 18 Int'l Law 381 (1984); Note, *The Grenada Intervention: "Illegal" in Form, Sound as Policy,* 16 N.Y.U. J. Int'l L. & Pol. 1167 (1984).

[21] The validity of the rescue attempt under international law, and the ICJ's response to it, have been discussed at length in Stein, *Contempt, Crisis, and the Court: The World Court and the Hostage Rescue Attempt,* 76 Am. J. Int'l L. 499 (1982); Janis, *The Role of the International Court in the Hostages Crisis,* 13 Conn. L. Rev. 263, 288 (1981); and Note, *Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and its Legality Under International Law,* 21 Va. J. Int'l L. 3 (1981).

the frozen Iranian assets. Suits were brought against the Islamic Republic of Iran both by U.S. commercial claimants and by the American hostages and their families.

1. *Suits by Commercial Claimants:* In order to implement President Carter's original freeze order of November 14, 1979, *see* pp. 73–78, *supra,* the Secretary of the Treasury, through the Office of Foreign Assets Control (OFAC), issued the Iranian Assets Control Regulations, 31 C.F.R. § 535 (1979) (IACR). Those regulations, *inter alia,* blocked the removal, transfer, or acquisition of any Iranian government assets in the United States except in accordance with the terms of OFAC licenses which either accompanied the blocking order or were later issued pursuant to regulations authorized by it. One of those regulations, 31 C.F.R. § 535.203(e), effectively prohibited United States courts from determining substantive legal rights to contested Iranian property by declaring "null and void" "any attachment, judgment, decree, lien, execution, garnishment, or other judicial process" that had not been licensed by the Secretary. Those regulations also made clear that any licenses or authorizations granted by OFAC could subsequently be amended, modified, or revoked at any time. *Id.* § 535.805.

On November 23, 1979, the Secretary of the Treasury issued a general license authorizing private litigants to institute certain judicial proceedings—such as proceedings to secure prejudgment attachments—against Iranian assets. At the same time, however, the regulations prohibited the "entry of any judgment or of any decree or order of similar or analogous effect" against such assets. *Id.* § 535.504(b), 44 Fed. Reg. 67,617 (1979). Within weeks after the Treasury Department had authorized the filing of such prejudgment attachments against blocked Iranian assets, United States banks, contractors, and other private investors who were owed amounts under contracts or loans with the Iranian government or its owned or controlled entities filed suit against Iran in federal district courts around the country.[22]

At this time, the United States government contemplated the possibility of responding to that litigation by simply "vesting," or taking title to, the frozen Iranian assets. In an opinion prepared for the Attorney General with the assistance of the Civil Division, dated March 12, 1980 ("Vesting of Iranian Assets"), the Office of Legal Counsel addressed a number of issues raised by that possibility. Since IEEPA does not

[22] The IACR permitted overseas branches or subsidiaries of domestic banks to engage in so-called "self-attachments," i.e., to set off any claims they might have against Iran by debiting blocked accounts held by them on Iran's behalf. The same domestic banks were not, however, permitted to assert set-off rights against Iran's bank deposits in the United States, although the IACR did allow U.S. banks to attach those deposits "for cause."

The required "cause" arose when, as a result of the assets freeze, Iran was unable to pay interest on various loans previously extended to it by private syndicates, causing its loans to be declared in default. Other loans were then quickly declared in default as a result of cross-default clauses in financial agreements, leading to a public race to attach Iranian bank deposits. *See* Ball, *The Unseemly Squabble over Iran's Assets,* Fortune, Jan. 28, 1980, at 60.

authorize the President to vest foreign property, and the Trading With the Enemy Act, 50 U.S.C. App. § 5(b) (1976 & Supp. III 1979), authorizes vesting only in the event of a declared war, the opinion concluded that the Iranian property could not be vested without either a formal declaration of war against Iran or new vesting legislation. Since only Iranian government property—as opposed to private property—would be vested, the opinion reasoned, vesting would not constitute a "taking of private property for a public use without just compensation" for purposes of the Fifth Amendment. Under international law, the opinion suggested, vesting could be viewed either as a self-help remedy for the damages the United States had incurred as a result of the seizure of its diplomats, or as a reprisal for Iran's continuing violations of international law that was reasonably proportional to the injury the United States had suffered. Finally, the opinion concluded that vesting legislation would have little effect on pending domestic litigation involving Iranian assets, even with respect to prejudgment attachments, since the United States would not nullify any valid attachments upon vesting Iran's property, but would merely step into the shoes of Iran, the pre-vesting owner. The opinion cautioned, however, that under international law vesting legislation would probably not be enforceable against Iranian property located abroad.

By March 5, 1980, 159 separate actions had been filed against Iran and Iranian entities in United States courts, and ultimately, about 400 actions in all were filed. The proliferation and pendency of so many private actions against Iran raised serious questions regarding the propriety of judicial resolution of cases bearing so directly on an ongoing foreign policy crisis. As commentators later noted,

> [t]his rush of plaintiffs, storming through the attachment gap in the assets regulations, threatened to undermine the United States strategy for dealing with the hostage crisis. . . . If the [Treasury regulations'] prohibition [of final judgments] were overturned, and the assets distributed, the United States would lose its primary bargaining chip for the safe return of the hostages.

Lambert & Coston, *Friendly Foes in the Iranian Assets Litigation,* 7 Yale J. World Pub. Order 88, 92 (1980).

In June 1980, the Attorney General sought advice from the Office of Legal Counsel on two questions regarding this domestic litigation: first, whether IEEPA empowered the President to order the federal courts to stay the pending litigation between United States nationals and the Islamic Republic of Iran, and second, whether, short of taking direct action with respect to the courts, the President could direct the litigants themselves to take no further action with respect to those cases.

Both questions were answered affirmatively in an opinion to the Attorney General entitled "Presidential Power to Regulate Domestic

Litigation Involving Iranian Assets," dated June 25, 1980. That opinion began by observing that the IACR already generally prohibited unauthorized transfers of Iranian government property, including Iranian property subject to legal proceedings. Since IEEPA expressly authorized the President to regulate or prohibit the exercise of rights or privileges "with respect to" foreign property, the opinion reasoned, the statute could also be read to permit the President to regulate or prohibit rights, powers, or privileges in foreign property exercised through the prosecution or adjudication of claims respecting such property brought in federal court. The President's power under IEEPA to prevent the prosecution or adjudication of such claims extended to any claim asserting an interest in property in which Iran had an interest.[23] Thus, the opinion concluded, the IACR were lawful to the extent that they already prohibited litigation involving Iranian property. Moreover, those regulations could lawfully be amended further to restrict the jurisdiction of the federal courts to adjudicate claims respecting Iranian property during the life of the blocking order, or to prohibit claimants from proceeding further with the prosecution of their existing claims.

In the summer of 1980, the United States government proceeded to file Suggestions of Interest in hundreds of pending cases, requesting that all further proceedings involving Iranian entities be stayed. *See, e.g.,* Br. for the United States as *Amicus Curiae* in *American Int'l Group* v. *Islamic Republic of Iran,* 657 F.2d 430 (D.C. Cir. 1981) (urging the court to exercise its inherent power to stay proceedings on appeal indefinitely, with an opportunity for reconsideration in 90 days). These requests were accompanied by affidavits from State and Treasury Department officials, warning that court judgments could send unintended signals to Iran regarding the policy of the United States government, or jeopardize ongoing negotiations for the release of the hostages. A number of those requests were granted, but a significant number were denied. *Compare In re Related Iranian Cases,* No. C-79-3542-RFP (N.D. Cal. Nov. 13, 1980) (granting stays in 20 cases after viewing classified affidavits of Secretary of State Edmund Muskie and Deputy Secretary of State Warren Christopher), *with New England Merchants*

[23] In practical terms, the opinion concluded, an assertion of a claim against Iran would be tantamount to a claim "*with respect to*" Iranian property for purposes of IEEPA whenever the underlying obligation was secured by Iranian property under contract or by law, or whenever the viability of the claim depended upon the assertion of an interest in Iranian property (as in the case of a prejudgment attachment). The opinion also found that IEEPA could be read broadly enough to permit regulation of claims of debt asserted without reference to extraneous property interests, but found it unclear whether the statute could be stretched to cover adjudication of naked tort claims against Iran that did not otherwise involve the assertion of an "interest in property."

The courts never definitively resolved the question whether IEEPA provided a basis upon which they could stay litigation. In those cases where the courts found that IEEPA gave the Executive power to suspend the litigation altogether, a stay proved unnecessary, *see, e.g., New England Merchants Nat'l Bank* v. *Iran Power Generation & Transmission Co.,* 502 F. Supp. 120, 133–34 (S.D.N.Y. 1980); in those cases where the courts found that suspension of litigation seeking an inchoate judgment did not affect an Iranian "interest in property," they concluded that IEEPA gave the Executive no power to suspend the litigation. *See, e.g., National Airmotive Corp.* v. *Iran,* 499 F. Supp. 401 (D.D.C. 1980).

Nat'l Bank v. *Iran Power Generation & Transmission Co.*, 502 F. Supp. 120, 133–34 (S.D.N.Y. 1980) (denying stays in 96 consolidated cases).

Despite repeated requests for stays, and numerous unsuccessful motions by both the United States government and certain Iranian defendants to transfer all the cases for consolidation before a multi-district panel, *see, e.g., In re Litigation Involving the State of Iran,* No. 425 (J.P.M.D.L. May 7, 1980); *In re Litigation Involving the State of Iran* (No. II), No. 435 (J.P.M.D.L. July 8, 1980), the litigation inched forward in at least 18 federal judicial districts across the country. In the suits that proceeded, a difficult question arose as to whether the Iranian defendants could properly be subjected to the jurisdiction of the federal courts in light of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602–11 (1976) (FSIA). Generally speaking, the FSIA declares that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States," 28 U.S.C. § 1604, but also authorizes plaintiffs to bring civil actions against foreign sovereigns and their agencies and instrumentalities in certain carefully defined classes of cases in which Congress has determined that those defendants should not be immune. In even more carefully restricted circumstances, the FSIA permits plaintiffs to obtain prejudgment attachments to secure satisfaction of judgments that may be entered in the future against foreign government assets, but only if the defendant has explicitly waived the immunity of those assets from prejudgment attachment. *See id.* § 1610(d).

In the Iranian assets litigation, the plaintiff banks, contractors, and investors sought prejudgment attachments against frozen Iranian assets which they themselves held, *see* note 22, *supra,* against Iranian deposits held in other banks, and against Iranian property held by other commercial entities. Generally speaking, they argued that Iran had waived its immunity from such attachments under Art. XI(4) of the 1955 U.S.-Iran Treaty of Amity. A number of courts concluded, however, that plaintiffs could not so rely on Art. XI(4), since that provision did not *explicitly* waive Iran's immunity with respect to prejudgment attachments. *See, e.g., Reading & Bates Corp.* v. *Nat'l Iranian Oil Co.*, 478 F. Supp. 724 (S.D.N.Y. 1979); *New England Merchants Nat'l Bank* v. *Iran Power Generation & Transmission Co.*, 502 F. Supp. 120 (S.D.N.Y. 1980).

In July 1980, the Office of Legal Counsel was asked to address the question whether IEEPA would authorize the President to suspend the FSIA in the assets litigation pending against Iran, thereby effectively barring Iran from asserting any sovereign immunity defense either against prejudgment attachment or on the merits. In an opinion for the Attorney General entitled "Presidential Authority to Suspend the Foreign Sovereign Immunities Act in Domestic Litigation Involving Iranian Assets" (July 22, 1980) OLC found it "highly doubtful" that IEEPA could be utilized to override the highly specific provisions of a

comprehensive federal statute such as the FSIA. The opinion further questioned the wisdom of attempting to invoke IEEPA in this manner, particularly in the Iranian assets litigation, where it could not be forcefully argued that the President's action was significantly and demonstrably necessary to address the underlying emergency. While conceding that such a use of IEEPA might be justifiable if that use appeared essential to resolving the Hostage Crisis, the opinion found it difficult to demonstrate the necessity for invoking IEEPA where the assets were already frozen and the Administration had discretion to seek legislation to seize those assets.[24]

In September 1980, the United States and Iranian governments began steps to initiate serious negotiations regarding settlement of the Hostage Crisis. From this time until the conclusion of the Algiers Accords, the Office of Legal Counsel represented the Attorney General on the small, Washington-based working group on the United States negotiating position headed by Deputy Secretary of State Warren Christopher. On September 10, through the intermediation of the West German government, Deputy Secretary Christopher and the Legal Adviser to the State Department met with an Iranian official in Bonn, Germany. At that meeting the two sides discussed four conditions which the Ayatollah Khomeini viewed as prerequisite to any release of the hostages: (1) return of the Shah's wealth to Iran; (2) cancellation of private and public claims against Iran; (3) unfreezing of the Iranian assets; and (4) a commitment from the United States not to interfere in Iran's internal affairs. These negotiating demands raised numerous historically unresolved questions regarding the scope of the President's constitutional and statutory authority to enter international agreements with foreign governments that settle private claims of American citizens against those governments.

Addressing those issues in an opinion for the Attorney General dated September 16, 1980, entitled "Presidential Authority to Settle the Iranian Crisis," OLC concluded that the President possessed the constitutional and statutory authority to enter an executive agreement with Iran that settled American citizens' claims against Iran and returned to Iran some of its blocked funds; that the President was empowered to implement such an agreement under IEEPA by revoking existing licenses permitting prejudgment attachments against blocked Iranian funds in

[24] Notwithstanding this conclusion, at least one district court later ruled that the President's action in issuing the IACR had temporarily suspended Iran's sovereign immunity from prejudgment attachment, without conferring any lasting rights with respect to the assets, a position that the United States government had neither urged nor endorsed. *See New England Merchants Nat'l Bank* v. *Iran Power Generation & Transmission Co.*, 502 F. Supp. 120, 129 (S.D.N.Y. 1980). That opinion was later modified by *Marschalk Co., Inc.* v. *Iran Nat'l Airlines Corp.*, 518 F. Supp. 69 (S.D.N.Y. 1981), which was in turn dismissed in part on other grounds by the Supreme Court. *See* 453 U.S. 919 (1981). Moreover, in *E-Systems, Inc.* v. *Islamic Republic of Iran*, 491 F. Supp. 1294 (N.D. Tex. 1980), another district court adopted reasoning similar to that expressed in the OLC opinion discussed in text, concluding that the IACR, issued under IEEPA, had not *de facto* displaced the FSIA's grant to Iran of sovereign immunity from prejudgment attachments.

federal and private banks, then licensing Iran to withdraw those funds, even over the objection of disappointed lien claimants; that an order under IEEPA would be effective "extraterritorially" to license Iran to withdraw its funds even from foreign branches of American banks, so long as previously licensed set-offs in those branches were left undisturbed; that the settlement agreement could lawfully provide for the United States to aid Iran in recovering the Shah's assets in *Islamic Republic of Iran* v. *Pahlavi* (the New York state court litigation discussed in Part C *supra*); and, that so long as the United States government did not vest itself of the Shah's assets, but simply undertook to aid Iran in its domestic litigation, a successful takings challenge by the Shah's estate would be unlikely. *Cf.* March 12, 1980 OLC opinion, *discussed at* pp. 91–92, *supra.*[25]

On the same day, the Office of Legal Counsel sent the Attorney General a second opinion examining more fully the option of the United States government's vesting the Iranian dollar deposits held in the foreign branches of American banks. That opinion, also dated September 16, 1980, and entitled "Congressional Power to Provide for the Vesting of Iranian Deposits in the Foreign Branches of United States Banks," explored in greater detail some of the issues analyzed in the March 12, 1980, OLC opinion discussed above. The September 16 opinion concluded that Congress had the power under Article I, § 8 of the Constitution to authorize the peacetime vesting of the assets of a foreign government in the control of foreign branches of American-owned and incorporated-banks, notwithstanding the extraterritorial location of those assets. While conceding that an uncompensated seizure of extraterritorial assets might violate particular treaties or general principles of international law, the opinion concluded that an express congressional directive that vesting should take place would likely be enforced in United States courts.[26] The opinion cautioned, however,

[25] In passing, the opinion also reached a number of significant subsidiary conclusions: that Congress did not intend the FSIA to limit the President's established power to settle claims; that claimants whose claims are settled for less than their stated value should not be able to receive additional compensation from the government on the theory that the settlement constituted a taking; that because the government reserved full rights in the IACR to revoke licensed attachments at will, those licenses could be revoked without giving rise to a successful takings claim; that as an incident to an executive agreement finally settling the claims of American citizens, the President could void attachments and other inchoate interests relating to those claims; and, that a separate executive order blocking assets owned by the Shah's estate would be a necessary prerequisite to any effort to return the Shah's assets to Iran.

Subsequently, the Supreme Court agreed with the first, third, and fourth of these conclusions in *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), *discussed in* Part H, *infra*. The second conclusion is currently the subject of litigation in a case unrelated to the Hostage Crisis now pending in the United States Court of Appeals for the Federal Circuit. *See Shanghai Power Co.* v. *United States, dismissed*, 4 Cl. Ct. 237 (1983), *appeal pending*, No. 84-860 (Fed. Cir. July 9, 1984). The fifth conclusion was implemented by Executive Order No. 12,284 ("Restrictions on the Transfer of Property of Former Shah of Iran"), which was issued on January 19, 1981. *See* Part H, *infra* (discussing this order).

[26] Thus, the opinion concluded that the overseas assets could be subject to the extraterritorial effect of vesting legislation because American-owned and -incorporated foreign branches of United States banks were "United States persons" subject to United States legislative jurisdiction.

Continued

that in a suit brought by Iran overseas to recover its deposits, foreign courts might refuse to give effect to what would appear to be the United States' uncompensated extraterritorial expropriation of nonenemy assets, thus creating difficult international jurisdictional conflicts.[27] The opinion suggested that this problem might be partially alleviated if Congress were to authorize seizure of overseas deposits by permitting vesting orders to be served against the head offices of the banks involved, which were located in New York, since those head offices appeared to have actual control of the overseas deposits.

On October 8, 1980, the Office of Legal Counsel sent the Attorney General yet another opinion dealing with the disposition of the frozen Iranian assets, entitled "Presidential Authority to Permit the Withdrawal of Iranian Assets Now in the Possession of the Federal Reserve Bank." That opinion expanded upon the conclusions previously drawn in the Office's first opinion of September 16, finding that IEEPA authorized the President to nullify outstanding attachments against blocked Iranian assets simply by revoking existing licenses for attachments against those assets granted by 31 C.F.R. § 535.504(a), and then licensing withdrawal of those blocked assets by the Central Bank of Iran and the Bank Markazi Iran. Relying upon the Supreme Court's decision in *Orvis* v. *Brownell,* 345 U.S. 183 (1953), the opinion reasoned that, since the President had, in the IACR, expressly withheld his consent to the entry of final judgments against the blocked assets and reserved the right to revoke his consent to prejudgment attachments at any time, *see* 31 C.F.R. § 535.805, he could simply invoke that right and nullify those attachments without effecting any compensable taking of private property. *Cf.* note 25 *supra* (discussing first September 16 opinion).

The opinion further concluded, as a critically important procedural matter, that the Federal Reserve Bank of New York could rely on the President's actions under IEEPA to release assets which had been attached, but which were not yet subject to a licensed final judgment, without first applying to the courts to vacate their prior attachment

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Although the validity under international law of the extraterritorial reach of IEEPA or any congressional vesting legislation was not resolved in the Hostage Crisis, *cf.* note 6, *supra,* similar issues were raised, but not conclusively resolved, two years later during the controversy over the application of the Export Administration Act to high-technology exports bound for the Soviet pipeline. In *Dresser Industries, Inc.* v. *Baldridge,* 549 F. Supp. 108 (D.D.C. 1982), an American corporation unsuccessfully sought to obtain a federal court injunction barring the United States from imposing sanctions upon it for its French subsidiary's failure to comply with controls issued pursuant to the EAA, that purported to reach all persons "subject to the jurisdiction of the United States." The plaintiff argued that the extraterritorial extension of United States export controls to foreign-incorporated subsidiaries of American companies would violate international law.

[27]Indeed, during the 1982 Soviet pipeline controversy, *see* note 26, *supra,* a Dutch court held that an American subsidiary incorporated and having its principal place of business in the Netherlands should be treated as a Dutch, rather than as an American, corporation. Consequently, under relevant principles of international law, United States extraterritorial export controls could not apply. *See Compagnie Europeene des Petroles* v. *Sensor Nederland B.V.,* No. 82/7216 (Dist. Ct., the Hague, 1982) *reprinted in* 22 I.L.M. 66 (1983). The Dutch ruling did not, however, address the appropriate treatment of foreign *branches* of U.S. companies, as opposed to their foreign-incorporated *subsidiaries.*

orders. So long as the Federal Reserve Bank complied in good faith with the President's order vacating the attachments and rendering them unenforceable pursuant to Congress' authorization in IEEPA, OLC asserted, the courts would abuse their discretion if they used their contempt power to penalize that compliance.[28] Finally, the opinion stated, neither the Federal Reserve Bank nor the United States could be held liable to attachment creditors for damages resulting from the loss of their prejudgment security, even if the presidential orders nullifying the attachment orders were ultimately held to be unlawful.

2. *Suits by the Hostages and Their Families:* At the same time as OLC was reviewing the general scope of the President's claims settlement authority in anticipation of an international settlement with Iran, it was also exploring the specific question whether the President had authority to extinguish any claims that the hostages and their families might wish to assert against the Islamic Republic of Iran for kidnapping, false imprisonment, and other torts arising out of acts committed by Iran and its agents in the United States embassy compound in Tehran.

In an opinion dated October 14, 1980, entitled "Presidential Authority to Settle Claims of the Hostages and their Families," OLC concluded that the President did possess such authority.[29] The opinion noted the difficulty of identifying any real loss to the hostages resulting from the extinction of their claims, since any such extinction would presumably result from an international settlement negotiated primarily for their personal benefit. Moreover, the opinion noted that the hostages would be unlikely to recover in a United States court on tort claims from Iran in any event, since the noncommercial tort provision of the FSIA, 28 U.S.C. § 1605(a)(5), permits courts to award tort damages against a foreign state only "for personal injury or death . . . *occurring in the United States*" (emphasis added). Since the hostages' own injuries occurred in Iran, not in the United States, the opinion concluded that the hostages would be barred from recovery in any event by the FSIA.

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[28] Although this issue appeared on its face to be a procedural technicality, in fact the Office of Legal Counsel resolution of this difficult question was to prove critical to the successful implementation of the Algiers Accords. Throughout the negotiations in Algeria, the Islamic Republic of Iran insisted upon contemporaneous transfer of the full amount of its funds frozen in the United States in exchange for the release of the hostages. Even the temporary refusal of a federal district court to void its attachments could have potentially frustrated the ability of the executive branch to carry out its obligation under the Algiers Accords to make the requisite contemporaneous transfer. *See* pp. 100-06, *infra*. Thus, the Office of Legal Counsel concluded that unilateral, *ex parte* actions by the Federal Reserve Bank that would clearly have been punishable by contempt if undertaken by private parties would not warrant contempt in these narrow and highly extraordinary circumstances.

[29] A later opinion, dated November 13, 1980, and entitled "Congressional Authority to Modify an Executive Agreement Settling Claims Against Iran," addressed another aspect of the same policy issue: whether Congress could constitutionally override an executive agreement that purported to settle or extinguish all The opinion found no legal impediment to such legislation, because in this area Congress had exercised authority to enact statutes that modify or abrogate preexisting executive agreements for domestic law purposes. No court ever adjudicated this issue, however, because Congress never enacted the draft legislation amending the FSIA in the manner proposed.

The conclusions stated in this opinion were ultimately upheld by two circuit courts in *Persinger* v. *Islamic Republic of Iran,* 729 F.2d 835 (D.C. Cir. 1984), *cert. denied,* — U.S. —, 105 S. Ct. 247 (1984), and *McKeel* v. *Islamic Republic of Iran,* 722 F.2d 582 (9th Cir. 1983), *cert. denied,* — U.S. —, 105 S. Ct. 243 (1984). In both cases, former hostages and their families sought tortious damages from Iran for injuries inflicted upon the hostages by their seizure and detention in the United States embassy compound in Tehran. Pursuant to its obligations under the Algiers Accords, *see* Part H, *infra,* the United States intervened as a party defendant on behalf of Iran. The United States then argued that Iran was immune from plaintiffs' suit, since their injury had not occurred "in the United States" within the meaning of § 1605(a)(5) of the FSIA. Plaintiffs countered that the FSIA had defined the term "United States" in 28 U.S.C. § 1603 to include "all territory and waters, continental or insular, *subject to the jurisdiction of the United States*" (emphasis added). Because, under international law, the United States embassy compound in Tehran was arguably subject to the *concurrent* jurisdiction of the United States, the plaintiffs asserted that the FSIA did not apply to bar their suit.

Although a panel of the United States Court of Appeals for the District of Columbia Circuit initially accepted plaintiffs' assertion, on rehearing the panel reversed itself and accepted the Government's position. *See Persinger* v. *Islamic Republic of Iran,* 690 F.2d 1010 (D.C. Cir. 1982), *vacated and holding regarding FSIA reversed,* 729 F.2d 835 (D.C. Cir. 1984). In *McKeel, supra,* the Ninth Circuit considered the same issue and similarly concluded that the noncommercial tort provision of the FSIA barred plaintiffs' suit from going forward. *See* 722 F.2d at 589. A number of other federal court suits against Iran by former hostages or their families were also dismissed. *See Williams* v. *Iran,* 692 F.2d 151 (D.C. Cir. 1982); *Lauterbach* v. *Iran,* 692 F.2d 150 (D.C. Cir. 1982); *Moeller* v. *Islamic Republic of Iran,* No. 80–1171 (D.D.C. August 5, 1981) (no appeal taken). On October 9, 1984, petitions for certiorari were denied in both *Persinger* and *McKeel.* 105 S. Ct. 243, 247.

These lawsuits did not definitively resolve the question of what financial compensation, if any, should be paid to the former hostages and their families. On January 19, 1981, as one of ten executive orders implementing the Algiers Accords, *see* Part H, *infra,* President Carter established a nine-member Presidential Commission on Hostage Compensation to determine what compensation was due the hostages and their families. *See* Exec. Order No. 12,285, 46 Fed. Reg. 7931 (1981), *reprinted in* 50 U.S.C. § 1701 note (Supp. V 1981). In September 1981, the Commission issued a final report recommending that Congress amend the Hostage Relief Act of 1980, Pub. L. No. 96–449, 94 Stat. 1967, to compensate those governmental employees who had been held

hostage in Tehran for their medical costs and property damage. The Commission further concluded, however, that the United States was *not* obligated to compensate the hostages for the loss of their right to sue Iran or for any actual harm suffered by the hostages during their detention. Instead, the Commission recommended that the government pay each government employee held hostage the sum of $12.50 per day of captivity.[30]

In response, two groups of former hostages and their families filed suit against the United States in the Claims Court seeking compensation for the taking of their claims against Iran. *See Cooke* v. *United States,* 1 Cl. Ct. 695 (1983); *Amburn-Lijek* v. *United States,* No. 564-82C (Ct. Cl. Nov. 4, 1982). Because the *Persinger* and *McKeel* decisions have held Iran immune from such claims, it remains an open question whether the hostages were in fact deprived of anything of value. As of this writing, both suits are still pending before the Claims Court.

H. The Signing and Implementation of the Algiers Accords

1. *The Negotiations:* During the fall of 1980, settlement negotiations intensified. The Shah's death in Cairo, Egypt, in July 1980 eliminated one central point of controversy between the United States and Iran—whether the United States should assist the Islamic Republic in obtaining the Shah's return to Iran. *Cf.* pp. 81-84, *supra* (discussing the November 23, 1979, OLC opinion concluding that the President lacked the authority to force the Shah to return to Iran). On September 22, 1980, war was formally declared between Iran and Iraq, an event which apparently spurred the Islamic Republic to seek a prompt settlement of the dispute. On November 2, the Iranian Parliament formally promulgated the Ayatollah's four conditions of September 10, 1980 for the release of the American hostages. *See* p. 95, *supra.* On November 10, six days after Ronald Reagan was elected President, representatives of the United States and Iran began intensive negotiations over these four conditions. At no time during these negotiations, however, either in Algeria or in the United States, did United States and Iranian officials actually meet face-to-face; instead, negotiations were conducted exclusively through Algerian government officials, who had agreed to serve as intermediaries or "interlocutors." The negotiations took place in three cities. The United States would propose terms to the Algerians in Algiers, who would then fly to Tehran and present them to the Iranians. The Algerians would then fly to Washington to present the Iranian responses to the United States government.

[30] The Commission arrived at the $12.50 per day figure by following the precedent established in the War Claims Act of 1948, 50 U.S.C. App. §§ 2001-2005 (1976). That Act provided similar *per diem* sums to prisoners of war and civilians interned during World War II, the Korean War, the taking of the *Pueblo* by North Korea, and the Vietnam War. The Commission recommended no compensation for the one private citizen held hostage in Iran who was not a government employee. *See* President's Commission on Hostage Compensation, Final Report and Recommendations 84 (1981).

With respect to one of the four Iranian conditions—the demand that the United States recognize the nationalization of the Shah's assets as a prerequisite to resuming normal relations—the question arose whether the United States could lawfully give effect within its borders to the Iranian decrees confiscating the property of the late Shah and his close relatives. An opinion addressed to the Legal Adviser of the Department of State, dated November 17, 1980 and entitled "Effect Within the United States of Iranian Decrees Confiscating the Shah's Assets," discussed this issue.

The opinion reasoned that the judicially created act of state doctrine, as articulated in its modern form in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 416 (1964), generally requires United States courts to recognize and enforce foreign nationalization decrees against property located *within* the territory of the nationalizing state. Under the rule stated in *Republic of Iraq* v. *First Nat'l City Bank,* 353 F.2d 47 (2d Cir. 1965), *cert. denied,* 382 U.S. 1027 (1966), however, United States courts are not generally required to recognize or enforce such decrees against property located outside the nationalizing state, particularly when that property is also located in the United States. Although the opinion found that the courts would not treat a presidential proclamation dealing with the Shah's property as conclusive, it held that the Supreme Court's decisions in *United States* v. *Belmont,* 301 U.S. 324 (1937), and *United States* v. *Pink,* 315 U.S. 203 (1942), would be controlling if the President were to enter into an executive agreement recognizing the validity of an Iranian expropriation decree. *Belmont* and *Pink* concerned an executive agreement between the United States and the Soviet Union that recognized the validity of Soviet expropriation decrees and assigned the United States all of the Soviet Union's claims against United States nationals. The Supreme Court held that the Soviet nationalization decrees could be enforced extraterritorially against property located in the United States. Accordingly, the November 17, 1980, opinion concluded that the Executive could, as an integral part of an international agreement with Iran settling the Hostage Crisis, stipulate that Iranian nationalization decrees would have an extraterritorial effect that United States courts would recognize.

On December 2, 1980, Deputy Secretary of State Christopher arrived in Algeria to present a detailed United States response to the four Iranian conditions. On December 19, the Islamic Republic unexpectedly demanded that the United States pay Iran $24 billion in exchange for a settlement. The Carter Administration publicly rejected this demand, but private negotiations continued in earnest. *See* Norton & Collins, *Reflections on the Iranian Hostage Settlement,* 67 A.B.A. J. 428, 429 (1981). Shortly after New Year's Day 1981, Algeria reported Iran's willingness to enter a final settlement if the United States would immediately turn over $9.5 billion in frozen assets. Deputy Secretary Chris-

topher returned to Algeria, and on January 15 reached a compromise whereby Iran agreed to release the hostages in exchange for the immediate return of $7.955 billion in frozen assets.

At this point, the OLC opinion of October 8, 1980, discussed at pp. 97–98 & n. 28, *supra,* became particularly critical to the negotiations, because the immediate transfer of the approximately $2.5 billion in Iranian funds held by the Federal Reserve Bank in New York was essential to make up the $7.955 billion demanded by Iran. In addition, it became necessary for the United States government to convince the Islamic Republic that $9.5 billion, the larger sum that Iran had demanded, could *not* be transferred immediately because the frozen Iranian assets held in domestic banks other than the Federal Reserve Bank in New York were subject to prejudgment attachments and could not be transferred without further involvement by numerous federal district courts. The United States negotiators conveyed to Iran the message that the holders of those funds could be expected to seek immediate judicial review of any presidential order seeking to effect such a transfer before they would comply with any such order and that therefore those funds could not be immediately transferred.

Anticipating a settlement and based upon their continuing negotiations with executive officials, United States bankers engaged in intense private negotiations with their European counterparts to finalize the complex financial transactions that would govern the release of the assets.[31] In brief, those negotiations, ultimately approved by the two governments, concluded that the overseas branches of 16 American commercial banks would transfer by telex some $5.5 billion in Iranian funds held in their foreign branches to the Federal Reserve Bank of New York, which would credit that money to the Bank of England, a mutually agreeable central bank, as depositary, which would in turn credit the account of the Central Bank of Algeria as escrow agent. Once the Bank of England had notified the governments of Algeria, Iran, and the United States that it had received gold, dollars, and securities in the aggregate amount of $7.955 billion, the Iranians were required to bring about the safe departure of the 52 hostages.

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[31] Even as the likelihood of a settlement increased, the United States government remained concerned that Iran might suddenly end or reduce exports of its oil to some United States allies who were heavily dependent on Iranian oil. In an opinion for the Associate Attorney General dated January 12, 1981 and entitled "Diverting Oil Imports to Allies," OLC concluded that IEEPA empowered the President, in dealing with the declared national emergency, to respond to an Iranian cutoff of oil to United States allies. Under IEEPA, the President could require American oil companies and the foreign entities they control to ship oil they acquire abroad to nations specified by the President and in certain specified quantities, so long as that oil is "property in which any foreign country or a national thereof has any interest." *See* 50 U.S.C. § 1702(a)(1)(B) (Supp. III 1979). The opinion also found that § 232(b) of the Trade Expansion Act of 1962, 19 U.S.C. § 1862(b), upon which the President had originally relied to discontinue oil purchases from Iran, *see* Part B *supra,* authorized the President in certain circumstances threatening the national security to respond to an Iranian oil cutoff by imposing a quota on oil imports into the United States. The opinion did not view that provision of the Trade Expansion Act, however, as empowering the President to direct the diversion of oil imports to other countries.

As soon as the hostages cleared Iranian airspace, the escrow agent, the Central Bank of Algeria, was to instruct the Bank of England to release $3.667 billion back to the Federal Reserve Bank of New York, which would in turn use those funds to pay off in full all syndicated Iranian loans in which a United States bank was a participant. The Bank of England would also retain an additional $1.418 billion in escrow to pay off any unpaid principal of and any interest owing on the syndicated loans and credits and indebtedness of Iran and its instrumentalities held in United States banking institutions, as well as disputed amounts of deposits, assets, and interest, if any, owing on Iranian deposits in United States banks. *See* 20 I.L.M. 229 (1981).

2. *The Settlement:* On January 18, 1981, two days before President-elect Reagan was to be inaugurated, Iran accepted the basic terms of the settlement outlined above. On January 19, 1981, at 3:00 a.m., Washington time, Deputy Secretary Christopher initialed the four documents that formed the Algiers Accords, which have become known as the Assets Agreement, the Claims Settlement Agreement, the Escrow Agreement, and the Depositary Agreement.[32] Because the Iranians refused to sign a bilateral agreement with the United States, the first two agreements, which formed the heart of the settlement, were set out in Declarations by the Democratic and Popular Republic of Algeria. Those declarations stated the terms of the agreements and proclaimed that both Iran and the United States had formally adhered to them.

In brief, the Assets Agreement provided that Iran would release the 52 American hostages in exchange for a United States pledge of nonintervention in Iranian internal affairs and the delivery to an escrow account of all frozen Iranian assets in the United States and abroad subject to the jurisdiction of the United States. *See* Declaration of the Government of the Democratic and Popular Republic of Algeria, January 19, 1981, ¶¶ 1, 4–9, *reprinted in* 20 I.L.M. 224 (1981). The Assets Agreement went on to rescind virtually all of the economic and political sanctions taken by the United States against Iran over the preceding 14 months. The Agreement provided that the United States would (1) "revoke all trade sanctions which were directed against Iran in the period Nov. 4, 1979, to date," *id.*, ¶ 10, *cf.* Part B, *supra*; (2) "freeze, and prohibit any transfer of, property and assets in the United States" of the former Shah and any of his close relatives "served as a defendant in United States litigation brought by Iran to recover such property and

[32] The Escrow Agreement and the Depositary Agreement specified the obligations and powers of the Central Bank of Algeria as escrow agent and the Bank of England in London as the depositary. The United States and Iran also executed a set of "Undertakings" with respect to the principal agreements. An intricate technical attachment to the Escrow Agreement, known as the "Implementing Technical Clarifications and Directions," was also executed by representatives of the Algerian Central Bank as escrow agent, the Bank of England, and the Federal Reserve Bank of New York as the United States' fiscal agent. Most of these agreements are reprinted in 20 I.L.M. 223 (1981).

assets as belonging to Iran," *id.*, ¶ 12, *cf.* Part C, *supra*; [33] (3) "promptly withdraw all claims now pending against Iran before the International Court of Justice," *id.*, ¶ 11, *cf.* Part E, *supra*; (4) "not . . . intervene . . . militarily, in Iran's internal affairs," *id.*, ¶ 1, *cf.* Part F, *supra*; (5) "terminate all [ongoing and future] legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises" and "nullify all attachments and judgments" against Iranian assets, *id.*, ¶ B, *cf.* Part G(1), *supra*; and (6) "bar and preclude the prosecution against Iran of any pending or future claim of . . . [any] United States national arising out of events" related to the seizure and detention of the 52 American hostages, *id.*, ¶ 11, *cf.* Part G(2), *supra.*

The accompanying Claims Settlement Agreement addressed the outstanding claims of United States nationals against Iran by establishing a new international arbitral tribunal at the Hague. In the past, the United States had generally settled similar claims not by creating a new arbitral entity, but rather, by relying upon existing international arbitral bodies or by obtaining a lump-sum payment from the foreign government that purported fully and finally to satisfy all outstanding claims of U.S. nationals against that government. *See generally* 1 R. Lillich & B. Weston, International Claims: Their Settlement by Lump Sum Agreements (1975). Thus, the Claims Settlement Agreement marked a dramatic shift from 20th century United States practice with regard to settlement of international claims. The Agreement established a nine-member Iran-United States Claims Tribunal (Tribunal) which, beginning six months from the effective date of the Agreement, would have exclusive jurisdiction to decide outstanding claims by nationals of either country against the government of the other arising out of debts, contracts, expropriations, or other measures affecting property rights, as well as official intergovernmental claims arising out of certain sales contracts between the United States and Iran, and disputes as to the interpretation or performance of any provision of the Algiers Accords themselves.

The Tribunal, whose awards were to be enforceable in the domestic courts of any nation, was further authorized to make its legal determinations pursuant to substantive principles of commercial and international law and the procedural rules for arbitration established by the United Nations Commission on International Trade Law (UNCITRAL). Awards were to be paid from a security account

[33] In ¶¶ 12–14 of the Assets Agreement, the United States also agreed to retrieve and freeze assets of the Shah and his close relatives located in the United States. Significantly, as was recommended by the November 17, 1980, OLC opinion to the Legal Adviser of the Department of State, discussed at pp. 100–01, *supra*, the United States agreed that both "Iranian decrees and judgments relating to such assets should be enforced . . . in accordance with United States law," *Id.*, ¶ 14. Furthermore, ¶ 14 of the Agreement abrogated any sovereign immunity or act of state defense that might otherwise be asserted against Iranian claims to the Shah's domestic property. *Cf.* p. 79, *supra.*

funded initially with $1 billion of the unfrozen Iranian assets, subject to the commitment of the government of Iran and its central bank, the Bank Markazi Iran, to replenish that account if it should fall below $500 million during the claims adjudication process. The depositary for the Security Account was a subsidiary of the Central Bank of the Netherlands, with the Algerian Central Bank acting as escrow agent.

3. *Implementing the Settlement:* Beginning in November 1980, in the course of providing advice with respect to the negotiations in Algeria, the Office of Legal Counsel had continuously revised a draft of a formal opinion of the Attorney General which analyzed the legal issues presented by the terms of the various proposed settlements that were offered during those negotiations. *See* 28 C.F.R. § 0.25(a) (authorizing the Assistant Attorney General, Office of Legal Counsel, to supervise the preparation of the formal opinions of the Attorney General). On January 19, 1981, the day the Algiers Accords were initialed, the Attorney General sent the President a formal opinion which was entitled "Legality of Actions Described in International Agreement with Iran and in Implementing Executive Orders." That opinion reviewed the four international agreements initialed by Deputy Secretary Christopher and the series of ten executive orders proposed to implement those agreements, *see* Exec. Order Nos. 12,276 through 12,285, 46 Fed. Reg. 7913–31 (1981), *reprinted in* 50 U.S.C. § 1701 note (Supp. V 1981), and concluded that the President and his delegates had legal authority to issue all of them.

As their captions make clear, the first six executive orders directed the Secretary of the Treasury, the Federal Reserve Bank of New York, and the Federal Reserve Board to take the steps necessary to implement the complex financial transactions outlined at pp. 102–03, *supra.*[34] Largely restating the analysis set forth in the Office of Legal Counsel opinions of September 16, 1980, *see* pp. 95–97, *supra,* the Attorney General concluded that each of these six orders fell within the President's powers under IEEPA and the Hostage Act to order the transfer of property owned by Iran as directed by Iran and to nullify outstanding attachments and court orders related to such property. For the reasons stated in the Office of Legal Counsel opinion of October 8, 1980, *see* pp. 97–98 & n. 28, *supra,* the Attorney General also advised that anyone taking action in good-faith compliance with those orders would be immune from liability.

The seventh executive order, Exec. Order No. 12,282 entitled "Revocation of Prohibition Against Transactions Involving Iran," revoked the

[34] *See* Exec. Order No. 12,276 ("Direction Relating to Establishment of Escrow Accounts"); Exec. Order No. 12,277 ("Direction to Transfer Iranian Government Assets"); Exec. Order No. 12,278 ("Direction to Transfer Iranian Government Assets Overseas"); Exec. Order No. 12,279 ("Direction to Transfer Iranian Government Assets Held by Domestic Banks"); Exec. Order No. 12,280 ("Direction to Transfer Iranian Government Financial Assets Held by Non-Banking Institutions"); Exec. Order No. 12,281 ("Direction to Transfer Certain Iranian Government Assets").

executive orders of April 7 & 17, 1980, limiting trade with and travel to Iran, as well as the President's November 14, 1979, restriction on oil imports from Iran. *See* Part B, *supra.* The Attorney General then concluded that the eighth and tenth orders, which implemented the President's decision to extinguish the claims of former hostages and their families against Iran, *see* Exec. Order No. 12,283 ("Non-Prosecution of Claims of Hostages and for Actions at the United States Embassy and Elsewhere") and Exec. Order No. 12,285 ("President's Commision on Hostage Compensation"), were authorized by the President's power under IEEPA and the Hostage Act to take steps in aid of his constitutional authority to settle claims of the United States or its nationals against a foreign government. *Cf.* pp. 98–100, *supra.* The Attorney General further concluded that IEEPA authorized the ninth executive order, Exec. Order No. 12,284 ("Restrictions on the Transfer of Property of the Former Shah of Iran"), which implemented the paragraphs of the Assets Agreement wherein the United States had agreed to assist Iran in its litigation to obtain the former Shah's assets. *See* note 33, *supra.* Finally, the opinion advised that the President's inherent constitutional powers to conduct foreign relations, supplemented by Article XXI(2) of the Treaty of Amity, the Hostage Act, and historical precedent, all authorized the President to enter an agreement designating the Iran-United States Claims Tribunal as the sole forum for the determination of the various types of claims over which the Algiers Accords gave it jurisdiction.

I. Subsequent Ratification of the Algiers Accords

Although the Algiers Accords were formally implemented on January 19, 1981, the hostages themselves were not finally released until about 12:30 p.m., Washington time, January 20, 1981, 30 minutes after President Reagan was inaugurated. Soon after the hostages' release, a number of commentators suggested that, as a matter of international law, the Algiers Accords were void *ab initio,* either in whole or in part, because the United States had negotiated those Accords under duress. In particular, these commentators pointed to Article 52 of the Vienna Convention on the Law of Treaties, U.M. Doc. A/CONF. 39/27, May 23, 1969, *reprinted in* 8 I.L.M. 679 (1969), which states:

> A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.

See, e.g., Obligations of the United States, Wall St. J., Jan. 27, 1981, at 30, cols. 1–2; Malawer, *A Gross Violation of Treaty Law,* Nat'l L.J., Mar. 2, 1981, at 13, col. 1.

The new Administration conducted a comprehensive review of the Algiers Accords in light of these charges. During that review, the Office of Legal Counsel was asked to prepare a legal opinion regarding the validity of the Accords under both domestic and international law. An opinion for the Attorney General dated January 29, 1981 and entitled "Review of Domestic and International Legal Implications of Implementation of the Agreement with Iran" surveyed both the domestic and international law arguments that could be raised against the Accords. With respect to the various domestic law objections, the Office of Legal Counsel reviewed the legal authorities relied upon in its earlier opinions, as well as in the formal January 19, 1981, Opinion of the Attorney General, and concluded that each of the executive actions taken were well within the power conferred on the President by the Constitution, federal statutes, and treaties.

With respect to the international law arguments, the opinion reached six separate conclusions: (1) that a persuasive case could be made that the Accords were void *ab initio* under international law; [35] (2) that the United States' act of *negotiating* the Accords under duress was not in itself a violation of international law; (3) that once Iran's coercion had been removed, the President could, consistent with international law, choose either to repudiate or to adhere to the Accords; (4) that any presidential decision to repudiate the Accords should be confirmed by litigation before the ICJ, rather than before the Iran-United States Claims Tribunal; (5) that any challenge to whatever decision the President might make regarding ratification of the Accords would raise a political question unreviewable in United States domestic courts; and (6) that if the United States should decide to repudiate the Accords, serious questions would arise concerning revival of hostage claims against Iran and the proper disposition of Iranian assets already transferred to the escrow account or still frozen in United States domestic accounts.

Following receipt of this opinion, the Attorney General requested the additional views of the Office of Legal Counsel on the related question whether, if the Accords were void under international law, the United States could choose, consistent with international law, to implement some parts of the Agreement and not others. In an opinion dated February 5, 1981, entitled "Whether the Agreement with Iran Can Be Treated as Void in Part," the Office of Legal Counsel concluded that the provisions of the agreement were not separable—*i.e.*, that if the United States chose to honor some provisions of the Accords, it would

[35] A number of commentators have subsequently reached the same conclusion. *See, e.g.*, Note, *The Prohibition of the Use of Duress in Treaty Negotiations: A Study of the Iranian Hostage Crisis*, 7 B.C. Int'l & Comp. L. Rev. 135 (1984); Note, *The Iranian Hostage Agreement Under International and United States Law*, 81 Colum. L. Rev. 822, 826–41 (1981); Note, *Void Ab Initio: The U.S.-Iran Hostage Accords*, 21 Va. J. Int'l L. 347 (1981). Note, *The Effect of Duress on the Iranian Hostage Settlement Agreement*, 14 Vand. J. Transnat'l L. 847 (1981).

have a legal duty under international law to honor all of them. The opinion relied upon Article 44(5) of the Vienna Convention on the Law of Treaties, which permits a coerced state to maintain a treaty which it could treat as void under Article 52, but which states that "no separation of the provisions of the treaty is permitted." The opinion pointed out that if the United States affirmed the Accords but failed to implement part of them, serious consequences could result. For example, Iran might secure a determination of illegality from the Iran-United States Claims Tribunal, invoke the United States' "breach" as a ground for terminating the entire agreement, or otherwise implement some form of nonforcible reprisal against the United States.

After more than a month of scrutiny, President Reagan announced on February 24, 1981, that his Administration had decided to "ratify" the Algiers Accords and the January 19, 1981, executive orders implementing them. *See* "Suspension of Litigation Against Iran," Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (1981), reprinted in 50 U.S.C. § 1701 note (Supp. V 1981). Rather than requiring the outright dismissal of the commercial claims being litigated in United States courts that would now properly be presented to the Iran-United States Claims Tribunal, the President "suspended" those claims, declaring them to "have no legal effect in any action now pending in any court of the United States." *Id.* If the Tribunal were to determine that it lacked jurisdiction over a particular claim, the suspension of that claim would terminate; if the Tribunal were to award some recovery or to determine that no recovery was due, that claim would be discharged for all purposes. *Id.*

Pursuant to the President's order, the Treasury Department amended the IACR to implement the United States' obligation to transfer the Iranian funds remaining in domestic accounts to Iran and the security account of the Iran-United States Claims Tribunal. *See* 46 Fed. Reg. 14,330 (1981). The amended regulations nullified any rights to those funds that had been previously acquired by judicial attachments, injunctions, or other methods, by the technique described in the OLC opinions of September 16, 1980, and October 8, 1980, discussed at pp. 95–98, *supra,* and the Attorney General opinion of January 19, 1981, discussed at pp. 104–05, *supra,* namely, withdrawal of all licenses for such judicial process granted after November 14, 1979. United States banks holding Iranian deposits were directed to turn them over to the Federal Reserve Bank of New York, but were not required to transfer those deposits until the United States government's authority to issue such a transfer order had been subjected to a definitive court ruling.

J. Domestic Litigation Involving the Frozen Iranian Assets—After the Algiers Accords

In the weeks that followed, the pace of domestic litigation accelerated sharply. Two days after President Reagan ratified the Algiers Accords, the government filed renewed Statements of Interest across the country in hundreds of pending commercial suits against Iran, asking courts to comply with the President's executive order, to suspend the litigation before them, and to dissolve any attachments or preliminary injunctions that they might previously have entered in such litigation. A declaration by Secretary of State Alexander Haig that accompanied many of the Statements warned that "[i]f the United States should be prevented from freeing the Iranian assets from judicial restraints . . . the whole structure of the agreements may begin to crumble . . . ." Statement of Interest of the United States, *American Int'l Group, Inc.* v. *Islamic Republic of Iran,* Nos. 80–1779, 80–1891 (D.C. Cir. filed Feb. 26, 1981).

Under the terms of ¶ 6 of the Assets Agreement, the United States was obliged to return the Iranian funds remaining in American banks within six months after the conclusion of the Accords, namely, July 19, 1981. Recognizing that only the Supreme Court could definitively resolve the legality of the Accords under domestic law by that date, the government searched the federal courts for a claimant willing to petition the Court for a writ of certiorari. The most active litigation occurred in the Second Circuit, where 96 consolidated cases had been pending before Judge Kevin Duffy in the Southern District of New York prior to the conclusion of the Accords. The United States had sought to intervene in these cases in November 1980; Judge Duffy had denied leave to intervene and had certified an interlocutory appeal to the Court of Appeals for the Second Circuit on December 22. *See New England Merchants Nat'l Bank* v. *Iran Power Generation & Transmission Co.,* 508 F. Supp. 47 (S.D.N.Y. 1980) (Memorandum and order denying U.S. leave to intervene), 508 F. Supp. 49 (S.D.N.Y. 1980) (memorandum and order certifying questions for appeal). Following the conclusion of the Accords, the Second Circuit remanded the interlocutory appeal to Judge Duffy for reconsideration in light of changed circumstances, directing him to choose a representative case that squarely presented the most crucial issues. *See New England Merchants Nat'l Bank* v. *Iran Power Generation & Transmission Co.,* 646 F.2d 779 (2d Cir. 1981).

Before Judge Duffy issued his decision, however, the United States Court of Appeals for the First Circuit heard an expedited appeal in *Chas. T. Main Int'l, Inc.* v. *Khuzestan Water & Power Auth.,* 651 F.2d 800 (1st Cir. 1981). On May 22, 1981, the First Circuit upheld the President's authority to conclude and implement the Accords, largely on grounds previously foreshadowed in the September 16, 1980, OLC

opinions discussed at pp. 95–97, *supra.* In the process, the First Circuit reached four significant holdings. It held first, that IEEPA authorized the President to freeze the assets, to issue a revocable license whereby claimants could obtain qualified attachments against those assets, and then to revoke a licensed attachment and order the transfer of the frozen assets to the pre-freeze owner. *Id.,* at 801–09. Like the OLC opinion of October 8, 1980, discussed at pp. 97–98, *supra,* the First Circuit's opinion in *Main* relied heavily for this point on the Supreme Court's decision in *Orvis* v. *Brownell, supra.* Second, the court upheld the President's authority to suspend claims of United States nationals against Iran pending a determination by the Iran-United States Claims Tribunal. That power derived, the court held, not from IEEPA but from the President's authority under Article II of the Constitution, historically acquiesced in by Congress, to settle claims of United States nationals against foreign governments.[36] Third, the court concluded that plaintiffs' interest in their attachments was conditional and revocable and, therefore, that the President's nullification of those attachments could not give rise to a right to seek compensation from the United States in the Claims Court under the Tucker Act, 28 U.S.C. § 1491 (1976 & Supp. III 1979). Finally, the court dismissed plaintiffs' claim that the President's suspension of their claims constituted a taking without just compensation under the Fifth Amendment, holding that this claim was not ripe because it remained to be seen whether plaintiffs would actually suffer a loss if required to pursue their action before the Iran-United States Claims Tribunal.

On June 5, 1981, in *American Int'l Group, Inc.* v. *Islamic Republic of Iran,* 657 F.2d 430 (D.C. Cir. 1981), the United States Court of Appeals for the District of Columbia Circuit issued a decision concurring with each of the First Circuit's four principal holdings in *Main.* The D.C. Circuit's decision differed from that of the First Circuit in only one significant respect—two members of the panel concluded that the Hostage Act of 1868, *discussed in* note 8, *supra,* provided additional statutory authority for the President's action suspending the claims. *See* 657 F.2d at 449–52 (statement of McGowan, J., joined by Jameson, J.). In a brief separate statement, the third panel member expressed the contrary view, arguing that the legislative history of the Hostage Act demonstrated that it was intended only to authorize presidential acts short of war directed against the offending foreign government, not every domestic action deemed necessary to implement whatever agreement the President may have entered with that government. *See id.* at 452–53 (statement of Mikva, J.). *See also* Mikva & Neuman, *The Hostage Crisis*

[36] The First Circuit majority also rejected plaintiffs' contention that the passage of the FSIA in 1976 had somehow limited the Executive's authority to settle claims against a foreign sovereign. Judge Breyer, concurring, eschewed reliance on constitutional authority, arguing instead that the President's power to suspend claims derived from IEEPA. *See* 651 F.2d at 817–18 (Breyer, J., concurring).

and the "Hostage Act," 49 U. Chi. L. Rev. 292 (1982) (subsequently elaborating upon that argument).

Six days after the D.C. Circuit issued its decision, Judge Duffy issued a lengthy opinion reaching the opposite conclusion. In *Marschalk Co.* v. *Iranian Nat'l Airlines Corp.*, 518 F. Supp. 69 (S.D.N.Y. 1981), he concluded that IEEPA did not authorize the President to revoke the licensed attachments, nor did the Constitution nor any statute authorize the President to suspend claims and transfer them to the Iran-United States Claims Tribunal. Furthermore, he held that under the Fifth Amendment, claimants were entitled to compensation for the government's taking of their claims and attachments. Shortly after this opinion issued, the Second Circuit certified three crucial questions to the Supreme Court, involving the legality of the President's suspension of claims, the President's nullification of the attachments, and the claimants' entitlement to compensation in both cases.

Ironically, none of these early decisions received plenary Supreme Court review. A California claimant, Dames & Moore, bypassed review in the Ninth Circuit and sought an extraordinary writ of certiorari before judgment in the Supreme Court. As it has occasionally done when a case is of paramount national importance, *see, e.g., United States* v. *Nixon,* 418 U.S. 683 (1974); *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952), the Supreme Court granted the extraordinary writ on June 11, 1981, adopted an expedited briefing schedule, and heard argument less than two weeks later. *See Dames & Moore* v. *Regan,* 452 U.S. 932 (1981). On July 2, 1981, less than three weeks before the Iranian assets were scheduled to leave the country, the Court upheld the Government's position in virtually all particulars. *See Dames & Moore* v. *Regan,* 453 U.S. 654 (1981).

Writing for a unanimous Court on all but two issues,[37] Justice Rehnquist relied heavily on the decisions of the Courts of Appeals for the First and D.C. Circuits discussed above. The Court concluded that § 203 of IEEPA, 50 U.S.C. § 1702(a)(1), authorized the President to nullify the attachments and to order the transfer of the Iranian assets. *Id.* at 669–74. Because the President's action in nullifying the attachments and ordering the transfer was taken pursuant to express congressional authorization, it was "supported by the strongest of presumptions and the widest latitude of judicial interpretation," *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 637 (1952) (Jackson, J., concurring), which petitioner Dames & Moore had failed to overcome. Moreover, because petitioner's interest in those attachments was conditional and

[37] Justice Stevens argued that the Court need not decide whether the Court of Claims would later have jurisdiction to hear takings claims growing out of the implementation of the Accords. *See* 453 U.S. at 690 (Stevens, J., concurring in part). Justice Powell dissented from the holding that the nullification of the attachments did not effect a compensable taking, arguing that that question should have been left open for resolution on a case-by-case basis by the Court of Claims. *See id.* at 690 (Powell, J., concurring in part and dissenting in part).

revocable, the President's action nullifying the attachments and ordering the transfer of the assets did not amount to a compensable taking. *See* 453 U.S. at 674, n. 6.

The Court declined to hold that either IEEPA, *see id.* at 675, or the Hostage Act, *see id.* at 676–78, specifically authorized the suspension of claims, but found that both statutes were "highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action" in cases where the President has settled international claims by executive agreement. *Id.* at 677. Moreover, the Court agreed with the two circuit courts that by enacting the FSIA in 1976, Congress had not divested the President of his authority to settle claims. *Id.* at 684–86. Because "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 because "Congress acquiesced in the President's action," *id.* at 688, the Court held that the suspension of the claims did fall within the President's powers under Article II.

Finally, the Court dismissed as not ripe the question whether any authorized suspension of the claims was compensable as a taking under the Fifth Amendment. Relying on a concession made at oral argument by the Solicitor General-designate, *see id.* at 689, the Court held that, notwithstanding the "treaty exception" to the jurisdiction of the Court of Claims, 28 U.S.C. § 1502, jurisdiction would later be available in that Court to decide the takings question. In short, in virtually all relevant respects, the Court's reasoning closely hewed to that set forth in the numerous OLC opinions issued throughout the fall of 1980, as well as that found in the Attorney General's January 19, 1981, opinion to the President.

K. Aftermath

Although *Dames & Moore* v. *Regan* effectively resolved the most salient constitutional issues concerning the validity of the Algiers Accords, domestic litigation relating to the crisis has continued with respect to standby letters of credit, Iran's rights to the Shah's assets, the hostages' rights to sue Iran in United States courts, and the hostages' rights to recover against the United States for the alleged taking of their claims against Iran. *See* pp. 78–80 & 91–98, *supra.* Numerous commentators have subsequently attempted to evaluate the lessons of the Hostage Crisis, focusing, *inter alia,* on the effectiveness of the trade sanctions imposed, the efficacy of the extraterritorial application of the assets control regulations, and the breadth of the President's authority under IEEPA. *See, e.g.,* Feldman, *Implementation of the Iranian Claims Settlement Agreement,* in Private Investors Abroad—Problems and Solutions in International Business in 1981, at 75 (1981); Trooboff, *Implementation of the Iranian Settlement Agreements—Status, Issues, and Lessons: View from the Private Sector's Perspective,* in *id.* at 103.

Pursuant to the Algiers Accords, more than half of the 49 United States banks holding nonsyndicated debts of the Bank Markazi Iran have reached settlements in an amount totaling approximately $1.4 billion, which have been paid from the $1.418 billion escrow account at the Bank of England. In the meantime, the national emergency declared on November 14, 1979, by Executive Order No. 12,170 continues. In December 1983, the Department of the Treasury amended § 535.504 of the IACR, 31 C.F.R. § 535.504 (1983), to continue in effect indefinitely that section's prohibition on any final judgment or order by a United States court disposing of any interest of Iran in any standby letter of credit, performance bond, or similar obligation. The prohibition was extended specifically to allow claims involving letters of credit to be resolved definitively by the Iran-United States Claims Tribunal.

The Iran-United States Claims Tribunal, which has recently completed two and one-half years of operation, remains perhaps the most tangible and lasting legacy of the Hostage Crisis. *See* President's Message to the Congress Reporting on Recent Developments Regarding Declaration of National Emergency with Respect to Iran, 20 Weekly Comp. Pres. Doc. 640–41 (May 3, 1984). Under the Accords, claims could be filed with the Tribunal no earlier than October 21, 1981, and no later than January 19, 1982. In toto, some 3,835 claims were filed, the great majority of them claims by United States nationals against Iran. Of these, 520 were claims for $250,000 or more (so-called "large claims") where prosecution of the claim is being handled by private counsel; another 2,782 so-called "small claims" for less than $250,000 are being handled by the Legal Adviser's Office of the Department of State. As of October 1, 1984, the Tribunal had issued a total of 151 partial or final decisions from its caseload of close to 4,000 cases, and 111 awards in favor of United States claimants, totaling approximately $306 million. *See generally* Selby & Stewart, *Practical Aspects of Arbitrating Claims Before the Iran-United States Claims Tribunal,* 18 Int'l Law. 211 (1984); Stewart & Sherman, *Developments at the Iran-United States Claims Tribunal: 1981–1983,* 24 Va. J. Int'l L. 1 (1983).

As of October 1, 1984, the Tribunal has also adopted a "test case" approach for its cases involving small claims and has disposed of more than 25 percent of its pending claims of United States nationals involving larger amounts, leaving about 381 "large claims" on its docket. *See* Selby & Stewart, *supra,* 18 Int'l Law, at 251. As of this writing, about $720 million remains in the security account held at the Settlement Bank of the Netherlands, with some $350 million in the adjacent interest account. Although the Tribunal has made significant progress in arbitrating the claims before it, Iran has repeatedly sought to delay the arbitral process. It recently challenged the validity of a number of the Tribunal's awards to American claimants in the Dutch courts, then withdrew those challenges. Moreover, on September 3, 1984, two Ira-

nian arbitrators physically assaulted a third-country arbitrator in an attempt to exclude him from the Tribunal, resulting in a temporary suspension of Tribunal proceedings. A special chamber has been established to consider requests for withdrawals or terminations of claims and for awards on agreed terms until regular proceedings are reestablished. While it is still too early to determine conclusively what lasting precedents the Tribunal will establish in the field of international commercial arbitration,[38] at its present pace it seems likely to continue in existence for the rest of this decade.

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[38] A body of literature has already begun to appear, however, on some of the Tribunal's important decisions to date. *See, e.g.*, Selby & Stewart, *supra;* Stewart & Sherman, *supra;* Stein, *Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-U.S. Claims Tribunal,* 78 Am. J. Int'l L. 1 (1984); Jones, *The Iran-United States Claims Tribunal: Private Rights and State Responsibility,* 24 Va. J. Int'l L. 259 (1984); Lowenfeld, *The Iran-U.S. Claims Tribunal: An Interim Appraisal,* 38 Arb. J. 14 (1983); von Mehren, *The Iran-U.S.A. Arbitral Tribunal,* 31 Am. J. Comp. L. 713 (1983); Note, *The Standing of Dual Nationals Before the Iran-United States Claims Tribunal,* 24 Va. J. Int'l L. 698 (1984).