ADVICE AND CONSENT: INTERNATIONAL EXECUTIVE CLAIMS SETTLEMENT AGREEMENTS

D. CHRISTOPHER OHLY*

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such authority plus the very delicate plenary and exclusive power of the President, as the sole organ of the federal government in the field of international relations. . . .[1]

—Justice George Sutherland

[I]t was understood by all to be the intent of the [Treaty] provision to give that power the most ample latitude—to render it competent to all the stipulations which the exigencies of national affairs might require, competent to the making of treaties of alliance, treaties of commerce, treaties of peace, and every other species of convention usual among nations . . . . And it was emphatically for this reason that it was so carefully guarded; the cooperation of two-thirds of the Senate, with the President, being required to make any treaty whatever.[2]

—Alexander Hamilton

Executive agreements have increasingly become the medium of international agreement by the United States with other sovereign powers.[3] Indeed, such agreements which effectively preclude the advice and consent of the Congress, have almost entirely replaced the treaty as the mechanism of international con-

* Associate with the firm of Melnicove, Greenberg, Kaufman & Weiner, Baltimore, Maryland. A.B., Johns Hopkins University; J.D., University of Virginia.

1. United States v. Curtiss-Wright Corp., 299 U.S. 304, 319-320 (1936).

2. A. Hamilton, Letters of Camillus, cited in R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 143-44 (1974) [hereinafter cited as BERGER].

3. *See* 14 WHITEMAN, DIGEST OF INTERNATIONAL LAW 210 (1970) [hereinafter cited as WHITEMAN]; J.N. Moore, *The Roles of Congress and the President in Foreign Affairs*, 7 INT'L LAWYER 740 (1973) [hereinafter cited as J.N. Moore].

cord in many substantive areas, and have become an "indispensible tool of foreign relations."[4] Even ardent advocates of the assertion of congressional authority in the international agreement-making process have suggested that, "no one has doubted that the President has the power to make some 'sole' executive agreements . . ."[5] which may prevail "even in the face of earlier congressional legislation."[6] Yet the influence of Congress, and particularly the Senate, in the international agreement-making process continues to decline, almost in direct proportion to the expansion of presidential power. This amplification of presidential power has occurred through the process of "usage,"[7] which seemingly bypasses explicit constitutional provisions.[8]

No serious effort has been made, since the introduction of the proposed constitutional amendment of Senator John W. Bricker in 1952,[9] to limit the capacity of the President to enter into executive agreements binding upon the United States without the advice and consent of the Congress, save for a few legislative efforts requiring the President to transmit executive agreements, entered into on his allegedly independent or congressional authority, to the Congress.[10] Still, the powers constitutionally granted to the Congress, to enact legislation imposing such limits and facilitating the exercise of the proper congressional role in the making of international agreements, "are not lost by being allowed to lie dormant, any more than non-existent

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4. *Id.*

5. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 177 (1973) [hereinafter cited as HENKIN].

6. *Id.* at 186. The assertion made is purely speculative, and qualified, in a footnote to United States v. Capps, 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955). *See also* M. McDougal and A. Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 304 (1945) [hereinafter cited as McDougal and Lans].

7. *See id.*; BERGER, *supra* note 2, at 88-100.

8. U.S. CONST. art. II, § 2, cl. 2. This section provides that the President

> [S]hall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.

9. S.J. Res. 130, 82d Cong., 2d Sess. (1952). This resolution is commonly referred to as the Bricker Amendment. *See also* S.J. Res. 1, 83d Cong., 1st Sess. (1953); S.J. Res. 1, 84th Cong., 1st Sess. (1955); *and compare* Sutherland, *Restricting the Treaty Power*, 65 HARV. L. REV. 1305 (1952), *with* Richberg, *Bricker Amendment and the Treaty Power*, 39 VA. L. REV. 753 (1953).

10. *See, e.g.*, S. 596, 92d Cong., 1st Sess. (1971) *enacted as* P.L. 92-403, 86 Stat. 619 (1972); S. 3475, 92d Cong., 2nd Sess. (1972).

powers can be prescripted by an unchallenged exercise."[11] The Congress, at least arguably, has the constitutional authority to enact legislation restricting the capacity of the President to enter into executive agreements without its advice and consent in several areas of national and international concern.

One such area is that of settlement of international claims by nationals of the United States against foreign governments. The claim settlement agreement is a vehicle employed by the federal government to pursue such claims; for example, such an agreement would be an appropriate procedure to procure from a foreign government reimbursement for property which it expropriated abroad from United States citizens. This article will direct itself to the proper constitutional power of Congress to check the presidential use of the executive agreement in this field.

I. THE CONSTITUTIONAL AUTHORITY OF CONGRESS

The Constitution grants to the Congress the power

> [t]o make all laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.[12]

While the power thus granted has but once been explicitly used by the Congress, at least in recent years, to enact legislation dealing with foreign relations of the United States,[13] this residual reservoir of congressional power places in Congress the power to legislate in all matters relating to the conduct of foreign relations by the national government.[14] Indeed, as the Supreme Court has stated:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but

11. United States v. Morton Salt Co., 338 U.S. 632, 647 (1950), *cited in* BERGER, *supra* note 2, at 87.

12. U.S. CONST. art. I, § 8.

13. *See* War Powers Resolution, § 2(a), 83 Stat. 555 (1973); Neely v. Henkel, 180 U.S. 109 (1901); Missouri v. Holland, 252 U.S. 416 (1920).

14. *See* report entitled THE LEGAL BASIS UPON WHICH CONGRESS MAY HAVE A RIGHT OF ACCESS TO THE TEXTS OF ALL EXECUTIVE AGREEMENTS, *in Hearings before the Subcommittee on National Security and Scientific Developments of the House Committee on Foreign Affairs on S. 596, H.R. 14365, and H.R. 14647*, 92d Cong., 2d Sess., at 24 (1972) [hereinafter cited as *House Hearings*].

> consistent with the letter and spirit of the constitution, are constitutional.[15]

The grant of power contained in the Necessary and Proper Clause thus permits the passage of legislation on any matter "within the scope of the Constitution,"[16] including any matters arising out of powers vested not only in the Congress, but also in "the Government of the United States, or in any Department or Officer thereof,"[17] so long as the means adopted by the Congress to regulate such matters is "legitimate"[18] and "consistent with the letter and spirit of the Constitution."[19] Hence, the Congress may, "should it be thought necessary . . . define and codify the powers of the government as a whole, including those of the President as its principal officer."[20] Even if the President is thought to have independent authority to enter into executive agreements settling outstanding claims of nationals of the United States, as some would assert,[21] the Congress would still, under

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15. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 159, 206 (1819).
16. *Id.*
17. U.S. CONST., art. I, § 8.
18. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 159, 206 (1819).
19. *Id.*
20. S. REP. No. 92-606, 92d Cong., 2d Sess., at 15-16 (1972), *cited in House Hearings, supra* note 14, at 25. *See also* Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).
21. *See* statement by John R. Stevenson, Legal Adviser, Department of State in *Hearings before the Senate Committee on Foreign Relations on S. 596*, 92d Cong., 1st Sess., at 73-75 (1971) [hereinafter cited as *Senate Hearings*], maintaining that the President is possessed of authority to settle such international claims pursuant to his power to "receive Ambassadors and other public Ministers", U.S. CONST. art. II, § 3, a power which Professor Berger cites Alexander Hamilton as "constrained to explain" as "more a matter of dignity than of authority" and "without consequence in the administration of government." BERGER, *supra* note 2, at 120, 153. Indeed, Professor Berger himself describes such assertions of presidential authority by suggesting:

> So flimsy a base offers shaky support for a claim to oust Senate participation in the making of such settlement agreements, considering particularly the confiscatory impact of such settlements on the reimbursement of claims of citizens.

Id. at 153.

The confiscatory impact of such settlements upon the claims of U.S. nationals is readily apparent from recent practice before the Foreign Claims Settlement Commission. Indeed, of ten recent claims settlement programs supervised by that commission pursuant to lump sum settlement agreements, the indemnification of claimants averaged only 35.47% of the amount awarded such claimants by the commission, and only 6.61% of the total amount claimed. *See* FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES, DECISIONS AND ANNOTATIONS at 11, 157, 158, 265, 297, 379, 457, 567 (1968). The problems of inadequate compensation are further magnified by the effects of delay in settlement, which

the authority granted by the Necessary and Proper Clause, be able to enact legislation regulating the exercise of that presidential power.[22] However, Congress need not specifically regulate presidential authority and conduct in the making of such agreements in order to accomplish that end. The Congress may alternatively enact appropriate legislation, independent of its regulation of presidential authority, to carry into execution powers specifically granted to it by the Constitution.

The Congress is endowed by the Constitution with the power to "regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."[23] Even as early as 1824, when the Supreme Court decided the landmark case of *Gibbons v. Ogden*,[24] it was recognized that the power thus granted to the Congress was

> [L]ike all others vested in congress . . . complete in itself. [It] may be exercised to its utmost extent, and acknowledges no limitations, other than [those] prescribed in the constitution. . . . If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.[25]

Since that decision was promulgated by the Court, vast expansions of congressional power to regulate interstate and foreign commerce have occurred, even to the extent of permitting the Congress to entirely prohibit foreign commerce in certain goods, if it finds such prohibition necessary or proper.[26]

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deprives claimants of their ability to put to productive use whatever compensation they may ultimately receive during often lengthy negotiations, and the effects of inflation. *See also* United States v. Belmont, 301 U.S. 324 (1937); United States v. Pink, 315 U.S. 203 (1941).

22. *See* discussion of presidential powers in text accompanying notes 45-83, *infra*.

23. U.S. CONST., art. I, § 8, cl. 3.

24. 22 U.S. (9 Wheat.) 1 (1824).

25. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 86 (1824).

26. *See* Buttfield v. Stranahan, 192 U.S. 470 (1904) (drugs); Weber v. Freed, 239 U.S. 325 (1914) (films of prizefighting); *and* Board of Trustees v. United States, 289 U.S. 48, 57 (1933), which suggests that:

> The Congress may determine what articles may be imported into this country and the terms upon which importation is permitted. No one can

In deciding the case of *Banco Nacional de Cuba v. Farr*,[27] the Second Circuit Court of Appeals suggested, while considering the applicability and constitutionality of the Hickenlooper Amendment,[28] that "it is clear that there is ample constitutional authority for an assertion of congressional power"[29] over the subject matter of the legislation, namely the taking of property by a foreign state, as such a taking is considered "an act of a foreign state in violation of the principles of international law."[30] As well, there is authority for the submission of such issues to the jurisdiction of federal courts for decisions on the merits.[31] Through the constitutional authority granted to Congress to regulate commerce, to make all laws which are necessary and proper for the execution of powers vested in the Federal government, and to "define and punish . . . Offenses against the Law of Nations,"[32] the court concluded:

> Since Congress thus clearly possesses a constitutional interest in the problem involved in this case, it was entitled to make its will known by means of a statute. In *Abra Silver Mining Co. v. United States*, . . . the same objection raised here, that a matter was within the President's exclusive power over our foreign relations, was disposed of by the Supreme Court with the statement that: "The subject was one in which Congress had an interest, and in respect to which it could give directions by means of a legislative enactment."[33]

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be said to have a vested right to carry on foreign commerce with the United States.

No case has been found, however, dealing with the power of Congress to prohibit foreign commerce from emanating from the United States, which might plausibly involve such "vested rights". Presumably such prohibition would be permissible as well, as long as consistent with Fifth Amendment Due Process rights. *Cf.* Smith v. Turner, 48 U.S. (7 How.) 301 (1849); Champion v. Ames, 188 U.S. 321, 373-74 (1903); United States v. Darby, 312 U.S. 100 (1941). *See also* Wickard v. Filburn, 317 U.S. 111 (1942); Katzenbach v. McClung, 379 U.S. 294 (1964).

27. 383 F.2d 166, *cert. denied*, 390 U.S. 356, *rehearing denied*, 390 U.S. 1037 (1968).

28. The Hickenlooper Amendment, 78 Stat. 1009, 1013 (1964), *as amended*, 22 U.S.C. § 2370(e) (1970).

29. Banco Nacional de Cuba v. Farr, 383 F.2d 166, 182, *cert. denied*, 390 U.S. 356, *rehearing denied*, 390 U.S. 1037 (1968).

30. S. REP. No. 170, 89th Cong., 1st Sess., at 19 (1965).

31. Banco Nacional de Cuba v. Farr, 383 F.2d 166, 182, *cert. denied*, 390 U.S. 356, *rehearing denied*, 390 U.S. 1037 (1968).

32. U.S. CONST., art. I, § 8.

33. Banco Nacional de Cuba v. Farr, 383 F.2d 166, 182, *cert. denied*, 390 U.S. 356, *rehearing denied*, 390 U.S. 1037 (1968) (citations omitted).

Though the case did not directly deal with the authority of the Congress to enact legislation concerning international claims, or the power of the President to independently enter into agreements for their settlement, it is clear that pursuant to the authority granted to the Congress by the Commerce Clause, the Congress may permissibly enact legislation relating to the settlement of international claims. Indeed, it has been suggested that "[f]rom the beginning the foreign trade of the United States was near the core of its foreign policy and the power to regulate commerce with foreign nations gave Congress a major voice in it."[34]

As is alluded to above, the Congress is likewise endowed by the Constitution with the power to "define and punish . . . Offenses against the Law of Nations."[35] While the authority thus granted has not often been used by the Congress,[36] it has been held that statutes enacted pursuant to the constitutional grant to define such offenses are constitutional.[37] Since conduct "attributable to a state and causing injury to an alien is wrongful . . ."[38]

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34. HENKIN, *supra* note 5, at 69.

35. U.S. CONST., art. I, § 8, cl. 10.

36. 18 U.S.C. § 1651, 62 Stat. 683, 774, provides:

> Whoever, on the high seas, commits the crime of piracy, *as defined by the law of nations*, and is afterwards brought into or found in the United States, shall be imprisoned for life. (emphasis added).

See also 4 WHITEMAN, *supra* note 3, at 648 *et seq.*; The Hickenlooper Amendment, 78 Stat. 1009, 1013, *as amended*, 22 U.S.C. § 2370(e) (1970).

37. *See, e.g.*, United States v. Smith, 18 U.S. (5 Wheat.) 71 (1820); United States v. Brig Malek Adhel, 43 U.S. (2 How.) 198 (1844) (declaring the definition of piracy as an offense against the law of nations, an appropriate exercise of congressional constitutional authority); *Ex parte* Quirin, 317 U.S. 1 (1942), in which the Supreme Court found that by sanctioning the jurisdiction of military commissions to try individuals for violating the laws of war, Congress appropriately exercised its authority to define and punish offenses against the law of nations.

38. *See* RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 164-177 (1965) [hereinafter cited as RESTATEMENT], especially § 165, which provides, in pertinent part:

> (1) Conduct attributable to a state and causing injury to an alien is wrongful under international law if it
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> (a) departs from the international standard of justice, or
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> (b) constitutes a violation of an international agreement.
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> (2) The international standard of justice specified in Subsection (1) is the standard required for the treatment of aliens by
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> (a) the applicable principles of international law as established by international custom, judicial and arbitral decisions, and other recognized sources, or, in the absence of such applicable principles,
>
> (b) analogous principles of justice generally recognized by states that have reasonably developed legal systems. . . .

See also, 8 WHITEMAN, *supra* note 3, at 697-706.

under the law of nations if it violates the "international standard of justice"[39] established for the treatment of aliens by states, the Congress might, pursuant to its power to "define . . . Offenses against the Law of Nations,"[40] constitutionally define the conditions under which the United States will regard as wrongful the conduct of a foreign state which is injurious, in some manner, to a national of the United States. By enacting necessary and proper legislation to define such conditions, the Congress might also punish such wrongful conduct by describing the conditions which a foreign state must meet in making reparations for such wrongful conduct before the United States will regard such conduct as fully retributed, and before which the United States will agree to a settlement of claims against foreign states arising out of such wrongful conduct.

The Congress is possessed of other powers, including the power to investigate the conduct of other branches of the government,[41] and the power to "dispose of . . . property belonging

39. *Id.* § 165(1)(a).

40. U.S. CONST., art. I, § 8, cl. 10.

41. No specific constitutional provision is to be found granting either house of Congress the power to make investigations and compel the production of documents of giving oral testimony. Nonetheless, the Supreme Court has recognized the power of the Congress to make such investigations, implying such power from the general vesting of legislative power in the Congress. *See* McGrain v. Daugherty, 273 U.S. 135 (1927); Watkins v. United States, 354 U.S. 178 (1957); *cf.* Kilbourn v. Thompson, 103 U.S. 168 (1881). Such investigatory powers as may vest in the Congress may be grounded upon legislation, at least arguably, enacted pursuant to the Necessary and Proper Clause to facilitate other congressional legislation, should Congress find such legislation necessary. It may itself be relied upon by the Congress to compel the submission of international executive agreements, pertaining to matters appropriately within the ambit of congressional concerns, by the President to the Congress. Indeed, such legislation has recently been considered by the Congress. *See Senate Hearings, supra* note 21; *House Hearings, supra* note 14. However, all such investigatory claims must confront opposing presidential claims to withhold such agreements grounded upon "executive privilege" or "national security".

In the recent Supreme Court decision in *United States v. Nixon*, 418 U.S. 683 (1974), the Court recognized that "executive privilege" to withhold certain documents from the judiciary has some support in the Constitution:

> Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of presidential communications has similar constitutional underpinnings. . . .
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> However, neither the doctrine of separation of powers, nor the need for confidentiality of high level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances. . . . Absent a claim of need to protect military, diplomatic or sensitive national security secrets, we find it very difficult to accept the argument that even the very important interest in confidentiality of presidential communications is significantly

to the United States,"[42] pursuant to which it may enact necessary and proper legislation concerning the settlement of claims by nationals of the United States against foreign sovereigns.

Though the Necessary and Proper Clause provides the Congress with a vast reservoir of power to enact legislation to carry into effect its own enumerated powers, as well as those of "the Government of the United States, or . . . any Department or Officer thereof,"[43] the question still remains whether the Congress may, by relying upon the Necessary and Proper Clause, or any of its other enumerated powers, enact legislation restricting the

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diminished by production of such material for *in camera* inspection with all the protection that a district court will be obliged to provide.

Id. at 705-706. The Court thus held that the President was required to produce the famous "Watergate Tapes" for inspection by the U.S. District Court for the District of Columbia.

While the decision in *Nixon* dealt with an assertion of "executive privilege" by the President when confronted with a judicial *subpoena duces tecum*, and is therefore not perfectly analogous, the decision is instructive about the existence of the privilege and its likely successful assertion in the face of congressional action. Since settlement agreements may be transmitted to the Congress under an injunction of secrecy, potentially the equivalent of *in camera* judicial inspection, and since the Congress is vested with strong constitutional authority in the field of foreign affairs (where courts are not so endowed), it may well be that the President could not justifiably advance even the few reasons enumerated by the court in *Nixon*, to prevent the transmission of international executive claims settlement agreements to the Congress. Indeed, the Congress has already enacted legislation which would require the transmission of such agreements to it, under appropriate injunctions of secrecy. *See* S. 596, 92d Cong., 1st Sess. (1971), *enacted as* P.L. 92-403, 86 Stat. 619 (1972). *See also* BERGER, *supra* note 2; *Hearings before the Subcommittee on the Separation of Powers of the Senate Judiciary Committee*, 92d Cong., 1st Sess. (1971).

42. U.S. CONST., art. IV, § 3, cl. 2. The power of Congress to dispose of any kind of property belonging to the United States "is vested in Congress without limitation." Alabama v. Texas, 347 U.S. 272 (1953), *cited in* 14 WHITEMAN, *supra* note 3, at 249. The power of Congress to dispose of property belonging to the United States is augmented by its power to appropriate funds and to pay debts. U.S. CONST., art. I, §§ 8, 9. At least arguably under international law, a claim by a national if the United States against a foreign sovereign is not "owned" by such national, but rather by the state of which he is a national, namely the United States, though this is most often viewed as a question of standing rather than substance in the advancing of an international claim. *See* RESTATEMENT, *supra* note 38, §§ 174, 211, 213. The Congress might, however, enact necessary and proper legislation defining such claims as the "property" of the United States, consistently with both international and constitutional law, subjected thereby to the "ownership" of the United States. Hence, such claims thus "belonging" to the United States, as intangible property, in the nature of a debt owed to the United States, would be subject to the disposal of the Congress under "all needful rules and regulations," U.S. CONST., art. IV, § 3, cl. 2, which the Congress may deem fit to provide through legislation.

43. U.S. CONST., art. I, § 8.

capacity of the President to enter into international agreements relating to the settlement of international claims. Each of these powers of Congress provides a means by which it may enact legislation relating to the subject matter generally, but each in turn must confront the conflicting claims of the President to enter into international executive agreements upon his own "inherent" powers, without interference by the Congress.[44]

II. PRESIDENTIAL AUTHORITY: POWERS AND LIMITATIONS

The presidential authority for entering into international executive agreements settling claims of nationals of the United States against foreign governments must be found in his capacity to recognize foreign governments, receive foreign ambassadors, in his capacity as the nation's Chief Executive or, perhaps, as the "sole organ of the federal government in the field of international relations . . ."[45] To constitutional authority other than that contained in these meager provisions, the President has not, and probably cannot, make any claim.[46]

The power of the President to receive foreign ambassadors would not, by itself, seem to grant to the President any independent authority to enter into international executive agreements. Indeed, the power thus granted has been regarded as more a "function rather than a 'power', a ceremony which in many countries

44. That Congress may authorize the settlement of specific claims or groups of claims by the President through executive agreements, either pursuant to statute or treaty, is nowhere doubted. *See* RESTATEMENT *supra* note 38, § 119, 120. It may even condition the conclusion of such agreements on the happening of certain contingencies. *See, e.g.*, Trade Expansion Act of 1962, 76 Stat. 872 (1962); 14 WHITEMAN *supra* note 3, at 223. The important question here is whether Presidential claims to independent "inherent" powers will permit the President to negotiate international executive claims settlement agreements without prior congressional authorization or in contravention of the express wishes of Congress specified in such legislatively imposed conditions (one of which might plausibly be the submission of such agreements to the Senate for its advice and consent pursuant to constitutional provisions for the making of treaties). *See* W. MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS 363 (1941), suggesting that a "case can be made for the President's constitutional authority to enter into and enforce any *bona fide* international agreement that is not in conflict with the Constitution regardless of congressional approval or *at least if Congress does not by law dissent.*" (emphasis added).

45. *See* United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936); and discussion in note 21 *supra*. *See also* RESTATEMENT, *supra* note 38, § 121.

46. This statement obviously ignores presidential claims of independent authority to withhold such agreements from the scrutiny of Congress based on "executive privilege". *See* note 39, *supra*.

is performed by a figurehead."[47] Yet in *United States v. Belmont*[48] the power granted to the President to receive ambassadors was expanded beyond its literal bounds to include the power to enter into executive agreements settling international claims. The Court, there speaking through Justice Sutherland, suggested in dicta that the recognition of the government of the Soviet Union, "the establishment of diplomatic relations, the [Litvinov] assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments."[49] Yet the Court felt compelled to say more and added:

> That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And, in respect of what was done here, the Executive had authority to speak as the sole organ of that government. The assignment . . . did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution [art. II, § 2], require the advice and consent of the Senate.[50]

Four years later, in *United States v. Pink*,[51] the Court, this time speaking through Justice Douglas, again decided a case involving the settlement of the claims of nationals of the United States against the government of the Soviet Union through an executive agreement. While continuing to recognize the settlement of such claims and the recognition of the Soviet Union as part of a single transaction, the Court found additional authority for the conclusion of such agreements:

> Recognition is not always absolute; it is sometimes conditional. . . . Power to remove such obstacles to full recognition as settlement of claims of our nationals . . . certainly is a modest implied power of the President who is the "sole organ of the federal government in the field of inter-

47. HENKIN, *supra* note 5, at 41. *See also* note 21, *supra*.
48. United States v. Belmont, 301 U.S. 324 (1937).
49. *Id.* at 330.
50. *Id.* *See also* United States v. Pink, 315 U.S. 203, 223 (1941).
51. *Id.*

> national relations." *United States v. Curtis Wright Corp.* . . . Effectiveness in handling the delicate problems of foreign relations requires no less. Unless such a power exists, the power of recognition might be thwarted or seriously diluted. No such obstacle can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs . . . is to be drastically revised."[52]

Hence, from the narrow grant of powers to the President to receive foreign ambassadors, it was "modestly implied" that the President has the power to enter into international executive agreements concerning the settlement of international claims during the process of recognition of a foreign government, without the express authorization of the Congress. That modest implication of power has since been relied upon, even though the statements made by the court in both *Belmont* and *Pink* were entirely unncessary to the instant decision.[53] The expansive view of presidential authority pursuant to his power to receive foreign ambassadors is thus unwarranted,[54] even if narrowed to the restricted sphere of the settlement of international claims.[55] Fur-

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52. *Id.* at 229 (citations omitted).

53. Both *Belmont* and *Pink* raised the question of whether an executive agreement settling international claims could prevail over contrary *state* law or policy. United States v. Belmont, 301 U.S. 324, 330-31 (1937); United States v. Pink, 315 U.S. 203, 223 (1941). Both cases were thus decided on the distribution of power between the states and the national government, and not the distribution of authority between the President and the Congress. Indeed, the Court in *Belmont* suggested that "complete power over international affairs is in the *national government* and is not and cannot be subject to any curtailment or interference on the part of the several states." United States v. Belmont, 301 U.S. 324, 331 (1937) (emphasis added). The court did not distinguish between the branches or "political departments" of the national government. *Id.* at 328.

54. It is interesting to note, therefore, that it was the authority of the President, and not that of the Senate, that was the last to be added to the Treaty Clause, and then only at the last moments of the Constitutional Convention. *See* BERGER, *supra* note 2, at 127. Hence, it might well be asserted that such an expansive reading of presidential powers in foreign affairs, as a totality, is unwarranted since:

> The framers hardly intended by the inconsequential function (of receiving ambassadors) to authorize the President to evade Senate consent to treaties for which they so painstakingly provided, particularly treaties of serious import.

BERGER, *supra* note 2, at 159-62. *See also* Reveley, *Constitutional Allocation of the War Powers Between the President and Congress: 1787-1788*, 15 VA. J. INT'L L. 73, 133-38 (1975).

55. BERGER, *supra* note 2, at 153.

thermore, neither *Belmont* nor *Pink* in any way *precludes* the Congress from asserting whatever constitutional authority it may possess to legislatively prescribe the conditions under which such agreements may be entered into by the President,[56] though both hold that the executive agreement therein considered did not require the advice and consent of the Senate.[57] Hence, if presidential authority is sufficient to preclude the exercise of any power by Congress over the making of international agreements concerning the settlement of international claims, it must be found in presidential powers other than those he may have pursuant to his power to receive foreign ambassadors.

It might plausibly be asserted that the authority conferred upon the President by the constitutional provision vesting executive power in him[58] is sufficient to effect such a preclusion of the legislative role.[59] However, such a conception of the executive power would do violence "to the clear intention [of the framers of the Constitution] to create an executive of rigorously limited powers, and the history of the words 'Executive power'."[60] In-

56. One of such conditions might well be the submission by the President of such agreements to the Senate for its advice and consent. *See* 14 WHITEMAN, *supra* note 3, at 234 *et seq.*

The last sentence of the cited portion of the decision in United States v. Pink, 315 U.S. 203 (1941), and accompanying text, is curiously ambiguous on this point. Nowhere is it specified by whom "such obstacles . . . placed in the way of rehabilitating relations between this country and another nation", *id.* at 229, might be placed, though presumably the phrase must refer to obstacles placed by enactment of *state* rather than *congressional* legislation. Further, no differentiation is made, linguistically at least, between "obstacles" which may be removed by the President (second sentence quoted) and other obstacles mentioned (last sentence quoted). Finally, nowhere is a description of the "historic conception of the powers of the President" provided, though presumably that conception of him must be the one found in United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936), and cited in the text. In the absence of a clear preclusion of congressional authority in the international executive claims settlement agreement making process, it must be presumed to remain intact.

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

58. U.S. CONST., art. II, § 1, cl. 1. *See also* HENKIN, *supra* note 5, at 41-43.

59. *See, e.g.*, McDougal and Lans, *supra* note 6, at 338, suggesting that the President might "disregard" statutes enacted by Congress which relate to subjects within the "President's special competence—related, for example, to the recognition of a foreign government or to an exercise of his authority as Commander in Chief. . . ." *Id.*

60. *See* BERGER, *supra* note 2, at 58-59, wherein he cites Meyers v. United States, 272 U.S. 52 (1926) (Holmes, J., dissenting), in which it is stated that "[t]he duty of the President to see that the laws be faithfully executed is a duty that does not go beyond the laws." *See also* Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952) (Douglas, J., concurring), which states that "the

deed, the executive power, being one specifically enumerated by the framers, did not "convey in bulk all conceivable power."[61] Rather, it required that the President faithfully execute laws necessarily and properly enacted by the Congress. Hence, the granting of the executive power to the President was merely "an allocation to the presidential office of the generic powers thereafter stated."[62] Since the conclusion of international agreements other than treaties, by and with the advice and consent of the Senate, is not included among such after enumerated powers, it certainly cannot be asserted that the executive power precludes the Congress from enacting legislation prescribing conditions for the settlement of international claims.

So, we come finally upon the powers of the President as "the sole organ of the federal government in the field of international relations. . . ."[63] These are commonly termed the President's foreign relations powers, and were first enunciated in the landmark decision of the Supreme Court in *United States v. Curtiss-Wright Corp.*[64] It is this power upon which many other assertions of presidential authority are founded.[65] The *Curtiss-Wright* case was one in which the court was called upon to make a determination of the question

> [W]hether the Joint Resolution [under consideration in the case] as applied to that situation, is vulnerable to attack under the rule that forbids a delegation of the lawmaking power [by the Congress to the President]. In other words, assuming (but not deciding) that the challenged delegation, if it were confined to internal affairs, would be invalid, may it nevertheless be sustained on the ground that its exclusive aim is to afford a remedy for a hurtful condition within foreign territory?[66]

In short, the question presented by the case was whether the *Congress* could properly *delegate to the President* legislative power which it possessed in the field of foreign relations. While

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power to execute the laws starts and ends with the law Congress has enacted." *Id.*

61. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

62. *Id.*

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

64. *Id.*

65. *See, e.g.*, United States v. Belmont, 315 U.S. 203 (1941); United States v. Pink, 315 U.S. 203, 223 (1941).

66. United States v. Curtiss-Wright Corp., 299 U.S. 304, 315 (1936).

deciding that the delegation in question was not improper or unconstitutional because of the essentially different character of federal power in foreign relations,[67] the Court added, in the course of its general discussion of the foreign relations powers of the federal government:

> In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to *speak* or *listen* as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of *negotiation* the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations . . ."[68]

While the Court then suggested that the authority thus granted to the President did not depend upon a legislative enactment, it failed to specify that the authority thus granted was only to "make Treaties"[69] and then with "the Advice and Consent of the Senate."[70] Likewise, the Court failed to note that the power to "speak or listen as a representative of the nation,"[71] even as "the sole organ of the nation in its external relations,"[72] did not necessarily imply that the President had a power to bypass constitutional provisions relating to the making of treaties, or to make international agreements binding the United States domestically, as well as internationally, through some inherent power of which he was possessed. Indeed, the Court properly noted that if such "inherent power" exists, "as necessary concommitants of nationality,"[73] it was "vested in the federal government"[74] and not in any individual branch thereof. Yet, from the President's power as the "sole organ of the federal government in the field of international relations,"[75] from his power to "speak or listen,"[76] vast assertions of presidential power in the field of international affairs

67. *Id.* at 319.
68. *Id.* (emphasis added) (footnotes omitted).
69. U.S. CONST., art. II, sec. 2, cl. 1.
70. *Id.*
71. United States v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936).
72. *Id.* (footnotes omitted).
73. United States v. Curtiss-Wright Corp., 299 U.S. 304, 315 (1936).
74. *Id.*
75. *Id.* at 320.
76. *Id.* at 319.

have been made,[77] the only justification for which has been the modification of the explicit language of the Constitution by "usage".[78] Such usage has long been regarded as an inadequate source of constitutional authority when confronted with other, more explicit constitutional provisions.[79] Indeed, the *Curtiss-Wright* case itself, as Justice Jackson properly noted in *Youngstown*, "intimated that the President might act in external affairs *without* congressional authority, *but not* that he might act *contrary to an Act of Congress*."[80] Hence, the President's supposed inherent powers as the "sole organ of the federal government in the field of international relations"[81] certainly cannot *preclude* congressional attempts at legislation concerning the capacity of the President to enter into international agreements settling the claims of nationals of the United States against foreign sovereigns. Nor, indeed, can such powers preclude any congressional legislation in the field of international relations.

The President may be seized of the power to make international agreements with or without the approval of Congress. Yet, the Congress cannot be precluded from enacting legislation conditioning the making of such agreements upon the happening of certain contingencies including, perhaps, the submission of such agreements to the Senate for its advice and consent. The question still remains, however, whether congressional legislation requiring the President to submit international agreements settling the claims of United States nationals against foreign sovereigns to the Senate for its advice and consent may prevail over presidential assertions of authority to refuse to comply with such legislation.

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77. *See generally*, McDougal and Lans, *supra* note 6; Moore, *Executive Agreements and Congressional-Executive Relations in Hearings before the Subcommittee on the Separation of Powers of the Senate Committee on the Judiciary on S. 3475*, 92d Cong., 2d Sess., at 149-60 (1972). *See also* 39 OPP. ATT'Y GEN'L 484 (1940).

78. See McDougal and Lans, *supra* note 6, at 304 *et seq.*; Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

79. *See* BERGER, *supra* note 2, at 90, 98 *passim*, in which Lord Denman is quoted as saying: "The practice of a ruling power in the state is but a feeble proof of its legality," and Justice Frankfurter is quoted as suggesting that: "Deeply implanted traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them."

80. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 636 n.2 (1952).

81. United States v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936).

III. ENABLING CONGRESSIONAL LEGISLATION

In 1952, the Supreme Court heard and decided what became known as the "Steel Seizure" case, *Youngstown Sheet & Tube Co. v. Sawyer.*[82] This case presented a novel question regarding the constitutionality of the seizure of the nation's steel mills pursuant to an executive order of President Harry S. Truman. The seizures were made without prior congressional authorization,[83] and hence the President was forced to rely upon power granted to him which could be "implied from the aggregate of his powers under the Constitution."[84] These included his powers as Commander-in-Chief, Chief Executive, and that implied from the constitutional provision requiring him to "take Care that the Laws be faithfully executed."[85] Finding all legislative power in the Congress, the Court suggested that "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[86] The fact of *presidential precedents* does not deprive the Congress of its

> [E]*xclusive* constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution "in the Government of the United States, or any Department or Officer thereof."[87]

The Court held the seizure of the steel mills in question to be unconstitutional.[88] While the case did not involve the specific question considered here, and while it is perhaps distinguishable from the instant case since it involved domestic rather than international affairs, the case was instructive as to the preclusion of the President from actions binding domestically upon the United States in the absence of congressional authorization. It was also instructive as to the prevalence of specific constitutional authority over implied powers when the two confront one another. Most apposite to the instant case is the concurring opinion of Justice Jackson, in which he stated:

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82. 343 U.S. 579 (1952).

83. As stated by the Supreme Court:

> There is no statute that expressly authorizes the President to take possession of property as he did here. Nor is there any act of Congress to which our attention has been directed from which such power can be fairly implied. Indeed, we do not understand the Government to rely on statutory authorization for this seizure.

Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 585-86 n.2 (1952).

84. *Id.* at 587.

85. *Id.*

86. *Id.*

87. *Id.* at 588-89 (emphasis added).

88. *Id.* at 589.

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. . . .
>
> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circircumstances, and in these only, may he be said . . . to personify the federal sovereignty. . . .
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system . . .[89]

The implications of this discourse are clear. The presidential capacity to enter into executive agreements in most, if not all, cases based upon the President's independent powers, is held only as a concurrent power, with Congress constitutionally able to act legislatively on the subject matter of such agreements. Certainly, in the instant case, presidential authority to enter into executive agreements settling the claims of United States' nationals against foreign governments is held concurrently with the powers of Con-

89. *Id.* at 635-38 (Jackson, J., concurring).

gress to regulate commerce with foreign nations,[90] to define and punish offenses against the law of nations,[91] and to make all laws necessary and proper for the execution of the functions of government.[92] In such cases, therefore, the powers of both the President and the Congress are in a "zone of twilight"[93] in which there is no clear definition of the prevalence of one over the other. In such cases, it may only be said that in the absence of congressional legislation, the President may act upon his own "independent presidential responsibility,"[94] the constitutionality of which must depend upon "the imperatives of events and contemporary imponderables."[95] Indeed this uncertain situation would seem to exist at present whenever the President enters into international claims agreements without prior congressional authorization.

The enactment of specific legislation, or the approval of certain treaties has, until now, been the means of resolving such uncertainties about presidential power to enter into international agreements settling the claims of nationals of the United States against foreign governments.[96] Yet the situation has arisen with increasing frequency in which the President does not seek such prior congressional approval. It is conceiveable that the situation may arise in which the President enters into specific claims settlement agreements not entirely in accord with the express or implied wishes of the Congress.[97]

The enactment of legislation by the Congress, therefore, concerning the entrance by the President into executive agreements settling the claims of nationals of the United States against a foreign government will have the dual effect of removing whatever uncertainty about the distribution of powers between the President and the Congress that may now exist, and of adding to the

90. *See* notes 23-34, *supra*, and accompanying text.

91. *See* notes 35-39, *supra*, and accompanying text.

92. *See* Section I, *supra*.

93. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952).

94. *Id.*

95. *Id.*

96. *See* 14 WHITEMAN, *supra* note 3, at 247, describing the practice of the Department of State "to obtain the approval of the Senate for the settlement of international claims." *See also,* RESTATEMENT, *supra* note 38, at 119-21, 131, 141-144.

97. *See* note 42, *supra*.

power of the President "all that Congress can delegate."[98] Presidential power, in such a situation "is at its maximum."[99] Hence, legislation which would require the President to submit such agreements to the Senate for its advice and consent would add to, rather than detract from, the power of the President to *negotiate* such agreements.[100]

To suggest that the Congress may not enact such legislation would force the President to rely on "his own constitutional powers minus any constitutional powers of Congress over the matter."[101] In this case, congressional powers are substantial. Such a claim of presidential authority "must be scrutinized with caution,"[102] for in effect it "disabl[es] the Congress from acting upon the subject."[103] Likewise, if the President chooses to enter into such executive agreements in contravention of the prior expressed wish of the Congress, as by refusing to submit such agreements to the Senate for its advice and consent when so required by statute, the power of the President must be "at its lowest ebb."[104]

In any event, the enactment of legislation by the Congress requiring the President to submit international agreements settling the claims of nationals of the United States against foreign sovereigns, in accordance with constitutionally specified procedures, will remove the entire subject from the "zone of twilight"[105] within which it is now condemned to reside. An example of legislation which would accomplish these goals, and remain within the enumerated provisions is set forth in the Appendix.

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98. Indeed, it was the fear of many that the recently enacted "War Powers Resolution" would constitute such a prior delegation of authority by the Congress to the President. *See, e.g., War Powers Legislation, 1973, Hearings before the Senate Committee on Foreign Relations on S. 440*, 93d Cong., 1st Sess. (1973).

99. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952).

100. As a practical matter, if recognition is usually the end sought in the settlement of international claims, *see* note 19, *supra*, and if such recognition is desired by *both* parties to such recognition negotiations, the foreknowledge that such claims settlement agreements must face the advice and consent of the Senate *may* make it easier to settle the outstanding claims of nationals of the United States against such government on terms favorable to such claimants. *See* note 21, *supra.*

101. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

The Supreme Court has not yet been presented with a situation in which an executive agreement entered into on the sole authority of the President is claimed to supervene a prior congressional statute which has an *international* effect. However, in *United States v. Capps*,[106] the court was given an opportunity to rule on the *domestic* effect of such an allegedly supervening executive agreement. In that case, the question was whether an executive agreement with Canada concerning the importation of potatoes was invalid because it conflicted with a prior statute enacted by the Congress under its power over commerce with foreign nations.[107] The Fourth Circuit Court of Appeals held that it was invalid, stating that:

> [T]he executive agreement was void because it was not authorized by Congress and contravened provisions of a statute dealing with the very matter to which it related and that the contract [in dispute in the case] relied on, which was based on the executive agreement, was unenforceable in the courts of the United States for like reason.[108]

Though some would suggest that the decision thus rendered takes "the narrowest view of the President's power,"[109] and that the decision by the Supreme Court to affirm on other grounds *neutralized* the views of the Fourth Circuit on executive agreements,[110] it seems clear that the *Capps* case must, in the absence of a contrary ruling by the Supreme Court, still stand for the proposition that a prior congressional enactment must prevail over presidential assertions of independent authority to bind the United States, as a matter of domestic law, through an executive agreement entered into upon his own independent powers.

Hence, it might well be suggested that under the *Capps* case, if the Congress enacted a statute requiring the President to sub-

106. 204 F.2d 665 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955).

107. The case, of course, was restricted to a consideration of its domestic invalidity. The *international* invalidity or validity of such an agreement entered into in conflict with a prior Congressional statute remains in question. *Cf.* RESTATEMENT, *supra* note 38, § 131.

108. United States v. Capps, 204 F.2d 658 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955). *See also* RESTATEMENT, *supra* note 38, § 144, which specifies that "An executive agreement made by the United States without reference to a treaty or an act of Congress . . . does not supercede inconsistent provisions of earlier acts of Congress." *Cf.* Little v. Barreme, 6 U.S. (2 Cranch) 99 (1804).

109. *See* HENKIN, *supra* note 5, at 181.

110. *Id.* at 186. *See also* note 50, *supra.*

mit to the Senate for its advice and consent any international agreement relating to the settlement of international claims, such a statute would prevail domestically over any assertion of independent presidential authority to the contrary. No such agreement, therefore, could become effective domestically, though it might become effective internationally, unless and until it was submitted to the Senate in compliance with both statutory and constitutional provisions. In sum, then, not only is the President unable to preclude the Congress from enacting legislation of the type described above, but such legislation must prevail as a matter of domestic law, over any executive agreement to the contrary.

IV. CONCLUSION

In conclusion, authority can be found for assertions of both presidential and congressional power over the making of international agreements relating to the settlement of international claims. Neither the President nor the Congress can, in all likelihood, practically exclude the other entirely from acting on such agreements in fields over which it possesses peculiar competence. Yet, in an ultimate contest between such conflicting assertions of power, it would be preferable, if not likely, for the legislative branch to prevail.

The words of Justice Jackson should again be remembered, however:

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.[111]

Indeed, the Constitution is woven out of the gossamer fibers upon which the fragile fabric of trust is based. Such fibers, it should be noted, may easily be stretched or torn beyond the ability of time to repair them. If any injunction of action is to be derived from this discussion it is merely that such internecine conflicts between the claims of the two political departments of our government should, if possible, be avoided, and that the letter and spirit of cooperation commanded by the Constitution should be followed.

111. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 635-38 (1952).

APPENDIX

THE INTERNATIONAL CLAIMS SETTLEMENT ACT OF 1975

A BILL

To help preserve the separation of powers and to further the Constitutional prerogatives of the Congress by providing for the transmittal to and review by Congress of certain international agreements other than treaties.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that

whereas the Constitution of the United States provides for a system of shared powers between the Legislative and Executive branches of the United States in the making of international agreements; and

whereas the Congress finds that its powers in the making of international agreements have been substantially eroded by the use of so called international executive agreements; and

whereas the Senate of the United States has thereby been prevented from performing its assigned duties under Article II, section 2 of the Constitution of the United States which provides that the President of the United States "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur;" and

whereas under Article I, section 8 of the Constitution of the United States, the Congress of the United States is granted the power to make all laws necessary and proper for carrying into execution not only its own powers but also all other powers vested by the Constitution of the United States, or in any department or officer thereof; and

whereas under Article I, section 8 of the Constitution of the United States, the Congress of the United States is vested with the power to define and punish offenses against the Law of Nations; and

whereas the Congress finds that a state is responsible, under the Law of Nations, for injury caused to an alien by conduct subject to its jurisdiction that is attributable to the state, since such conduct departs from the standards established by international custom or otherwise recognized by international law, or since such conduct constitutes violation of the provisions of an international agreement to which the United States is a party; and

whereas the Congress finds that the failure of a foreign state to make reparation, in prompt, adequate and effective form, to a national of the United States for injury caused to such United States national and attributable to the foreign state is an offense against the Law of Nations; and

whereas Congress finds it necessary and proper to the execution of its power to define Offenses against the Law of Nations and to preserve its Constitutional prerogatives in the making of international agreements, to define the circumstances in which international claims arising from an injury, caused by conduct subject to the jurisdiction of and attributable to a foreign state, to a national of the United States, may be settled or waived by the government of the United States; and

whereas the settlement of such international claims has a direct affect upon Commerce with foreign Nations, and among the several States, which power to regulate is vested in the Congress of the United States by Article I, section 8 of the Constitution of the United States; and

whereas the definition of the circumstances in which such international claims may be settled or waived will necessarily and properly facilitate the regulation by Congress of Commerce with foreign Nations and among the several States; therefore be it enacted as follows:

Section 1. This act shall be known as the International Claims Settlement Act of 1975.

Section 2. In furtherance of the provisions of the Constitution of the United States regarding the sharing of powers in the making of international executive agreements between the Executive and Legislative Branches of the government of the United States, any international executive agreement relating to the settlement or waiver of any international claim or claims by nationals of the United States against any foreign government, made on or after the date of enactment of this Act shall be transmitted to the Secretary of State, who shall then transmit such agreement to the Congress.

However, any such agreement the immediate disclosure of which would, in the opinion of the President, be prejudicial to the security of the United States shall instead be transmitted by the Secretary to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate written injunction of secrecy to be removed only upon due notice from the President. Each committee shall personally notify the Members of its House that the Secretary has transmitted such an agreement with an injunction of secrecy, and such agreement shall thereafter be available for inspection only by such Members.

Section 3. In the case of any international executive agreement relating to the settlement of any international claim or claims by nationals of the United States against any foreign government, where the aggregate value of such claim or claims made by nationals of the United States against such foreign government exceeds $100,000,

where the value of such claim or claims are determined in good faith by the nationals of the United States concerned, or are determined by the Foreign Claims Settlement Commission, and where such claim or claims arise out of a single transaction or occurrence or a series of related transactions or occurrences, such international executive agreement as is concluded in settlement or waiver of such claim or claims shall come into force with respect to the United States only by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur.

Section 4. (a) Except as otherwise provided in Section 3 of this Act, any international executive agreement concluded in settlement or waiver of any international claim or claims by nationals of the United States against any foreign government shall come into force with respect to the United States at the end of the first period of sixty calendar days of continuous session of Congress after the date on which the executive agreement is transmitted to Congress unless, between the date of transmittal and the end of the sixty-day period, both Houses pass a concurrent resolution stating in substance that both Houses do not approve the executive agreement.

(b) For the purpose of subsection (a) of this section—

(1) continuity of session is broken only by an adjournment of Congress *sine die*; and

(2) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the sixty-day period.

(c) Under provisions contained in an international executive agreement, the agreement may come into force at a time later than the date on which the agreement comes into force under subsections (a) and (b) of this section.

Section 5. (a) For the purposes of this Act, the term "international executive agreement" means any bilateral or multilateral international agreement or commitment, other than a treaty, which is binding upon the United States, and which is made by the President of the United States or any officer, employee, or representative of the Executive Branch of the government of the United States, whether such agreement or commitment is made pursuant to prior statutory authorization of Congress, pursuant to a treaty to which the United is a party, or pursuant to an assertion of independent authority by the President of the United States.

(b) For the purposes of this Act "concurrent resolution" means only a concurrent resolution of either House of Congress, the matter after the resolving clause of which is as follows: "That the Congress does not approve the executive agreement numbered ———— trans-

mitted to (Congress) (the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives) by the President on _____, 19___.", the blank spaces therein being appropriately filled, and the appropriate words within one of the parenthetical phrases being used; but does not include a concurrent resolution which specifies more than one executive agreement.

Section 6. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act or the application of such provision to any other person or circumstance shall not be affected thereby.