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Friendly Foes in the Iranian Assets Litigation

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For the nearly two years that Americans were held hostage in Tehran, United States courts presided over complex litigation brought to wrest assets from the revolutionary government of Iran. The litigants were varied and powerful: United States banks and corporations, Iranian banks and commercial ventures, and the governments of both the United States and Iran. On any given issue, unexpected coalitions of interests formed among the litigants. While the United States and Iran hurled insults at each other for months, lawyers for those governments were nearly always in accord on major issues raised in United States courts. And, while United States banks were prominent plaintiffs, they were, in fact, not wholly hostile to the Iranian defendants. Moreover, despite the litigation’s simple focus—money—difficult issues demanded litigants’ attention, issues that eventually required extraordinary review by the Supreme Court. This Article examines chronologically the role of the Iranian assets litigation in the broader resolution of the Iranian crisis. It considers in particular novel issues of procedure, unique substantive rulings, and the remarkably congruent interests of the United States government, the Iranian government, and the banking plaintiffs.

I. The Commercial Background

For thirty years after World War II, United States corporate interests flourished in Iran, as that nation used its burgeoning oil reserves to build an infrastructure of highways, telecommunications, and industry. The governments of Iran and the United States encouraged and protected the development of commercial relationships under formal accords, including the 1955 Treaty of Amity, Economic Relations, and Consular Rights.¹ In 1978, the close ties between the two governments began to unravel. Angry demonstrations against the Shah and against the United States erupted in Iran, including the torching and attempted

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seizure of the United States Embassy. In January, 1979, the Shah finally fled Iran, prompting the United States to evacuate American dependents and non-essential personnel. On February 1, 1979, the Ayatollah Khomeini returned to Teheran from exile in France and assumed power. His vow to end American commercial domination of Iran became one of the revolution's most powerful unifying themes.

As economic and political relations between Iran and the United States worsened, some prescient United States creditors, early victims of Iran's renunciation of commercial responsibilities, brought suit against Iranian defendants. The creditors' foresight served them well: the eventual deal between the United States and Iran recognized the validity of attachments and judgments acquired prior to the hostage-taking.

On November 4, 1979, a mob seized the United States Embassy in Teheran, taking Americans hostage. Simultaneously, Iran threatened to withdraw all of its funds from accounts in United States banks and their overseas branches and to transfer those funds to other countries.

II. The Freeze

On November 14, 1979, President Carter responded to Iran's threat by freezing all assets located in the United States, or in the possession of persons subject to the United States' jurisdiction, in which the government of Iran, its instrumentalities and controlled entities, and the Central Bank of Iran had an interest. The freeze included deposits in

3. Id., Jan. 17, 1979, § 1, at 1, col. 4; id., Jan. 31, 1979, § 1, at 1, col. 2.
4. Id., Feb. 1, 1979, § 1, at 1, col. 6; id., Mar. 1, 1979, § 1, at 3, col. 3.
6. See note 115 infra.
7. N.Y. Times, Nov. 5, 1979, § 1, at 1, col. 6.
8. Id., Nov. 15, 1979, § 1, at 1, col. 5. After the President had relied on that announcement as justification for freezing Iranian assets, however, the Iranian government advertised in U.S. newspapers that it did not intend to withdraw its assets and that it would honor all "legitimate" debts. E.g., Wall St. J., Dec. 3, 1979, at 10, col. 1.
United States banks and their foreign branches. The President found authority for his action in the International Emergency Economic Powers Act (IEEPA). This act had been interpreted to empower the President to freeze, but not to seize, assets; President Carter, therefore, could not vest title to the assets in the United States. Indeed, in announcing the freeze order, the White House seemed to recognize this limitation, noting that “[t]he purpose of this order is to insure that claims on Iran by the United States and its citizens are provided for in an orderly manner.” Despite that assertion, the United States proceeded in a fashion which virtually guaranteed that claims would not be handled in an orderly way.

To implement the President’s freeze order, the Treasury’s Office of Foreign Assets Control issued the Iranian Assets Control Regulations. Initially, the regulations prohibited any transfer or acquisition of interest in Iranian assets, including any attachment or other judicial process. On November 23, 1979, however, the Treasury issued a general license authorizing private litigants to institute attachment proceedings against Iranian assets, but neither to obtain, nor to execute a judgment.

One of the initial Iranian assets regulations also prohibited banks from using any frozen assets as payment on the enormous loans outstanding to Iran. Before the ink was dry, the Treasury amended that regulation to allow overseas branches or subsidiaries of domestic banks to set off their claims against Iran by debiting blocked accounts held by

11. Hermann, Iran: The Legal Battles for Loan Protection, Financial Times of London, Jan. 10, 1980, at 20, col. 3. The IEEPA was enacted in order to limit the President’s broad powers during periods of national emergency, powers originally granted by the 1917 Trading with the Enemy Act (TWEA), 50 U.S.C. app. § 1 et seq. (1976 and Supp. III 1979). The TWEA had allowed the President to vest title to foreign assets in the United States, i.e. to take title to foreign property. 50 U.S.C. §§ 5(b), 7(c) (1976 and Supp. III 1979). In the parallel section of the IEEPA, Congress deliberately deleted any reference to “vesting” title. See 50 U.S.C. § 1702 (Supp. III 1979); S. Rep. No. 95-466, 95th Cong., 1st Sess. 5, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 4540, 4543 (“Authority to vest property . . . would not be granted” as part of the President’s emergency authority “to control or freeze property transactions where a foreign interest is involved.”)
12. 15 WEEKLY COMP. OF PRES. DOC. 2117 (Nov. 14, 1979).
15. 31 C.F.R. § 535.504 (1980). The regulations had previously included the warning that any license was revocable by the Treasury Department. 31 C.F.R. § 535.805 (1980). One reason for Treasury’s licensing attachments was to permit creditors to establish priorities on the assets. In November, 1979, it was still hoped that the hostage crisis would be short-lived and that the assets would not be needed by the United States for bargaining. Tolerating this first step of litigation minimized the Executive Branch’s intrusion—then hoped to be temporary—on the judicial process and on private dispute resolution.
them for Iran.\textsuperscript{17} This power permitted the banks to engage in unchecked self-help by setting off frozen Iranian deposits in foreign branches against the banks' foreign and domestic claims against Iran. While banks could not assert set-off rights against Iran's bank and deposits in the United States, they could nonetheless seek to attach those deposits for cause. The banks created the required justification by declaring Iran's loans to be in default. As a result of the freeze, Iran was unable to pay interest on various loans, including one for $500 million extended by an eleven-bank syndicate. On Iran's failure to pay interest, Chase Manhattan, the syndicate agent, declared the entire loan to be in default. A domino effect followed, with loan after loan collapsing, partially as a result of cross-default clauses.\textsuperscript{18} With defaults declared by the major banking creditors of Iran, the public race to attach assets was on in earnest.\textsuperscript{19} The major banks, having the advantage of knowing the exact location of Iran's wealth,\textsuperscript{20} and forewarned that a freeze of assets was likely,\textsuperscript{21} won the race handily, and many banks filed suit before the end of November.\textsuperscript{22}

\begin{quote}
17. 31 C.F.R. § 535.902 (1980). Even without the amendment, "[w]ithin hours of the freeze" the banks had begun to set off Iran's debts against its deposits. \textit{Iranian Asset Settlement: Hearings before the U.S. Senate Comm. on Banking, Housing and Urban Affairs, 97th Cong., 1st Sess.} 66 (1981) [hereinafter cited as \textit{1981 Hearings}] (statement of Hans H. Angermueller). The speed with which the banks claimed set-offs may be attributable to prior knowledge of the freeze's imminence. The Chairman of the House Banking Committee later concluded that pre-freeze activities by government officials "provided an opportunity for experienced bank officials to deduce that an assets freeze was to take place in the not too distant future." \textit{Staff of House Comm. on Banking, Finance and Urban Affairs, 97th Cong., 1st Sess., Iran: The Financial Aspects of the Hostage Settlement Agreement V} (Comm. Print 1981) [hereinafter cited as \textit{Committee Print}].


20. Initially, the Department of the Treasury valued the blocked assets at about $8 billion: $1.8 billion held by the Federal Reserve Bank in New York, including $1.2 billion in Treasury securities and $6 billion in gold; $400 million on deposit with the United States Treasury for military equipment; $1 billion on deposit with domestic United States banks; more than $500 million on deposit in domestic non-bank U.S. companies, and $4 billion on deposit in foreign branches or subsidiaries of U.S. banks. Wash. Post, Nov. 20, 1979, at D7, col. 1. The banks, of course, had trade knowledge of many of the deposits.


22. \textit{E.g.,} Morgan Guar. Trust Co. v. The State of Iran, No. 79-6312 (S.D.N.Y., filed Nov. 26, 1979), \textit{consolidated sub nom.} New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co., note 33 infra (demanding $66 million due on two loans and three overdrafts). In addition, the banks engaged in major litigation in French, English, and German courts, principally over the extraterritorial effect of the President's freeze. \textit{See} Hoffman, \textit{The Iranian Assets Litigation, in Private Investors Abroad—Problems and Solutions in International Business} in 1980 329, 345-46, 356-60 (M. Landwehr ed. 1980). It was Citibank's involvement in German litigation that initiated discussions between the banks and Iran to settle all of the assets litigation. \textit{See} text accompanying notes 42-45 infra.
\end{quote}
III. The Race to Attach

Non-bank plaintiffs' suits then proliferated in numbers that the Executive Branch may not have envisioned. Within the first two weeks of the President's freeze, thirty suits were filed in the United States District Court for the Southern District of New York alone.\textsuperscript{23} New York was the locus of nearly all Iran's liquid assets, including gold and securities at the New York Federal Reserve Bank,\textsuperscript{24} and for that reason, the Southern District became the arena for most of the subsequent litigation. Nationwide, the assets were more diverse and included military aircraft,\textsuperscript{25} hypothetical blocked accounts,\textsuperscript{26} road-building equipment, and modular housing units destined for Iran.\textsuperscript{27}

This 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. Government officials possibly feared that the regulations' prohibition of final judgments would not withstand either the political pressure built up by litigated victories against Iran or judicial scrutiny of the propriety of the ban. If the prohibition were overturned, and the assets distributed, the United States would lose its primary bargaining chip for the safe return of the hostages.

Accordingly, the United States sought to dampen the litigation fires, particularly in New York. On January 10, 1980, the Legal Adviser of the Department of State, Roberts B. Owen, wrote Attorney General Benjamin Civiletti "strongly support[ing] a temporary stay of [court] proceedings in the interests of the foreign relations of the United States."\textsuperscript{28} The Legal Adviser asserted that the United States was in the

\textsuperscript{23} Legal Times of Wash., Dec. 10, 1979, at 1, col. 2.
\textsuperscript{24} Under \$ 4 of the Foreign Sovereign Immunities Act (FSIA), the property of a foreign central bank held for its own account is immune from attachment, unless this immunity is explicitly waived. 28 U.S.C. \$ 1611(b) (1976). Iranian defendants consistently represented that the gold at the Federal Reserve Bank belonged to the Bank Markazi, the central bank of Iran.
\textsuperscript{26} 491 F. Supp. at 1297-99. The plaintiff had a potential liability to an American bank, which had issued letters of credit running to the benefit of an Iranian bank. Under the Iranian assets regulations, 31 C.F.R. \$ 535.568 (1980), the plaintiff sought to create, and then attach, a hypothetical "blocked account" on its own books representing an obligation to the Iranian bank, a device that the court rejected.
\textsuperscript{28} Attachment to Suggestion of Interest of the United States, McCollough & Co. Inc. v. The Gov't of Iran, No. 80-406 (S.D.N.Y., filed Jan. 22, 1980) consolidated sub nom. New
midst of "an unprecedented international crisis," that it was making "the most diligent efforts . . . to bring about the release of the hostages," and that "[d]evonments in the Iranian assets cases now pend-
ing could complicate these continuing efforts of the United States government to reach a solution to the crisis." 29 Initially, the judge most occupied with the litigation, Judge Duffy in the Southern District of New York, acceded to the government's request for a stay. 30 He would later tire of the government's constant delaying tactics. 31

By March 5, 1980, one hundred and fifty-nine separate actions had been filed against Iran and Iranian entities, and certain Iranian defendants proposed consolidation of all cases before a multi-district litigation panel. 32 Thereafter the litigation goals of the United States and the Iranian defendants came to be nearly identical: to delay the lawsuits and retard the claimants' stalking of judgments. Not surprisingly, the United States supported the Iranians' request for multi-district consolidation. 33

For their part, most major banks offered no opposition to the joint Iran-United States strategy of consolidation and delay. 34 The U.S. government's interest in staying proceedings developed only after most major banks had asserted set-off rights and filed attachments. The official move to stay the litigation, moreover, coincided with the then evolving opinion of certain bankers that the Iranian crisis should be settled by private negotiation, not by public litigation. 35 The banks were in an enviable position. Not only did they hold "frozen" assets that could be placed in short-term investments at high yields or used to satisfy reserve requirements (freeing other assets for investment); their loans to Iran were secured by set-offs and attachments superior to those


29. Id.


31. See note 44 & text accompanying notes 75-78 infra.

32. Motion for an Order Transferring Related Action, In re Litigation Involving the State of Iran, No. 425 (J.P.M.D.L. May 7, 1980).


35. The bankers conveyed these impressions privately to government officials. See 1981 Hearings, supra note 17, at 66-67 (statement of Hans H. Angermueller).
of most plaintiffs. In short, with delay the banks made money. The banks had the added satisfaction of knowing that their claims were most likely to be paid should the litigation go forward: their loans were liquidated, their services were necessary should Iran desire to return to international markets, and their lawsuits were likely to survive sovereign immunity defenses by Iran.

Despite this congruence of interests, the Judicial Panel on Multi-district Litigation denied Iran's first request for consolidation of the cases. Undeterred, various Iranian commercial banks, other Iranian defendants, and the Islamic Republic of Iran all filed new motions for consolidation before a multi-district panel.

Once again, the United States supported Iran's strategy to transfer the cases, stating that "consolidation of these subgroups will also further the foreign policy and international relations interests of the United States." And again, the great majority of major United States banks sided with Iran and the United States, at least to the extent of supporting the consolidation of the syndicated loan cases. The banks' cooperation in May, 1980 with the litigation strategies of the U.S. and Iran stemmed in part from the banks' part in generating private negotiations with Iran. Citibank's attorney would later tell the Senate Bank-

36. During the freeze, banks holding Iranian assets were not required to pay interest on these accounts, despite a proposal by the Treasury Department that they do so. COMMITTEE PRINT, supra note 17, at 17-20. Under the final agreement struck with Iran, banks ultimately were required to transfer the funds to Iran, along with interest from November 14, 1979, at "commercially reasonable rates." 46 Fed. Reg. 26,477 (1981) (to be codified in 31 C.F.R. § 535.213(a)). However, the administrative interpretation of "commercially reasonable rates" allowed only modest interest to Iran: for time or savings deposits, the rate provided in the deposit agreement; for demand accounts, no interest; for other accounts, any rate agreed to by the bank and Iran. 46 Fed. Reg. 30,341 (1981) (to be codified in 31 C.F.R. § 535.440).


38. In re Litigation Involving the State of Iran, No. 425 (J.P.M.D.L. May 7, 1980) (movants failed to show sufficient commonality of facts).

39. Motion for an Order Transferring Related Actions, In re Litigation Involving the State of Iran (II), No. 435 (J.P.M.D.L. July 8, 1980).

40. Amicus Curiae Memorandum of the United States at 1, In re Litigation Involving the State of Iran (II), No. 435 (J.P.M.D.L. July 8, 1980).

41. Brief of Certain New York Plaintiffs in Support of Motion to Transfer, In re Litigation Involving the State of Iran (II), No. 435 (J.P.M.D.L. July 8, 1980) (plaintiffs were Bankers Trust, Citibank, Chase Manhattan, Irving Trust, and Manufacturers Hanover Trust).
ing Committee that, on May 2, 1980, Citibank, the banks' lead negotiator, was contacted by a German attorney acting on behalf of Iran and seeking an economic solution of the Iranian difficulties. With the United States government's blessings, Citibank met with Iranian officials, and over the next eight months discussed various settlement proposals. These private negotiations complemented Citibank's cooperative stance in the litigation. Spurning the coordinated efforts of the major banks, the United States, and the government of Iran, the multi-district panel once again rejected the motions for transfer.

Despite the continued requests for stays by the government, the litigation inched forward in at least eighteen judicial districts across the country. While the domestic litigation crept ahead, the banks continued their private negotiations with Iranian officials. One initial plan, drafted in May, 1980 and discussed for nearly six months, called for immediate payment in full by Iran of liquidated claims (including most

42. 1981 Hearings, supra note 17, at 68-72 (statement of John E. Hoffman, Jr.). The banks and the United States government had personal ties as well. One of the government's chief negotiators was Deputy Treasury Secretary Robert Carswell, formerly Hoffman's partner at Shearman & Sterling. See Nat'l L.J., Feb. 9, 1981, at 31, col. 1; at 32, col. 3. See also COMMITTEE PRINT, supra note 17, at 30-31, 39.

43. In re Litigation Involving the State of Iran (II), No. 435 (J.P.M.D.L. July 8, 1980) (order denying motion for transfer of related actions) (movants again failed to demonstrate sufficient commonality of facts).

bank loans) and settlement of unliquidated claims by means of a claims commission. Citibank informed the United States government of the progress of this plan, "Plan C," and of all other discussions held with Iran. Indeed, Citibank told Iranian officials that any private settlement would require United States government approval and that the United States would insist on the safe return of the hostages. At this point, however, Citibank’s negotiations did not derail the litigation.

IV. The Early Issues

As the number of plaintiffs suing Iran or Iranian entities swelled to about four hundred, courts turned to the merits. Even if the United States government had not persistently prevented the courts from considering substantive issues, litigants would have encountered serious difficulties in suing Iran. Several issues were particularly worrisome: did United States courts have jurisdiction over plaintiffs’ claims against the government of Iran, its agencies, and/or instrumentalities? Was the Islamic Republic of Iran responsible for the debts, contract breaches, or other liabilities of various Iranian instrumentalities, under an alter-ego or “Big Mullah” theory? Could United States courts issue prejudgment orders of attachment against assets in which Iran, its agencies, or instrumentalities had an interest? The United States and Iran often found themselves closely aligned in addressing these issues.

A. Jurisdiction Over Claims

The Foreign Sovereign Immunities Act of 1976 (FSIA), defines both the circumstances in which a foreign state will be entitled to sovereign immunity and the conditions under which parties can maintain lawsuits against foreign states in the courts of the United States. The FSIA codifies the "restrictive" principle of sovereign immunity. Under that principle, the immunity of a foreign state is restricted to suits involving a foreign state’s public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis).

45. See 1981 Hearings, supra note 17, at 69 (statement of John E. Hoffman, Jr.); Committee Print, supra note 17, at 31-33.
48. This distinction was first adopted by the Department of State in the Tate letter of 1952, see Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 DEPT STATE BULL. 984 (1954), and to this day it has generally been followed by United States courts and by the Executive Branch. See Sugarman v. AeroMexico, Inc., 626 F.2d 270 (3d Cir. 1980).
The FSIA denies jurisdictional immunity to a foreign state in any cause of action founded upon that state's commercial activity in the United States; or upon an act that the state performed in the United States in connection with its commercial activity elsewhere; or upon an act that the state performed outside the United States but which causes a direct effect in the United States. Litigants suing Iran or Iranian entities drew upon this provision of the FSIA for subject matter and personal jurisdiction.49

Plaintiffs' success in proving jurisdiction over Iranian defendants depended on the facts of each case. In *American International Group, Inc. v. Islamic Republic of Iran*,50 the court held that Iran's failure to compensate a group of insurance companies nationalized by Iran caused a "direct effect" within the meaning of the FSIA, § 1605(a)(2), thereby establishing jurisdiction in the United States.51 Similarly, numerous visits to the United States by an Iranian entity's agents to review and inspect the progress made on a contract was found to constitute sufficient minimum contacts in *Electronic Data Systems Corp. v. Social Se-
control Organization of the Government of Iran. To the same effect was *Behring v. Imperial Iranian Air Force*, where the court found that by maintaining a New York office, and by negotiating and executing a contract in New York that obliged plaintiff Behring to prepare goods subsequently shipped to Iran in Iranian Air Force cargo planes, the Air Force had waived its jurisdictional immunity. These decisions required rather straightforward analyses of the nature and extent of the defendants' conduct. To summarize, courts have found authority to act where the activity in question was commercial (*jure gestionis*), as opposed to governmental (*jure imperii*), and where it was sufficiently connected to the United States. For the most part, while the United States sought to delay rulings, it did not take substantive positions on jurisdiction, leaving plaintiffs to their one-on-one battles with Iran.

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54. *Id* at 390.

55. The United States, of course, could not ignore the FSIA's provisions for jurisdiction over foreign defendants. However, it did try to ensure that the Act would be narrowly construed. Prior to the seizure of the hostages, the United States filed an amicus curiae brief that asserted that the sovereign government of Iran and its non-commercial agencies were entitled to immunity from suit under the FSIA and the 1955 Treaty. The United States considered even Iran's commercial enterprises to be immune from prejudgment attachment under the Treaty of Amity. Brief of United States as Amicus Curiae at 24-26, *Electronic Data Systems Corp. Iran v. Social Security Organization of the Gov't of Iran*, 610 F.2d 94 (2d Cir. 1979). The day after the President's freeze order, the Justice Department reiterated the views set out in its *amicus* brief. Letter from Alice Daniel, Acting Assistant Attorney General, to A. Daniel Fusaro, Esq., Clerk of the Second Circuit Court of Appeals (Nov. 15, 1979) (on file with *The Yale Journal of World Public Order*). As the hostage crisis dragged on, however, the United States represented that it took a neutral position on sovereign immunity questions, in, for example, an affidavit of Treasury Secretary Miller attached to the Suggestion of Interest of the United States filed in all New York assets cases on October 16, 1980. Yet this supposed "neutrality" was belied by the government's own pleadings, which suggested that Iran indeed was entitled to sovereign immunity from suit and prejudgment attachment.

Moreover, the issues before this court, particularly those relating to the validity of the sovereign immunity defense, have an important bearing on U.S. relations with other countries, especially those of governments or central banks which have substantial holdings in the U.S. The U.S. Government encourages such holdings. In deciding where to hold their funds, governments and central banks are influenced by the availability of the sovereign immunity defense as insulation against attack. However, the danger of conveying inappropriate signals to the Government of Iran by any brief submitted by the U.S. Government prevents it from presenting its views to this or other courts in which important issues, such as the issue of Iran's sovereign immunity, have been raised.

B. Liability of the Central Government

Very few of the Iranian cases proceeded to a resolution of liability, but one liability question did arise repeatedly in pretrial skirmishes: the vicarious responsibility of the government of Iran for acts of Iranian instrumentalities, agencies, or controlled corporations.

Many plaintiffs argued that particular Iranian instrumentalities or banks had no separate juridical identity, because assets and liabilities of all Iranian agencies and instrumentalities had merged following the revolution. For example, in one case, the plaintiff sued the Atomic Energy Organization of Iran and twenty-eight Iranian banks. The ostensible basis for naming the Iranian banks as defendants was “a unity of interest and ownership between Iran and all other defendants . . . such that any individuality and separateness between these entities have ceased and each of said defendants is the alter ego of Iran.” In another case, the plaintiff sued not only several Iranian banks but all other agencies and instrumentalities of Iran as well. Plaintiff argued that all of these entities were jointly liable because “their corporate identities have been disregarded, their management joined and confused, and their assets intermingled so that each defendant is now the alter-ego of the other and all defendants now constitute a single governmental enterprise.”

In these cases, plaintiffs asserted that as a direct result of the Iranian revolution, and Iranian legislation passed since that revolution, Iranian banks and other instrumentalities had merged into one economic system. This approach by plaintiffs has been dubbed the “Big Mullah” theory and is analogous to the doctrine of piercing the corporate veil. At the heart of plaintiffs’ argument was that this “Big Mullah,” which had been created by the converging of various defendants’ interests, controlled all Iranian assets; for that reason it should be held responsible for all outstanding liabilities as well.


57. Id., Complaint at ¶ 10.
59. Id., Amended Complaint at ¶ 26.
60. 1981 Hearings, supra note 17, at 79 (panel discussion on “Black Hole” and “Big Mullah” theories).
61. Id. at 78-79. See notes 54-57 supra.
where the court ruled that the government of Iran was "inseparable" from the Central Insurance of Iran, an enterprise engaged in issuing reinsurance; the two defendants were found to be "alter-ego[s]." The "Big Mullah" approach was a desperate, but necessary, strategy for American plaintiffs, who had seen their Iranian contractual partners swallowed up by the revolutionary government.

C. Prejudgment Attachment Issues

The most heated battles in the early days of the Iranian assets litigation were fought over the plaintiffs' right to prejudgment attachment of Iranian assets. The FSIA provides that the assets of a foreign state, its agencies, and instrumentalities are immune from this type of attachment unless two conditions are satisfied: there must be an explicit waiver of immunity from prejudgment attachment, and the purpose of the attachment must be to secure satisfaction of a judgment that has been or may be entered. Many plaintiffs offered Article XI of the 1955 Treaty of Amity as a waiver of immunity from prejudgment attachment. Few succeeded. In Behring International, Inc. v. Imperial Iranian Air Force, the court acknowledged that the waiver provision in Article XI, ¶ 4 of the Treaty, waiving immunity from "taxation, suit, execution of judgment, or other liability," did not constitute an explicit waiver of immunity from prejudgment attachment. The court found instead that this section of the Treaty could be considered an implicit waiver of immunity, and that an implicit waiver is sufficient. The FSIA's requirement of an explicit waiver was not applicable, according to the Behring court, because the FSIA itself provides that it is "subject to existing international agreements," and is therefore subordinate to the previously negotiated Treaty. Using this approach, the Court determined that the Treaty's waiver provision should be interpreted using ordinary principles of contract construction, not by applying the narrow waiver requirements of the FSIA. Only one other court has agreed with the Behring

63. Id. at 526.
64. 28 U.S.C. § 1610(d) (1976).
65. See note 1 supra.
66. See note 49 supra.
68. Id. at 393.
70. 475 F. Supp. at 393.
71. Id. at 394.
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analysis.72

Most courts concluded that the Treaty of Amity was neither an explicit waiver of Iran's immunity from prejudgment attachment under the FSIA, nor, even assuming that the FSIA was subordinate to the Treaty, an implicit waiver under ordinary principles of contract construction. In Reading & Bates Corp. v. National Iranian Oil Company,73 Judge Duffy found no waiver of immunity in the 1955 Treaty. He later affirmed that interpretation in the leading Iranian assets case, New England Merchants National Bank v. Iran Power Generation and Transmission Co.74

While Judge Duffy found no waiver of immunity from prejudgment attachment in the Treaty of Amity, he accepted one of plaintiff's secondary arguments: that the President's action under the International Emergency Economic Powers Act (IEEPA)75 in issuing the Iranian Assets Regulations "unequivocally suspended" Iran's immunity from prejudgment attachment.76 Judge Duffy concluded that:

75. The IEEPA provides that when the United States is confronted "with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States," the President may declare a national emergency. 50 U.S.C. § 1701(a) (Supp. III 1979). On declaring such an emergency:

The President may . . .
(A) investigate, regulate, or prohibit—

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof;

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest;

by any person, or with respect to any property, subject to the jurisdiction of the United States.
76. New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co., 502 F. Supp. 120, 129 (S.D.N.Y. 1980), modified sub nom. Marschalk Co., Inc. v. Iran Nat'l Airlines Corp., 518 F. Supp. 69 (S.D.N.Y. 1981), rev'd, 101 S. Ct. 3154 (1981). The key word in Judge Duffy's opinion was "suspend." In effect, Judge Duffy ruled that the President's freeze only temporarily suspended immunity from prejudgment attachment, but did not confer any lasting right to assets. As foreign policy circumstances changed, therefore,
The Emergency Powers Act permits the President to nullify and void any rights and privileges a foreign nation may have with respect to assets within the United States. Thus, there can be no doubt that by enacting the Emergency Powers Act, Congress intended to permit the President to nullify and void or suspend a sovereign immunity from prejudgment attachment.\(^7\)

The Duffy opinion, in allowing plaintiffs to secure prejudgment attachments, was to be the non-banking plaintiffs’ greatest victory and, conversely, the United States’ outstanding defeat in the litigation. In this ruling, Judge Duffy not only rejected yet another request for a stay by the United States, but determined that the United States government’s own conduct in freezing Iranian assets and issuing regulations authorizing prejudgment attachments had allowed the litigious drama to play on. While since the freeze the United States had not explicitly urged the courts to deny prejudgment attachments, there was little doubt that the United States thought Iran immune.\(^8\)

V. Up the Appellate Ladder

Following these twin setbacks, the United States sought to intervene formally before Judge Duffy in order to seek appellate review of the denial of stay. Once again, the United States filed public and private declarations of the Secretaries of State and Treasury, asserting that further proceedings would risk prejudicing the United States’ efforts to resolve the hostage crisis.\(^9\) Although in November, 1980, he denied the motions, Judge Duffy’s colorful and caustic opinion gave the United States more than it asked for; he stated that the President could stay all the litigation without leave of court.

The only basis for intervention is a showing of some need by the

the Executive could and did retract his limited tolerance of private access to foreign assets. Under this ruling, the attachments had not immobilized the assets any more than had the freeze, but served only to establish the claimants’ pecking order.

\(^77\). *Id.* at 130. In contrast to Judge Duffy’s ruling, the court in E-Systems Inc. v. Islamic Republic of Iran, 491 F. Supp. 1294 (N.D. Tex. 1980), ruled that the Treasury regulations under the IEEPA had not displaced the FSIA grant of immunity from prejudgment attachment. The court concluded that “[i]f the Treasury Department wishes to abrogate the existing law of prejudgment attachment of assets of foreign countries as to Iran and its entities, it could do so in a clearer fashion. And because its authority is not without question, it must do so.” *Id.* at 1303.

\(^78\). *See* note 55 supra.

\(^79\). Judge Duffy, perhaps weary of the United States’ unrelenting filings, refused to accept the preferred in camera submissions, ruling that “[t]he previous such submissions did not contain anything which has not been printed in most newspapers and news magazines of general circulation.” New England Merchants Nat’l Bank v. Iran Power Generation and Transmission Co., No. 79-6380 (KTD), Mem. and Order at 4 n.1 (S.D.N.Y., Nov. 5, 1980) (denying leave to intervene).
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Executive Department to intervene. There is no such need. The situation whereby the President invoked his extraordinary powers under the International Emergency Economic Powers Act, 50 U.S.C. §1701 et seq., in effect, suspended all litigation involving the frozen Iranian assets. These lawsuits are permitted by a general license issued by the Executive, 31 C.F.R. Part 535. That license can be suspended by the Executive acting alone. Such a suspension would effectively stay all this litigation. Thus, the Executive has within its sole power the means to obtain all of the relief it now seeks. To request this court to stay proceedings for which the Executive Branch has issued a special license, revocable at will, is explicable only in terms that could not properly be expressed in a judicial forum.80

All parties promptly appealed Judge Duffy's ruling.81 The Iranian defendants sought review of Judge Duffy's orders denying immunity from prejudgment attachment and providing for substituted service by telex. Many claimants petitioned for reversal of Judge Duffy's ruling that under the FSIA the Iranian defendants were immune from prejudgment attachment.82

The United States sought review of Judge Duffy's denial of its request for a stay. As in the past, an odd alliance formed on that issue:

80. Id. at 2-3 (footnote omitted). In a subsequent opinion, Judge Duffy tempered his suggestion that the President could control the litigation. He observed that the plaintiffs' attachments obtained under the general license:

vested in these plaintiffs certain inchoate rights to the frozen Iranian assets. Although these rights may not now be fixed and certain, they are still rights in property. As a result, the cancellation of these rights by the executive department may only be accomplished by due process of law. It is not necessary for this court at present to delineate the possible methods by which the plaintiffs' rights may be cancelled within constitutional bounds.

New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co., No. 79-6380 (KTD), Mem. and Order at 5-6 (S.D.N.Y., Dec. 22, 1980) (order certifying questions for appeal) (footnotes omitted). Judge Duffy did find, however, that the Executive Department could suspend the attachment license "for a reasonable time." Id. at 6. The suggestion that the plaintiffs would be entitled to some "due process" from the government perhaps dissuaded the government from retracting the license as Judge Duffy had suggested in his November 5, 1980 order. See note 79 supra. Moreover as a political matter, the government was not then prepared publicly to terminate plaintiffs' rights without some concession from Iran. See COMMITTEE PRINT, supra note 17, at 18.


82. Judge Duffy eventually certified five questions for appeal: (1) Did the President's freeze regulations dissolve defendants' immunity from prejudgment attachment? (2) If so, did the President have power to do so under the IEEPA? (3) If so, is the IEEPA constitutional? (4) Are the defendants entitled to immunity from prejudgment attachment under the FSIA, the Treaty of Amity, and/or because of the severance of diplomatic relations between the United States and Iran? (5) Was service by telex order appropriate? New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co., No. 79-6380 (S.D.N.Y., Dec. 22, 1980) (order certifying questions for appeal).
Iranian defendants and most of the major New York banks informed the Second Circuit that they did not oppose the United States’ request for a stay. Indeed, the banks observed that a stay was appropriate while appeals were pending. This alliance was forged in part by the intense negotiations among the banks, the United States, and the Iranians in the previous seven months. In fact, on January 5, 1981, as the banks filed their memorandum with the court, they were on the eve of a marathon negotiating session with Iranian officials that culminated in a financial settlement highly favorable to the banks.

VI. A Deal is Struck

Just as President Carter’s term rushed to a close—and just as the initial briefs were filed in the Second Circuit—the United States, Iran, and the major banks struck a deal. In exchange for Iran’s release of the hostages, the United States agreed to quash private litigants’ attachments, to unfreeze the assets, and to ban further litigation. Banks received nearly complete satisfaction of their claims. For non-banking plaintiffs, however, the agreement was less gratifying. Stripped of their post-freeze attachments, these claimants at best could seek international arbitration; at worst, they would be relegated to Iranian courts. The deal bore a striking resemblance to “Plan C” drafted by Citibank in May, 1980.

As a leading business publication succinctly reported: the banks “appear to be the major winners in the settlement.” Of just under $8 billion in blocked Iranian assets transferred from the Federal Reserve Bank of New York, United States government accounts, and foreign branches of United States banks, $3.7 billion went immediately to pay off twelve large United States banks and their foreign partners in syndicated loans to Iran. An additional $1.4 billion was held in escrow by the Central Bank of Algeria to pay off unsyndicated loans and any disputes arising from the syndicated settlements.


84. See 1981 Hearings, supra note 17, at 70-72 (statement of John E. Hoffman, Jr.).

85. See text accompanying notes 42-45 supra; COMMITTEE PRINT, supra note 17, at 35.

86. BUS. WEEK, Feb. 2, 1981, at 14. The syndicated banks’ recovery was so impressive that Business Week observed: “Some of the banks may actually have come out of the inter-
The heart of the Iran-United States settlement is found in two documents: the “Assets Agreement” and the “Arbitration Agreement.” In the Assets Agreement, the United States agreed to prohibit all pending and future United States court actions involving claims of U.S. persons and institutions against Iran, to nullify attachments and judgments in those suits, and to direct those claims to international arbitration. The United States agreed to transfer to an escrow account Iran’s gold and securities stored at the Federal Reserve and all Iranian deposits and securities in overseas banking offices of United States banks. In addition, the United States agreed to “act to bring about the transfer to the Central Bank [of Iran], within six months, of all Iranian deposits and securities” in domestic United States banks. Some of those deposits were to be accumulated in a separate escrow account, until a balance of $1 billion was reached, and would be used solely to secure the payment of commercial claims against Iran. Iran agreed to maintain a balance of $500 million in that account until all arbitration awards were satisfied. Finally, the United States agreed to assist in Iran’s litigation against the former Shah’s assets and to ban hostages’ claims against Iran.

In the Arbitration Agreement, Iran and the United States agreed to establish an international arbitral tribunal whose awards would be enforceable worldwide. The signatories chose not to rely on already existing institutions, such as the United States Foreign Claims Settlement Commission or International Chamber of Commerce arbitration panels. Instead, they created a new body with exclusive jurisdiction over all United States nationals’ claims against Iran except those claims arising under contracts requiring that disputes be resolved solely by

88. Assets Agreement, supra note 87, ¶ B.
89. Id. ¶ 4 & 5.
90. Id. ¶ 6.
91. Id. ¶ 7.
92. Id.
93. Id. ¶ 12-14.
94. Id. ¶ 11.
95. Arbitration Agreement, supra note 87, Arts. II; IV, ¶ 3.
Iranian courts. The tribunal is to consist of at least nine members, three appointed by the United States, three appointed by Iran, and the remaining three appointed by mutual agreement. Panels are to decide cases on the basis of "respect for law," including principles of commercial and international law and contractual choice of law provisions.

Fearing that the agreements would not guarantee redress of all legitimate claims, some non-banking claimants announced their reluctance to forego litigation without further assurance that the arbitral tribunal would act promptly and fairly. Indeed, several aggressive non-banking plaintiffs foreswore the mandate to arbitrate and immediately challenged the settlement.

In *Electronic Data Systems Corporation v. Social Security Organization of The Government of Iran,* plaintiff EDS challenged President Carter's final decree, Executive Order 12,279, ordering the transfer of assets from domestic banking institutions to the Federal Reserve Board in preparation for their eventual transfer to Iran. EDS had filed suit and obtained a prejudgment writ of attachment well in advance of the November, 1979 freeze; and, prior to the conclusion of the United States-Iran agreement, EDS had won a judgment against Iranian defendants for approximately $20 million. On these unique facts the court preliminarily enjoined the Secretary of the Treasury from requiring domestic banks to transfer assets to the Federal Reserve Bank.

The Executive asserted that three separate sources gave the President the authority to issue Executive Order 12,279: the IEEPA, the Hostage Act, and Article II of the Constitution. The Court examined each of

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96. *Id.* Art. II, ¶ 1.
97. *Id.* Art. III, ¶ 1.
98. *Id.* Art. V.
99. In testimony before the Senate Foreign Relations Committee, one attorney estimated that total claims exceed $3 billion by a "significant margin" and therefore even if Iran maintains $1 billion in the arbitration fund, claimants could receive less than 33 cents on the dollar. Daily Executive Rep. (BNA), Feb. 18, 1981, at L-5.
these, and found them wanting, ruling that there was "a substantial likelihood that the Executive Order was not validly promulgated during President Carter's term of office." The Court found that the IEEPA did not authorize the President to vest himself with custody and control of the assets. The statutory language and legislative history authorized the President to "freeze but not seize" assets. In addition, the IEEPA could not be construed as reflecting congressional intent to grant the President power to nullify or void attachments or judgments, which are valid exercises of judicial power by Article III courts.

Similarly, the Hostage Act, characterized as "an aging statute," provided no power to nullify valid orders and judgments of the Judicial Branch.

Finally, the court ruled that the "naked [Article II] powers of the Presidency" did not permit the Executive Branch to strip plaintiff of its interest in the attached assets. Article II gives the Executive no authority to nullify a court's already rendered judgment, and the Executive usurped congressional power by interfering with the federal courts' exercise of jurisdiction authorized by Congress in the FSIA.

In addition, the Executive's action interfered with plaintiff's property interests in violation of the Fifth Amendment to the United States Constitution. In short, the Court ruled that the Executive Order interfered with the constitutional powers of the Judiciary and Congress and violated the constitutional rights of individuals. Other lower courts later criticized and distinguished the EDS holding.

Despite the commercial claimants' public criticisms of the accords, the EDS opinion, and the incoming Administration's initial hesitancy to ratify anything negotiated by President Carter, President Reagan adopted the agreement. The United States did, however, make a modest effort to placate ordinary commercial creditors with claims against Iran. On February 24, 1981, President Reagan issued Execu-

104. Id. at 1359.
105. Id. at 1361.
106. Id.
107. Id. at 1361-62.
108. Id. at 1362.
109. Id. at 1362-63.
110. Id. at 1364.
111. Id. at 1363-64. Accord, Behring Int'l, Inc. v. Miller, 504 F. Supp. 552, 558 (D.N.J. 1980) (U.S. might use assets attached by creditor to settle crisis, but creditor is entitled to compensation from the U.S.).
112. See text accompanying notes 119-126 infra.
tive Order 12,294, suspending—rather than dismissing outright—all claims in litigation that would be presented to the proposed arbitral tribunal. The suspension of a claim will be lifted, and the claim discharged, only if the tribunal determines either that a claimant is not entitled to recovery or is entitled to recovery and has been paid in full.

To enforce the agreements and the Carter and Reagan Executive Orders, the Office of Foreign Assets Control issued revised assets regulations. Among other provisions, the regulations withdraw all licenses for attachments, and nullify any right obtained by attachments received after November 14, 1979. In addition, the regulations implement President Reagan’s Executive Order suspending rather than dismissing claims pending the decision of the international arbitral tribunal. As a practical matter, the suspension has little significance: a litigant whose attachments are quashed finds slight solace in a suspended right to litigate against phantom assets.

VII. A Final Litigious Flurry

Before the dust could settle on the new regulations, litigants returned to court. On February 26, 1981, the United States filed renewed suggestions of interest throughout the nation, asking courts to follow President Reagan’s lead by suspending litigation and vacating attachments. The United States asserted that the President had plenary power to return foreign assets and to terminate private litigation under Article II of

115. 46 Fed. Reg. 14,337 (1981) (to be codified in 31 C.F.R. § 535.218(a)). However, the regulations seem to permit any creditor who obtained an attachment, injunction, or other interest prior to Nov. 14, 1979, when the initial freeze was imposed, to maintain that attachment. 46 Fed. Reg. 14,337 (1981) (to be codified in 31 C.F.R. § 535.218(b)). While this regulation should protect the attachment obtained by plaintiff in the EDS litigation, it does not appear to protect a litigant’s unsatisfied judgment. Indeed, the EDS plaintiff, despite its judgment, is obligated to appear before the claims tribunal. Electronic Data Systems Corp. v. Social Security Organization of the Government of Iran, Nos. 79-2641 et al. (5th Cir. Jul. 15, 1981). However, if a judgment has been satisfied, the claimant need not return the sums collected. For example, on March 4, 1981, the government publicly acknowledged that the plaintiff in Behring Int’l, Inc. v. Miller, 504 F. Supp. 552 (D.N.J. 1980), having reached a settlement with Iran prior to the November, 1979 freeze, was entitled to collect sums previously deposited by Iran in a settlement account. Daily Executive Rep. (BNA), Mar. 4, 1981, at L-6.
117. The Algerian accords, and regulations enforcing them, do grant some protection to those non-banking claimants with letter of credit problems. While those claimants must take their underlying contractual disputes to the tribunal, in the interim their Iranian counterparts cannot successfully demand payment through letters of credit running to their benefit. See 31 C.F.R. § 535.568 (1980) (allowing American claimants to set up blocked accounts to prevent American banks’ payment of letter of credit to Iranian entity); Itek Corp. v. First Nat’l Bank of Boston, 511 F. Supp. 1341 (D. Mass. 1981).
the Constitution, the IEEPA, and the Hostage Act. Private plaintiffs, in contrast, challenged the President's authority to vacate attachments and to transfer litigation from United States courts to international tribunals.

The plaintiffs contesting the accords won little support in the lower courts. In stark contrast to the EDS opinion, the district court in Chas. T. Main International, Inc. v. United States concluded that the President was empowered by the Constitution, the IEEPA, and the FSIA to reach an agreement with a foreign government requiring the removal of civil actions pending in United States courts to an international tribunal. The court avoided an in-depth analysis of pertinent authorities, stating that only the Supreme Court could resolve the weighty issues.

On appeal, the First Circuit wrote a more careful and detailed opinion, but reached the same conclusion: the hostage agreements, and the regulations enforcing them, were legal. The court ratified the rationale earlier suggested by Judge Duffy in the New York suits: the IEEPA authorized the President to freeze, although not seize, Iranian assets; it authorized the President to issue a revocable license allowing claimants to obtain qualified attachments; and it authorized the President to revoke any licensed attachment and to transfer the assets to the pre-freeze owner.

The First Circuit also upheld the President's suspension of United States nationals' claims against Iran. That power is derived, not from any Executive Branch authority to define the jurisdiction of courts, but from the President's historical authority, apparently found in Article II of the Constitution, to settle claims by American nationals against foreign governments. The court dismissed as premature the frustrated litigants' claims to compensation from the United States for the revocation of attachment licenses.

At least two other courts reached the same conclusions: the freeze of assets was lawful under the IEEPA; the conditional licensing of attachments and subsequent revocation were lawful under the IEEPA; and

118. See text accompanying notes 101-112 supra.
120. Id. at 1164.
122. Id. at 807-09.
123. Id. at 810-13.
124. Id. at 814-15.
the suspension of litigation was lawful under the President's Article II powers, left intact, by Congress, to settle claims of American nationals against foreign governments.\textsuperscript{125}

In \textit{Unidyne Corp. v. Government of Iran},\textsuperscript{126} the court also determined that both the Constitution and the IEEPA empowered the President to transfer foreign assets abroad and to nullify litigants' rights in those assets.\textsuperscript{127} The \textit{Unidyne} court appeared less confident, however, about the President's authority to terminate legal proceedings against a foreign nation and therefore it denied the government's motion to stay the action.\textsuperscript{128} Thus, while plaintiff \textit{Unidyne} lost its attachment, it could continue its suit; but this became a pyrrhic victory once the assets were returned to Iran as provided in the accords.

VIII. Supreme Court Resolution

Just as the plaintiffs had raced eighteen months earlier to obtain attachments, so did the assets litigation speed to the Supreme Court. A substantial number of plaintiffs were certain that the Southern District of New York litigation would present the test case, but the shuttling of issues between Judge Duffy and the Second Circuit slowed that court's previous furious pace.\textsuperscript{129}

\begin{footnotesize}
\textsuperscript{127} \textit{id.} at 709.
\textsuperscript{128} \textit{id.} at 710-11.
\textsuperscript{129} Following Judge Duffy's certification of issues on appeal on December 22, 1980, see note 79 \textit{supra}, the Second Circuit remanded the case to Judge Duffy to select one plaintiff out of the 90 consolidated cases and to make a clear record of the effect of the Algerian accords on that plaintiff. New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co., 646 F.2d 779 (2d Cir. 1981). Judge Duffy selected Marschalk Co. as plaintiff, and subsequently issued an 89-page opinion, Marschalk Co., Inc. v. Iran Nat'l Airlines Corp., 518 F. Supp. 69 (S.D.N.Y. 1981). Unlike his fellow jurists in the Unidyne, Chas. T. Main, American International, and Security Pacific cases, see notes 126, 121, 72 & 125 respectively, \textit{supra}, Judge Duffy concluded that the IEEPA did \textit{not} authorize the President to revoke licensed attachment, nor did the Constitution or any statute empower the President to suspend claims and transfer them to the international tribunal. Moreover, Judge Duffy ruled that under the Fifth Amendment, claimants were entitled to compensation for the government's taking of their claims and attachments. Judge Duffy's conclusions were surprising, in light of his earlier opinion suggesting that the government could freely revoke the licensed attachments. See note 80 \textit{supra} and accompanying text. The day after Judge Duffy issued his opinion, the major banks asked the Second Circuit, which had retained jurisdiction over the appeals, to certify the case to the Supreme Court because the Supreme Court had granted certiorari in another Iranian assets case, Dames & Moore v. Regan, 101 S. Ct. 3182 (1981). The Second Circuit promptly certified three questions to the Supreme Court for review: the legality of suspending claims, the legality of nullifying attachments; and the claimants' eligibility for compensation from the government. The Supreme Court, having already decided Dames & Moore v. Regan, 101 S. Ct. 2972 (1981),
\end{footnotesize}
Instead, a West Coast litigant bypassed review by the court of appeals and sought an extraordinary writ of certiorari. The Supreme Court granted the extraordinary writ and set the case for oral argument on June 24, 1981. In their Supreme Court pleadings, the major banks cemented their alliance with the governments of Iran and the United States. They supported without exception every provision in the Algerian accords, and urged the Supreme Court to approve the President's conduct. Eight days after oral argument, the Supreme Court resolved the litigation issues raised by the hostage crisis by adopting the banks' position.

Justice Rehnquist opened on a highly dramatic note. "The questions presented by this case touch fundamentally upon the manner in which our Republic is to be governed." He described the case as:

. . . one more episode in the never-ending tension between the President exercising the executive authority in a world that presents each day some new challenge with which he must deal and the Constitution under which we all live and which no one disputes embodies some sort of system of checks and balances.

After reciting the facts, Justice Rehnquist turned to the classic analysis of executive power set out in Justice Jackson's concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer. Under that approach, the authority of a President to act is determined, in large measure, by:

(a) any express or implied authorization to act from Congress
(b) congressional silence in the face of the questioned conduct, or
(c) any demonstrations of contravening congressional will regarding that conduct; in other words, as legislative support for the activity diminishes, the likelihood of unconstitutionality increases. In connection with the Iranian crisis, the Presidential acts freezing the assets, licensing attachments, revoking licenses, and transferring assets to Iran, fell

responded to the three certified questions by citing to that opinion: the suspension was lawful; the nullification was lawful; and there was no taking by nullifying attachments. The question of a taking by suspending claims was dismissed. Iran Nat'l Airlines Corp. v. Marshalk Co., Inc., 101 S. Ct. 3154 (1981). In the end, despite Judge Duffy's heroic labors over the nearly two years of litigation, his final legal analysis was rejected by the Supreme Court.

134. 101 S. Ct. at 2977.
135. Id. at 2978.
within the IEEPA's grant of authority.  

With respect to the suspension of claims, Justice Rehnquist turned to the second level of Justice Jackson's analysis: a "zone of twilight" where there is no congressional authorization but at least a hint of congressional acquiescence.  Though neither the IEEPA nor the Hostage Act could be construed as clear support for the suspension of claims, each conveyed a sense of congressional acquiescence in the President's conduct. The President historically has settled claims of United States nationals against foreign governments, and both Congress and the Supreme Court have supported particular settlements reached in the distant and near past. Although Respondents argued that the FSIA, enacted in 1976, expressed a congressional policy at odds with broad claims settlement powers, the Court saw no contradiction. Justice Rehnquist found that the FSIA has no bearing on the President's authority to settle international disputes, but speaks to a wholly separate issue, that of sovereign immunity. In short, ruled the Court, the President's Article II "Executive power," understood in terms of a tradition of congressional recognition of settlement authority, permitted the suspension of claims.

IX. Conclusion

The courtroom battle for Iran's assets has now waned. At the conclusion of the Algerian accords, the United States banks retired from the front, and all other litigants retreated in the face of the Supreme Court's opinion. While the litigious assault on Iran's assets has

137. 101 S. Ct. at 2982-84. For a discussion of the relevant sections of the IEEPA, see note 75 supra. The Court cited Propper v. Clark, 337 U.S. 472, 493 (1949) as allowing the President "to maintain the foreign assets at his disposal for use in negotiating the resolution of a declared national emergency." 101 S. Ct. at 2984 (1981). However, Propper arose under the Trading With the Enemy Act (TWEA), which, unlike the IEEPA, authorized the vesting of title in the President. See note 11 supra.
140. 101 S. Ct. 2984-86.
141. Id. at 2986-88.
142. Id. at 2989-90.
143. Id. The Court concluded that the question of whether the suspension was a taking was not ripe for adjudication. Id. at 2991. However, it was not premature to direct claimants to the Court of Claims should any claimant believe a taking had occurred because of the suspension. Id. at 2992. The Court clearly ruled that no taking had occurred because of the revocation of the attachments. Id. at 2984 n.6.
144. The banks were quick to indicate their support for the Algerian accords. In their
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abated, however, the legal issues raised by the Iranian assets litigation are sure to affect both United States and international jurisprudence. In addition, the history of this litigation and the bankers' own post-mortems\textsuperscript{145} demonstrate the powerful role played by financial institutions in the resolution of international disputes.

appellate briefs, filed in the New York cases, the major banks announced that "other parties" will adequately brief the arguments on the legality of the United States-Iran agreements. However, they also noted: "... the [United States] Suggestion of Interest has forcefully set forth the legal bases which are asserted in support of the actions taken by the executive branch." Brief for Certain Plaintiff-Appellee Banks at 13, New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co., 646 F.2d 779 (2d Cir. 1981), note 33 \textit{supra}. In the Supreme Court, the banks gave full public support to the accord. \textit{See} text accompanying notes 131-33 \textit{supra}.