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# Prejudgment Attachment of Frozen Iranian Assets

After six months of revolution in Iran, Shah Mohammed Reza Pahlavi fled the country in January 1979 to exile in Mexico.<sup>1</sup> Ayatollah Ruhollah Khomeini, the "spiritual leader" of the revolt against the Shah, quickly returned from exile and assumed control of the government.<sup>2</sup> The new government was strongly hostile to the United States, which it viewed as a principal supporter of the Shah's rule. This anti-American sentiment reached a climax in late October and early November 1979, after the Shah was admitted into an American hospital for medical treatment. On November 4, 1979, militant Iranian students seized the American Embassy in Tehran and took its staff hostage,<sup>3</sup> apparently with the approval of the Iranian government. The government nationalized business assets located in Iran and threatened to withdraw all Iranian assets held in the United States, to repudiate Iranian obligations to the United States and its nationals, and to refuse payment for oil in dollars.<sup>4</sup> President Carter responded by ordering a wide range of economic sanctions against Iran, including an executive order freezing all Iranian assets held in the United States or under the control of persons subject to its jurisdiction.<sup>5</sup>

In the wake of these events, many private parties have brought suit in American courts against Iranian defendants, largely on contract grounds.<sup>6</sup> In light of the economic and political instabilities in Iran and the anti-American stance of the Iranian government, the plaintiffs in these actions have sought to protect their prospective interests in the

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1. N.Y. Times, Jan. 17, 1979, at 1, col. 6.

2. *Id.*, Feb. 1, 1979, at 1, col. 4.

3. Economic Sanctions Against Iran, Message to the Congress Reporting U.S. Actions, 16 WEEKLY COMP. OF PRES. DOC. No. 15, at 614 (April 14, 1980).

4. *Id.*

5. Exec. Order No. 12,211, 44 Fed. Reg. 26,685 (1980); Exec. Order No. 12,205, 44 Fed. Reg. 24,099 (1980); Exec. Order No. 12,170, 3 C.F.R. 457 (1979).

6. *See, e.g.*, *Chicago Bridge & Iron Co. v. Islamic Rep. of Iran*, 506 F. Supp. 981 (N.D. Ill. 1980) (breach of contract, conversion of equipment, and expropriation of funds); *American Int'l Group, Inc. v. Islamic Rep. of Iran*, 493 F. Supp. 522 (D.D.C. 1980) (expropriation of subsidiary insurance company); *E-Systems, Inc. v. Islamic Rep. of Iran*, 491 F. Supp. 1294 (N.D. Tex. 1980) (failure to pay for modification, repair, and improvement of two aircraft); *Reading & Bates Corp. v. National Iranian Oil Co.*, 478 F. Supp. 724 (S.D.N.Y. 1979) (conversion of oil rig); *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 383 (D.N.J. 1979) (failure to pay for shipping services). *See also* Comment, *Enjoining the International Standby Letter of Credit: The Iranian Letter of Credit Cases*, 21 HARV. INT'L L.J. 189, 248 (1980) (appendix of cases in which plaintiffs sought to enjoin payment by banks on standby letters of credit issued to guarantee the performance of contract between American companies and Iranian entities).

assets frozen by the executive order. In order to secure execution of potential judgments and to assert priority to the assets, the plaintiffs have petitioned the courts involved for prejudgment attachment of those assets. The availability of such attachments has emerged as a major issue in these cases.

Resolution of this issue depends on the judicial interpretation of a number of public documents, and the courts involved have reached different conclusions by different means. In *Behring International, Inc. v. Imperial Iranian Air Force*,<sup>7</sup> the court held that Iran had not explicitly waived its immunity from prejudgment attachment, as required by the Foreign Sovereign Immunities Act of 1976 (Immunities Act).<sup>8</sup> Observing that the Act made this immunity subject to preexisting treaties,<sup>9</sup> the court next looked to the 1957 Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran (Treaty of Amity).<sup>10</sup> Using general principles of construction, the court held that the *implicit* waiver contained in the treaty was sufficient to authorize prejudgment attachment, based on the conclusion that the language of the treaty evidenced a desire on the part of the United States and Iran "that they be treated as ordinary private parties in the other's courts."<sup>11</sup> The court found that the general requirements for prejudgment attachment had been satisfied, and ordered the attachments.

In *Reading & Bates Corp. v. National Iranian Oil Co.*,<sup>12</sup> the court held that the plaintiff had not met its burden of showing a need for prejudgment attachment, and on that basis denied the attachment petition. In dictum, the court also reached the issues presented in *Behring*. While agreeing with the *Behring* court that the plaintiff's claim of waiver under the Immunities Act was unfounded,<sup>13</sup> the court disagreed as to the waiver required under the Treaty of Amity. In the interest of consistent policy, the court stated that a waiver of immunity from prejudgment attachment must be explicit whether that immunity is provided by statute or by international agreement.<sup>14</sup>

In *E-Systems, Inc. v. Islamic Republic of Iran*,<sup>15</sup> the court held that the property that the plaintiff sought to attach was not subject to prejudgment attachment. The court also addressed the question of sovereign immunity, and determined that the Treaty of Amity could not be

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7. 475 F. Supp. 383 (D.N.J. 1979).

8. 28 U.S.C. §§ 1602-1611 (1976).

9. *Id.* § 1604.

10. 8 U.S.T. 899, T.I.A.S. No. 3853 (1957).

11. 475 F. Supp. at 395. *See also id.* at 395 n.29.

12. 478 F. Supp. 724, 727 (S.D.N.Y. 1979).

13. *Id.* at 728.

14. *Id.* at 729.

15. 491 F. Supp. 1294, 1299 (N.D. Tex. 1980).

read to permit prejudgment attachment, since the American practice at the time the treaty was signed was to grant foreign states absolute immunity from attachment, subject only to an express waiver.<sup>16</sup> Moreover, the court declined to interpret the regulations issued by the Treasury Department to implement the executive order freezing the Iranian assets as abrogating Iran's sovereign immunity, stating that if the Treasury Department had the authority to take such an action and intended to do so, it could and should have done so more clearly.<sup>17</sup>

Finally, in *New England Merchants National Bank v. Iran Power Generation and Transmission Co.*,<sup>18</sup> the court reaffirmed its earlier opinion in *Reading*, and held that Iran had made no explicit waiver of its immunity from prejudgment attachment, as required under the Immunities Act and the Treaty of Amity. The court went on, however, to hold that President Carter had suspended Iran's sovereign immunity, pursuant to his powers under the International Emergency Economic Powers Act (Emergency Powers Act),<sup>19</sup> in his executive order freezing Iran's assets.<sup>20</sup> Since sovereign immunity no longer applied, the court looked to state requirements for prejudgment attachment and, finding them to be satisfied, granted the attachments.<sup>21</sup>

This Comment analyzes the issues raised by these cases, and argues that prejudgment attachment of Iran's assets is improper under any of the grounds suggested. Part I examines whether Iran waived its immunity from prejudgment attachment under the Immunities Act or the Treaty of Amity. Part II analyzes whether the President had the

16. *Id.* at 1300.

17. *Id.* at 1303.

18. 502 F. Supp. 120, 127 (S.D.N.Y. 1980).

19. 50 U.S.C. §§ 1701-1706 (Supp. III 1979).

20. Exec. Order No. 12,170, 3 C.F.R. 457 (1980), *reprinted in* 50 U.S.C. § 1701, at 1596 (Supp. III 1979):

Pursuant to the authority vested in me as President by the Constitution and laws of the United States including the International Emergency Economic Powers Act, 50 U.S.C.A. sec. 1701 *et seq.*, the National Emergencies Act, 50 U.S.C. sec. 1601 *et seq.* and 3 U.S.C. sec. 301,

I, JIMMY CARTER, President of the United States, find that the situation in Iran constitutes an unusual and extraordinary threat to the national security, foreign policy and economy of the United States and hereby declare a national emergency to deal with that threat.

I hereby order blocked all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United States.

The Secretary of the Treasury is authorized to employ all powers granted to me by the International Emergency Economic Powers Act to carry out the provisions of this order. This order is effective immediately and shall be transmitted to the Congress and published in the Federal Register.

21. 502 F. Supp. at 134. Although theoretically unfrozen by the executive agreement resolving the hostage crisis, *see* notes 129-49 and accompanying text *infra*, they are still attached, and have not left the country.

power to suspend Iranian sovereign immunity pursuant to his powers under the Emergency Powers Act, and whether his executive order freezing Iran's assets should be read as invoking that power. Finally, Part III discusses the effect of the hostage agreement on the issue, and the various routes that the executive branch could take in implementing that agreement.

## I WAIVER OF IMMUNITY

Under the doctrine of sovereign immunity, every foreign nation recognized by the executive branch is immune from suit, attachment, and execution in the American courts. Before 1976, the doctrine was governed by individual treaties between nations<sup>22</sup> and by common law developed primarily by the United States Supreme Court.<sup>23</sup> The Federal Sovereign Immunities Act of 1976 was the first codification of the law of sovereign immunity, and is the controlling document on questions of immunity today.

Section 1609 of the Immunities Act provides that "the property in the United States of a foreign state shall be immune from attachment" in the American courts.<sup>24</sup> This grant of immunity, however, may be waived by the nation against which attachment is sought. The applicable provision with regard to prejudgment attachment is section 1610(d) of the Act. That section states that the property of a foreign state, used for a commercial activity in the United States, will not be immune from prejudgment attachment if two conditions are met: 1) the foreign state must *explicitly* waive its immunity; and 2) the purpose of the attachment must be to secure a potential judgment rather than to obtain jurisdiction.<sup>25</sup>

The Iranian assets sought to be attached in these cases are commercial in nature,<sup>26</sup> and the purpose of the attachments is to secure

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22. See, e.g., treaties cited at note 60 *infra*.

23. See note 81 *infra*.

24. 28 U.S.C. § 1609 (1976).

25. *Id.* § 1610(d).

26. For a discussion of the scope of the term "commercial activities," see notes 38-46 and accompanying text *infra*. While that discussion concerns the meaning of the term as used in the Treaty of Amity, it uses the Immunities Act as a guide. Under the Act, the nature of the property to be attached may be relevant in two ways. First, § 1610 establishes a waiver exception to the doctrine of sovereign immunity only for property "used for a commercial activity." Second, even if § 1610(d) is satisfied, specific property may be immune under § 1611 of the Act. For example, in *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 396, 407-08 (D.N.J. 1979), the court stated that the defendant had not proven that the property attached in that case was of a military character, and thus immune from all attachment and execution under § 1611(b)(2) of the Immunities Act, 28 U.S.C. § 1611(b)(2) (1976). If the defendant had proven a military character, no attachment would have been possible even if Iran had waived its immunity.

potential judgments.<sup>27</sup> The availability of prejudgment attachment under section 1610(d) of the Immunities Act thus depends on whether Iran explicitly waived its immunity from such attachment. No explicit waiver exists, either before or after the plaintiffs petitioned for attachment.<sup>28</sup> Thus, if section 1610(d) were the sole governing provision, prejudgment attachment would not be available.

Section 1609 of the Act, however, states that the rules and standards imposed by the Act are subject to international agreements in effect at the time of its enactment.<sup>29</sup> The Treaty of Amity is such an agreement, and is still in force. Therefore, where the treaty addresses the question of sovereign immunity, it rather than the Immunities Act governs.

Article XI, paragraph 4 is the only provision in the treaty that addresses sovereign immunity. It provides:

No enterprise of either High Contracting Parties, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or its property, immunity therein from taxation, suit, execution or judgment or other liability to which privately owned and controlled enterprises are subject therein.<sup>30</sup>

Thus, prejudgment attachment under the Treaty of Amity is available only if the foreign defendant is publicly owned or controlled and engages in commercial activity within the United States, and if the term "other liability" can be construed to include prejudgment attachment.

### A. *Status of the Defendants*

The first question, then, in determining whether plaintiffs may obtain prejudgment attachment under the Treaty of Amity is whether the defendants are publicly owned or controlled corporations, associations, or government agencies or instrumentalities. None of the courts involved in these cases has addressed this issue; however, with one exception, the named defendants fall within the treaty language. For example, the National Iranian Oil Company, defendant in the *Reading*

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27. Jurisdiction was based on other grounds. *See, e.g.,* *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. at 388-89 (finding jurisdiction under 28 U.S.C. § 1330(a) (1976)).

28. An explicit waiver may be by treaty, statement, contract, or failure to object. *See* note 57 *infra*. The courts that have addressed this issue have agreed that no such waiver was present. *See* *Reading & Bates Corp. v. National Iranian Oil Co.*, 478 F. Supp. at 782; *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 478 F. Supp. at 392-93.

29. 28 U.S.C. § 1609 (1976).

30. 8 U.S.T. at 909, T.I.A.S. No. 3853 at 909.

case, is a publicly owned corporation,<sup>31</sup> and the Imperial Iranian Air Force, defendant in *Behring*, is a "government agency or instrumentality."<sup>32</sup>

The single exception is the Islamic Republic of Iran itself, defendant in several suits.<sup>33</sup> The treaty language speaks in terms of the enterprises of the contracting parties (the United States and Iran), but makes no mention of the parties themselves.<sup>34</sup> A straightforward reading of the paragraph indicates that this was an intended omission. The absence of the contracting parties themselves is conspicuous, and could have been remedied easily if the parties had so desired.<sup>35</sup> Considering the care with which the paragraph was written, the only reasonable conclusion is that the United States and Iran did not waive their sovereign immunity as it applies to the nations themselves in that provision. Therefore, the waiver of immunity found in the Treaty of Amity does not apply where the plaintiffs seek attachment against the Iranian government itself rather than one of its enterprises, and section 1610(d) of the Immunities Act, with its requirement of an explicit waiver of immunity, governs. As Iran has made no such waiver,<sup>36</sup> attachments against the Islamic Republic of Iran must be denied or dissolved. Those cases in which the plaintiff named an Iranian enterprise as codefendant should not result in an automatic denial of all attachments, since the treaty's waiver provision would apply to that codefendant, and the plaintiff can still seek attachment of its assets.<sup>37</sup> Where the Republic of Iran is the only named defendant, or where it is the only defendant with attachable assets, however, the attachments must be denied at this point.

### B. Commercial Activity

The second issue is whether the activities of the Iranian defendants were commercial, industrial, shipping, or business in character. The Treaty of Amity does not define these terms; thus, it offers little guidance to the courts confronted with this issue. The Immunities Act,

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31. See *Reading & Bates Corp. v. National Iranian Oil Co.*, 478 F. Supp. at 725, 728 n.2 (defendant is a foreign corporation under § 1603(b) of the Immunities Act, 28 U.S.C. § 1603(b) (1976)).

32. See *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. at 386.

33. *E.g.*, *American Int'l Group, Inc. v. Islamic Repub. of Iran*, 493 F. Supp. 522 (D.D.C. 1980); *E-Systems, Inc. v. Islamic Repub. of Iran*, 491 F. Supp. 1294 (N.D. Tex. 1980).

34. See text accompanying note 30 *supra*.

35. See *E-Systems, Inc. v. Islamic Repub. of Iran*, 491 F. Supp. at 1303 (quoting Brief for United States as Amicus Curiae at 8-9, *Electronic Data Sys. Corp., Iran v. Social Sec. Org. of the Gov't of Iran*, 610 F.2d 94 (2d Cir. 1979)).

36. See note 28 and accompanying text *supra*.

37. *But see* notes 52-63 and accompanying text *infra*.

however, does define "commercial activities."<sup>38</sup> Since Congress, in enacting the Immunities Act, intended that the Act should govern if a prior existing treaty is silent on an issue that it addresses,<sup>39</sup> the courts should look to the statutory definition in determining the character of the defendants' activities.

Under section 1603(d) of the Immunities Act, the question whether an activity is commercial in character is to be resolved by reference to the nature of that activity, regardless of its purpose.<sup>40</sup> Thus, an activity is commercial in character if it is customarily engaged in for profit or if it could be performed by a private entity.<sup>41</sup> Therefore, even though undertaken for a public purpose, "a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity."<sup>42</sup>

The broad definition of commercial activity probably explains why the issue was raised in only one case, *E-Systems, Inc. v. Islamic Republic of Iran*.<sup>43</sup> Although the court in that case did not reach the issue,<sup>44</sup> the opinion shows that the United States, an amicus curiae, misperceived the scope of the commercial activity waiver. In a passage quoted by the *E-Systems* court, the United States had argued in another case that the treaty's waiver provisions apply only to "the property of publicly-owned or controlled commercial or business enterprises of the Contracting States."<sup>45</sup> The treaty, however, addresses commercial activities, not commercial enterprises. Thus, whether the enterprise itself is commercial or business in character is irrelevant; the only question is whether the activities engaged in by that entity are commercial or business in nature. *E-Systems'* contract to modify, repair, and im-

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38. 28 U.S.C. § 1603(d) (1976).

39. See H.R. REP. NO. 94-1487, 94th Cong., 2d Sess. 17, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6604, 6616: "To the extent such international agreements are silent on a question of immunity, the bill would control; the international agreement would control only where the conflict was manifest."

40. 28 U.S.C. § 1603(d) (1976) provides: "A commercial activity means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."

41. See H.R. REP. NO. 94-1487, *supra* note 39, at 16, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6615.

42. *Id.* Thus, a contract by a foreign government to buy cement in the United States is a commercial activity even though the cement may be used for military purposes, *National Am. Corp. v. Federal Repub. of Nigeria*, 448 F. Supp. 622 (S.D.N.Y. 1978), and even a contract entered into pursuant to an international cultural exchange program may be commercial in nature, *United Euram Corp. v. USSR*, 461 F. Supp. 609 (S.D.N.Y. 1978).

43. 491 F. Supp. 1294, 1303 (N.D. Tex. 1980).

44. *Id.* at 1303. The court's bases for stating that prejudgment attachment is unavailable generally against Iranian defendants is discussed at text accompanying notes 16-17 *supra*.

45. 491 F. Supp. at 1303 (quoting Brief for the United States as Amicus Curiae at 4, *Electronic Data Sys. Corp., Iran v. Social Sec. Org. of the Gov't of Iran*, 610 F.2d 94 (2d Cir. 1979)).



prove two aircraft owned by the Imperial Iranian Ministry of War was commercial in nature, even though in furtherance of Iran's national defense.<sup>46</sup> It therefore satisfies the second treaty requirement.

### C. *Within the United States*

The third issue is whether the defendants' commercial activities took place "within the territory" of the United States. In contract cases, this requirement is clearly met where the contract was to be performed in the United States.<sup>47</sup> The answer is not as clear, however, where the contract was to be performed outside the country. In those cases, the issue is whether the commercial activity of the defendants, within the United States but unrelated to the present claims, is sufficient to satisfy the territorial requirement.

Neither the Treaty of Amity's immunity provision nor the Immunity Act's prejudgment attachment provision directly addresses this question, and both differ from the Immunity Act's general jurisdictional provisions<sup>48</sup> in that they do not rest on the nexus between the actions giving rise to the claim and the United States.<sup>49</sup> The language of the treaty requirement, however, does provide some guidance toward resolution of this issue. Article XI, paragraph 4 draws no connection between the activities required for the waiver of immunity to apply and those underlying any particular claim. Rather, it states that no publicly owned or controlled enterprise of Iran shall claim or enjoy immunity if it engages in commercial or business activity within the United States.<sup>50</sup> Thus, it is reasonable to conclude that *any* such commercial or business activity will trigger this waiver.

The third requirement is satisfied, then, if the individual Iranian defendants engage in any commercial or business activity within the United States. This "doing business" standard should be easily met in most if not all of the frozen assets cases,<sup>51</sup> especially since the mere

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46. Even if the defendant had waived its immunity from prejudgment attachment, the property involved—the aircraft—might be immune under section 1611(b)(2) of the Immunities Act. See note 26 *supra*.

47. *E.g.*, *Chicago Bridge & Iron Co. v. Islamic Repub. of Iran*, No. 80-2864, slip op. at 9 (N.D. Ill., Nov. 12, 1980); *Electronic Data Sys. Corp., Iran v. Social Sec. Org. of the Gov't of Iran*, 610 F.2d 94 (2d Cir. 1979), *dismissed*, 616 F.2d 566 (1980).

48. 28 U.S.C. § 1330 (1976).

49. Whether the various courts have personal jurisdiction over the various defendants is a much more complex question involving wholly different factors including minimum contacts considerations. *E.g.*, *Texas Trading & Milling Corp. v. Federal Rep. of Nigeria*, Nos. 80-7703, *etc.* (2d Cir., April 16, 1981). But the FFIA, standing alone, cannot confer federal question jurisdiction upon the federal courts. *Verlinden B.V. v. Central Bank of Nigeria*, No. 80-7413 (2d Cir., April 16, 1981).

50. See text accompanying note 30 *supra*.

51. For example, in *Behring*, the fact that the defendant maintained offices in New York City should be sufficient to meet this standard. See 475 F. Supp. at 386, 387.

presence of assets in interest-bearing American bank accounts should constitute commercial activity.

D. "Other Liability"

If the three previous requirements are satisfied, the waiver of immunity embodied in the Treaty of Amity applies to the defendants, and they are subject to liability as set forth in the treaty. The treaty does not mention prejudgment attachment specifically, however; it refers only to taxation, suit, execution of judgment, and "other liability to which privately owned and controlled enterprises are subject."<sup>52</sup> The issue then becomes whether prejudgment attachment is included in "other liability." The courts involved have divided sharply on this issue. Some take the view that the treaty language indicates that the United States and Iran intended to be treated as ordinary parties in each other's courts.<sup>53</sup> Since ordinary defendants are subject to prejudgment attachment under certain circumstances,<sup>54</sup> they argue, Iranian defendants should be subject to it as well. Other courts<sup>55</sup> have held that other considerations preclude such a reading of the "other liability" language, and that prejudgment attachment cannot be permitted so lightly. This second, more restrictive position is correct.

A construction of "other liability" to include prejudgment attachment amounts, in essence, to a holding that Iran implicitly waived its immunity from such attachment in the Treaty of Amity. Such a construction conflicts with the American law on sovereign immunity and prejudgment attachment.

At the time the treaty was signed, foreign states were accorded absolute immunity from both prejudgment and postjudgment attachment in the American courts, even where the court involved found no jurisdictional immunity.<sup>56</sup> By comparison, the Immunities Act, while permitting a waiver of this immunity, draws a careful distinction between the waiver required with regard to prejudgment attachment and that

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52. 8 U.S.T. at 909, T.I.A.S. No. 3853 at 909.

53. *American Int'l Group, Inc. v. Islamic Repub. of Iran*, 493 F. Supp. 522, 525-26 (D.D.C. 1980); *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. at 395 & n.29 (also applying ordinary principles of statutory construction to find that "or other liability" shows that the specific language preceding it was of illustration, not limitation).

54. The availability of prejudgment attachment in individual cases is determined under state law. *See, e.g.*, N.Y. CIV. PRAC. LAW §§ 6201-6226 (McKinney 1980).

55. *New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co.*, 502 F. Supp. at 126-27; *E-Systems, Inc. v. Islamic Repub. of Iran*, 491 F. Supp. at 1300-02; *Reading & Bates Corp. v. National Iranian Oil Co.*, 478 F. Supp. at 728-29.

56. *E-Systems, Inc. v. Islamic Repub. of Iran*, 491 F. Supp. at 1300 & n.9 (citing *Del Bianco, Execution and Attachment Under the Foreign Sovereign Immunities Act of 1976*, 5 YALE STUDIES IN WORLD PUBLIC ORDER 109, 110-11 (1978)); H.R. REP. NO. 94-1487, *supra* note 39, at 27, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6626.

required for postjudgment attachment. A sovereign state may waive its immunity from postjudgment attachment either expressly or by implication, but must waive its immunity from prejudgment attachment expressly.<sup>57</sup>

This distinction is founded on solid policy considerations. Congress recognized that prejudgment attachment presents a greater potential for harrassing use than attachment in aid of execution, and therefore is more likely to strain America's relationships with foreign governments.<sup>58</sup> Thus, it required an explicit waiver of immunity from prejudgment attachment in order to ensure against an unwitting waiver of immunity from this irritating and potentially abusive remedy, while permitting an implicit waiver of immunity from postjudgment attachment, which is less potentially harmful. This policy is equally applicable to the interpretation of "other liability" in the Treaty of Amity. By requiring an explicit waiver of immunity from prejudgment attachment under the treaty, the courts would not only provide for a consistent policy,<sup>59</sup> but they would also establish a rule of construction that would further American foreign relations. The United States is a party to at least three other treaties that contain waivers of immunity that are substantially identical to that in the Iranian treaty,<sup>60</sup> and while an improvement in relations with Iran may not be a high public ambition at this time, the impact of a finding of waiver on our relations with the other nations also should be considered. Such a finding may have a precedential impact on the interpretation of the other treaties,<sup>61</sup> and therefore may have a negative influence on our relations with nations with which the United States is more friendly.

When combined with the general rules that prejudgment attachment is a harsh and extraordinary remedy that should be construed

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57. Compare 28 U.S.C. § 1610(a)(1) and (b)(1) (1976), with *id.* § 1610(d)(1). Explicit waiver may be in a treaty, contract, official statement, or failure to object, and may be made by the agency or instrumentality itself or by the foreign government involved. H.R. REP. NO. 94-1487, *supra* note 39, at 28, reprinted in [1978] U.S. CODE CONG. & AD. NEWS at 6627.

58. See *Reading & Bates Corp. v. National Iranian Oil Co.*, 478 F. Supp. at 728.

59. *Id.* at 729.

60. See treaties cited in *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. at 394 n.28. Treaty of Friendship, Commerce, and Navigation, November 28, 1956, United States-Korea art. XVIII, para. 2, 8 U.S.T. 2217, T.I.A.S. No. 3947; Treaty of Friendship, Commerce, and Navigation, April 2, 1953, United States-Japan art. XVIII, para. 2, 4 U.S.T. 2063, T.I.A.S. No. 2863; Treaty of Friendship, Commerce, February 2, 1948, United States-Italy art. XXIV, para. 6, 63 Stat. 2255, T.I.A.S. No. 1965.

61. This precedential impact may be severely limited, however. The Iranian crisis presented problems of an extraordinary nature and is virtually unprecedented in world history. Future courts, recognizing the unique circumstances surrounding the frozen assets cases, might restrict them to their facts.

strictly against the party seeking it<sup>62</sup> and that a waiver of immunity should not be implied lightly,<sup>63</sup> these considerations lead to the conclusion that even if a court has general jurisdiction under the Treaty of Amity to hear a suit against Iranian defendants, it cannot subject those defendants to prejudgment attachment of assets. The treaty requires an express waiver of immunity for attachment to be available, and Iran has made no such waiver in treaty or in contract. Thus, prejudgment attachment cannot be grounded on a theory that Iran waived its sovereign immunity under the Immunities Act or the Treaty of Amity.

## II

### SUSPENSION OF IMMUNITY UNDER THE EMERGENCY POWERS ACT

In *New England Merchants National Bank v. Iran Power Generation and Transmission Company*,<sup>64</sup> the court held that while prejudgment attachment was not generally invalid under the Immunities Act or the Treaty of Amity, it was available in this case because the President could and did suspend Iran's sovereign immunity pursuant to his powers under the International Economic Emergency Powers Act (Emergency Powers Act).<sup>65</sup> The Act gives the President the power to "nullify, void, prevent or prohibit . . . [the exercise of] any right, power or privilege with respect to . . . any property in which any foreign country or national thereof has any interest."<sup>66</sup> Since Congress passed the Emergency Powers Act after it passed the Immunities Act,<sup>67</sup> the court reasoned that it must have been aware of the earlier statute and have intended to give the President the power to abrogate or suspend the specific privilege of sovereign immunity.<sup>68</sup> In finding that the President had used this power, the court observed that sovereign immunity

62. *New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co.*, 502 F. Supp. at 127 (citing *Penoyar v. Kelsey*, 150 N.Y. 77, 79-80, 44 N.E. 788, 789 (1896)).

63. *United States v. New York Rayon Importing Co.*, 329 U.S. 654, 659 (1947) (contractual "consent . . . to waive the traditional immunity must be express, and it must be strictly construed"), quoted in *New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co.*, 502 F. Supp. at 126; Carl, *Suing Foreign Government in American Courts: The United States Foreign Sovereign Immunities Act in Practice*, 33 S.W.L.J. 1009, 1043 (1979).

The treaty may be analogized to domestic statutes restricting sovereign immunity, which the courts have uniformly held must be strictly construed. See *United States v. United Mine Workers*, 330 U.S. 258 (1947); *Pillsbury v. United Eng'r Co.*, 342 U.S. 197 (1952). See generally C. SANDS, 2A SUTHERLAND ON STATUTORY CONSTRUCTION, § 58.04 (4th ed. 1973).

64. 502 F. Supp. 120 (S.D.N.Y. 1980).

65. 50 U.S.C. §§ 1701-1706 (Supp. III 1979).

66. *Id.* § 1702.

67. Congress enacted the Immunities Act on October 21, 1976, Pub. L. No. 94-583, 90 Stat. 2892, and enacted the Emergency Powers Act on December 28, 1977, Pub. L. No. 95-223, 91 Stat. 1626.

68. 502 F. Supp. at 129-30.

means essentially that a foreign government can deal with its property as it pleases.<sup>69</sup> Since the executive order freezing Iran's assets<sup>70</sup> had the effect of denying this privilege, the President, in issuing it, in effect suspended Iran's sovereign immunity. Thus, the court said, the Treasury Department's subsequent regulation, promulgated to implement the executive order, which expressly permitted prejudgment attachment<sup>71</sup> was a valid exercise of administrative power, since it was consistent with the order.<sup>72</sup> The court therefore held prejudgment attachment to be valid.<sup>73</sup>

### A. Statutory Provisions

Whether the President has the power under the Emergency Powers Act to suspend Iran's immunity from prejudgment attachment was a question of first impression to the *New England Bank* court. Answering it requires the resolution of an apparent conflict between section 1609 of the Immunities Act and section 1701(a)(1) of the Emergency Powers Act.

Section 1609 states that "the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter."<sup>74</sup> Section 1610, a portion of which has already been discussed,<sup>75</sup> establishes various exceptions to this immunity,<sup>76</sup> and section 1611 specifies certain types of property that are immune from attachment in all cases.<sup>77</sup> Nowhere does the Immunities Act provide for presidential suspension or nullification of this immunity in time of emergency. In fact, section

69. *Id.* at 129.

70. *See* note 20 *supra*.

71. 31 C.F.R. § 535.418 (1980):

The general authorization for judicial proceedings contained in § 535.504(a) includes pre-judgment attachment. However, § 535.504(a) does not authorize payment or delivery of any blocked property to any court, marshal, sheriff, or similar entity, and any such transfer of blocked property is prohibited without a specific license. It would not be consistent with licensing policy to issue such a license.

72. 502 F. Supp. at 131.

73. *Id.* at 134 (subject to a case-by-case determination of plaintiff's likelihood of success on the merits).

74. 28 U.S.C. § 1609 (1976).

75. *See* notes 25-28 and accompanying text *supra*.

76. 28 U.S.C. § 1610 (1976). The statute permits prejudgment attachment only where the foreign state has expressly waived its immunity, and the attachment is sought to secure satisfaction of a judgment. *Id.* § 1610(d). It permits postjudgment attachment of property used in the United States for a commercial activity under five sets of circumstances, *id.* § 1610(a), and of any property held in the United States if the foreign state has expressly or implicitly waived its immunity, *id.* § 1610(b).

77. *Id.* § 1611. An example is property to be used in connection with a military activity, if that property is of a military character or is under the control of a military agency. *Id.* § 1611(b)(2).

1609 appears to establish an absolute immunity from attachment, subject only to the narrow exceptions embodied in sections 1610 and 1611. Thus, the Immunities Act appears to preclude presidential suspension or nullification of a nation's sovereign immunity.

On the other hand, section 1701(a)(1) of the Emergency Powers Act plainly permits the President to "nullify, void, prevent or prohibit" the exercise of "any right, power or privilege" of a foreign nation in any property interest.<sup>78</sup> Since sovereign immunity from prejudgment attachment is a right or privilege, this language appears to apply to the President's actions, permitting him to suspend Iran's immunity.

This apparent conflict in statutory language may be explained in part by the history and purposes behind the two Acts. Congress enacted the Immunities Act to achieve four major objectives. The first objective was to codify the "restrictive" theory of sovereign immunity, limiting that immunity to suits involving the public acts of a foreign state rather than its commercial or "private" activities.<sup>79</sup> The second was to ensure that the American courts apply this restrictive principle in the litigation before them, thus terminating the prior practice of looking to the State Department for the determination, in the form of "suggestions of immunity," of many sovereign immunity questions.<sup>80</sup> Achievement of this objective would therefore allocate the decision-making power on questions of sovereign immunity exclusively to the courts, an effect that the legislative history indicates was a principal purpose of the statute.<sup>81</sup> The third goal was to provide a statutory procedure for the service of process on and the establishment of jurisdic-

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78. 50 U.S.C. § 1701(a)(1) (Supp. III 1979).

79. H.R. REP. NO. 94-1487, *supra* note 39, at 7, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6605.

80. *Id.*, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6605-06.

81. *Id.*, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6606. To emphasize this basic policy, Congress declared: "Claims of foreign states to immunity should henceforth be decided by courts of the United States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602 (1976) (findings and declaration of purpose).

Judicial deference to executive suggestions of immunity became the practice early in American history. In *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), a French warship had seized an American schooner and had escorted it to a French port, where it was fitted for war. The ship later came to Philadelphia, where its previous owners, hoping to recover it, filed suit. The executive branch filed a suggestion of immunity with the district court, based on the contention that since Napoleon had issued a decree divesting plaintiffs of their title, the ship was French property and was therefore immune from suit. The district court ordered the schooner released without further proceedings. The circuit court reversed but the Supreme Court reinstated the district court's opinion. Speaking through Chief Justice Marshall, the Court reasoned that as a principle of international law, sovereign nations enter each other's territory in reliance on the host nation's implied waiver of sovereignty over the persons and property that it brings in. Although the extent to which the Court relied on the executive suggestion is unclear, the case initiated the practice of executive participation in the decision of sovereign immunity questions, which culminated in the common law rule that courts must defer to executive suggestions of immunity in

tion over a foreign state.<sup>82</sup> And finally, the statute was intended to enable the plaintiff who has obtained a judgment against a foreign state to obtain an execution of judgment if necessary.<sup>83</sup>

Thus, the Immunities Act was intended to solve some practical problems in the administration of suits against sovereign defendants and to provide for a consistent, *judicial* determination of issues involving sovereign immunity. The Emergency Powers Act had a different history and purpose. That Act was intended to prevent presidential abuses of emergency economic powers and to reassert the role of Congress in that area. Before the Act became law, several Presidents had used state declarations of emergency to regulate unrelated domestic and international transactions.<sup>84</sup> In an effort to end this abuse of out-of-date but unexpired declarations of emergency, Congress passed

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order to avoid embarrassment of the executive in its conduct of foreign affairs. *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945); *Ex parte Peru*, 318 U.S. 578 (1943).

The United States, through the Department of State, adhered to the theory of absolute immunity until 1952, when the department adopted the principle of restrictive sovereign immunity. 26 DEP'T STATE BULL. 984 (1952). Suggestions of immunity did not disappear, however. Sovereign immunity was not commonly granted under the restrictive principle in cases involving commercial activities, giving foreign sovereign defendants an incentive to use political pressure in an attempt to obtain a suggestion of immunity from the State Department.

Thus, the allocation of decisionmaking authority on questions of sovereign immunity to the Department of State created substantial problems. As a political agency, the department was open to political pressure. Threats of retaliation against American interests in the defendant's country or of a withdrawal of support of the American position in an unrelated policy area could result in a suggestion of immunity. To the extent that the department yielded to such political pressure, this practice allowed defendants a level of control over the litigation that was inimical to the fairness of the adversary system. See generally Cardozo, *Judicial Deference to State Department Suggestions: Recognition of Prerogative or Abdication to Usurper?*, 48 CORNELL L.Q. 461 (1963); Moore, *The Role of the State Department in Judicial Proceedings*, 31 FORDHAM L. REV. 277 (1962); Note, *The Relationship Between Executive and Judiciary: The State Department as the Supreme Court of International Law*, 53 MINN. L. REV. 389 (1968).

To eliminate these problems, the Departments of State and Justice initiated the bills that resulted in passage of the Immunities Act. Thus, commentators have urged that courts should have no "foreign affairs qualms" in deciding claims of sovereign immunity. See Von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 65-66 (1977); Comment, *Sovereign Immunity: Limits of Judicial Control*, 18 HARV. J. INT'L L. 429, 454 (1977).

82. H.R. REP. NO. 94-1487, *supra* note 39, at 8, reprinted in [1976] U.S. CODE CONG. & AD. NEWS at 6606.

83. *Id.*

84. For example, President Johnson used the 1950 Korean emergency proclamation, Pres. Proc. No. 2,914, 3 C.F.R. 99 (1949-1953 compilation), to regulate American direct investments abroad in 1968, and President Nixon used that same proclamation, in part, to levy a 10% surcharge on American imports in 1971. See S. REP. NO. 95-466, 95th Cong., 1st Sess. 2, reprinted in [1977] U.S. CODE CONG. & AD. NEWS 4541, 4541-42.

As of September 14, 1978, four presidentially-declared national emergencies were still in effect: President Nixon's 1971 Balance of Payment emergency Pres. Proc. No. 4,074, 3 C.F.R. 60 (1971-1975 compilation); President Nixon's 1970 Postal Emergency, Pres. Proc. No. 3,972, 3 C.F.R. 473 (1966-1970 compilation); President Truman's 1950 Korean Emergency; Pres. Proc. No. 2,914, 3 C.F.R. 99 (1949-1953 compilation); and President Roosevelt's 1933 National Banking Emergency, Pres. Proc. No. 2,039, reprinted in 48 Stat. 1689 (1933).

the National Emergencies Act<sup>85</sup> in 1976, terminating presidential authority under declarations in effect on September 14, 1976 and directing the study and revision of emergency powers legislation.<sup>86</sup> The Emergency Powers Act was the major result of that revision.<sup>87</sup>

The Act gives the President a broad range of powers<sup>88</sup> to deal with "any unusual or 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, if the President declares a national emergency with respect to such threat."<sup>89</sup> In order to protect against presidential abuse of these powers, the Act establishes a number of procedural checks. It limits declarations of emergency to one year's duration as established by the National Emergencies Act, which can be extended by a further declaration of emergency by the President,<sup>90</sup> requires a new declaration of emergency to deal with any new threat,<sup>91</sup> and, most importantly, provides for a congressional veto of emergency declarations made by the President.<sup>92</sup> In order to ensure that this veto power is used, if ever, in an informed manner, the Act also requires the President to comply with detailed consultation and reporting requirements. Whenever possible, the President must consult with Congress before taking any action, and must in every case report to the Congress immediately after taking action, specifying the nature of the emergency, the actions taken, and the reasons for taking the ac-

85. Act of Sept. 14, 1976, Pub. L. No. 94-412, 90 Stat. 1255 (codified at 50 U.S.C. §§ 1601-1651 (1976)).

86. *Id.* §§ 1601, 1651.

87. For an account of how this problem came to the attention of Congress, see Note, *The National Emergency Dilemma: Balancing the Executive's Crisis Powers with the Need for Accountability*, 52 So. CAL. L. REV. 1453, 1453 n.1 (1979).

88. 50 U.S.C. § 1702(a)(1) provides:

At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit—

(i) any transactions in foreign exchange,

(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,

(iii) the importing or exporting of currency or securities; and

(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.

89. *Id.* § 1701(a).

90. *Id.* § 1622(d) (1976). This provision is subject to the modifications of *id.* § 1706(b) (Supp. III 1979).

91. *Id.* § 1701(b).

92. *Id.* § 1706(b).



tions chosen. Such consultation must be continued throughout the duration of the emergency.<sup>93</sup>

Thus, the Emergency Powers Act was intended to delineate the scope and duration of the President's emergency powers, in order to prevent abuse of those powers while still providing necessary flexibility. This purpose contrasts sharply with those of the Immunities Act, a difference that may provide some guidance toward the proper interpretation of the two Acts. Although the Acts were passed just over a year apart,<sup>94</sup> it is unlikely that the Congress considered the possibility of a conflict with the Immunities Act when it formulated and enacted the Emergency Powers Act. They dealt with separate problems, and while there is some overlap in their coverage, the differences in approach, rather than any considered decision to prefer one statutory provision over the other, probably account for the conflict.

Thus, determination of whether the Emergency Powers Act should be read as giving back to the President some of the power that the Immunities Act gave to the judiciary must rest on broader constitutional and policy grounds. A consideration of these bases for presidential action follows.

### B. *Constitutional Allocation of Emergency Powers*

Under the terms of the Constitution, Congress and the President share the authority to deal with foreign affairs and national emergencies. The President's powers, derived from such sources as his position

93. *Id.* § 1703:

(a) The President, in every possible instance, shall consult with the Congress before exercising any of the authorities granted by this chapter and shall consult regularly with the Congress so long as such authorities are exercised.

**Report to Congress upon exercise of Presidential authorities**

(b) Whenever the President exercises any of the authorities granted by this chapter, he shall immediately transmit to the Congress a report specifying—

- (1) the circumstances which necessitate such exercise of authority;
- (2) why the President believes those circumstances constitute an 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;
- (3) the authorities to be exercised and the actions to be taken in the exercise of those authorities to deal with those circumstances;
- (4) why the President believes such actions are necessary to deal with those circumstances; and
- (5) any foreign countries with respect to which such actions are to be taken and why such actions are to be taken with respect to those countries.

**Periodic follow-up reports**

(c) At least once during each succeeding six-month period after transmitting a report pursuant to subsection (b) of this section with respect to an exercise of authorities under this chapter, the President shall report to the Congress with respect to the actions taken, since the last such report in the exercise of such authorities, and with respect to any changes which have occurred concerning any information previously furnished pursuant to paragraphs (1) through (5) of subsection (b) of this section.

94. See note 67 *supra*.

as Chief Executive<sup>95</sup> and as Commander-in-Chief of the Armed Forces,<sup>96</sup> are direct in nature, permitting immediate and decisive action. Congress' powers, on the other hand, tend to be more indirect and long-term in nature, deriving from the congressional authority to declare war,<sup>97</sup> to regulate interstate commerce,<sup>98</sup> to prescribe and administer the national budget,<sup>99</sup> and other like powers.<sup>100</sup>

What the Constitution failed to do, however, was to delineate the distribution of ultimate decisionmaking power in these areas between the two branches. Historically, this has resulted in broad presidential assertions of power, with congressional acquiescence or after the fact ratification and cooperation. For example, President Lincoln ordered a limited suspension of habeas corpus and an expansion of the armed forces in 1861, both of which were beyond his constitutional authority.<sup>101</sup> Congress subsequently ratified his actions.<sup>102</sup> Presidents Theodore Roosevelt, Taft, and Wilson authorized armed intervention in Latin America, all without congressional approval.<sup>103</sup> Franklin Roosevelt declared a bank holiday soon after his inauguration, with subsequent congressional ratification.<sup>104</sup> And Presidents Truman, Eisenhower, and Johnson sent American troops to Korea, Lebanon, and the Dominican Republic, respectively,<sup>105</sup> again without congressional authorization.

The judiciary has also given great deference to the President's

95. U.S. CONST. art. II, § 1, cl. 1.

96. *Id.* art. II, § 2, cl. 1. Executive power also may be implied from the President's oath of office, *id.* art. II, § 1, cl. 8, and his duty to "take care that the laws be faithfully executed", *id.* art. II, § 3.

97. *Id.* art. I, § 8, cl. 11.

98. *Id.* art. I, § 8, cl. 3.

99. *Id.* art. I, § 8, cl. 1.

100. *E.g.*, *id.* art. I, § 8, cls. 2 (power to establish uniform rules of naturalization), 11 (power to make rules concerning wartime captures).

101. Pres. Proc. No. 7, 12 Stat. 1260 (1861) (habeas corpus); Pres. Proc. No. 3, 12 Stat. 1258 (1861) (armed forces). Under U.S. CONST. art. I, § 8, cl. 12, Congress has the sole power to support and raise armies. Likewise, the only reference to the suspension of habeas corpus, *id.* art. I, § 9, cl. 2, mentions only congressional power, implying that Congress is the only body with the authority to take such an action.

102. An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases, 12 Stat. 755 (1863); An Act to increase the Pay of the Privates in the Regular Army and in the Volunteers in the Service of the United States, and for other Purposes, 12 Stat. 326 (1861); see E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957*, at 230 (4th ed. 1957); J. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN 128-30* (1951).

103. See SENATE COMM. ON FOREIGN RELATIONS, 91ST CONG. 2D SESS., *DOCUMENTS RELATING TO THE WAR POWER OF CONGRESS, THE PRESIDENT'S AUTHORITY AS COMMANDER-IN-CHIEF AND THE WAR IN INDOCHINA 14-15* (Comm. Print 1970).

104. See Pres. Proc. No. 2,038, 48 Stat. 1689 (1933); Emergency Banking Act of 1933, Pub. L. No. 73-1, § 1, 48 Stat. 1 (1933).

105. See Frank, *After the Fall: The New Procedural Framework for Congressional Control of the War Power*, 71 AM. J. INT'L. L. 605, 610 (1977).

emergency actions, generally upholding them except in cases of clear statutory or constitutional violation.<sup>106</sup> Even then the Supreme Court has recognized that its power to interfere with presidential actions during a crisis is limited.<sup>107</sup> A significant exception to this pattern of deference is presented by *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>108</sup> In that case, the Court invalidated an executive order issued by President Truman directing the Secretary of Commerce to seize and operate most of the nation's steel mills in order to avert a strike that threatened the national defense. The Court based its holding on two observations: (1) that the authority to take such an action cannot be implied from the President's article II powers;<sup>109</sup> and (2) that such authorization could not be found in any statute, and in fact was rejected by Congress in its formulation of the Taft-Hartley Act in 1947.<sup>110</sup>

Justice Jackson, concurring in *Youngstown*, provided a widely accepted framework for determining whether the President's emergency actions are legitimate. His analysis distinguishes three types of presidential emergency actions. In the first, the President acts pursuant to an express or implied grant of statutory power. In that case, the courts should give the President's actions the highest presumption of validity and should interpret his powers broadly, for he acts pursuant both to his inherent constitutional powers and to statutory authority.<sup>111</sup> In the second, the President acts in the absence of a congressional pronouncement either granting or denying him the authority to do so. In that case, the validity of the President's actions will depend on the facts and circumstances of the individual case, since the President and Congress share some powers, and the lack of congressional action may enable or invite independent presidential action.<sup>112</sup> In the third, the President acts contrary to the express or implied will of Congress. In that case, the President's authority is at its lowest point, since he must assert not only his own power, but also the absence of congressional authority over the area.<sup>113</sup> Justice Jackson recognized, however, that the courts can protect congressional authority fully only if Congress is willing to use them. If the courts are to restrain presidential abuses of emergency

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106. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943). The reasons for this deference are similar to the reasons for judicial deference to presidential actions in the foreign affairs field. See generally Comment, *Foreign Affairs Cases: The Need for a Mandatory Certification Procedure*, 68 CALIF. L. REV. 1186, 1197-1204 (1980).

107. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 109 (1866).

108. 343 U.S. 579 (1952).

109. *Id.* at 587-89.

110. *Id.* at 586.

111. *Id.* at 635-37 (Jackson, J., concurring).

112. *Id.* at 637 (Jackson, J., concurring).

113. *Id.* at 637-38 (Jackson, J., concurring).

power, Congress must lead the way.<sup>114</sup>

The Vietnam War provided the impetus for Congress to accept Justice Jackson's invitation by regulating the President's foreign affairs and emergency powers. Even though Congress approved America's original involvement in Vietnam,<sup>115</sup> the escalation and continuation of the fighting eventually created conflict between the executive and legislative branches.<sup>116</sup> Concerned with persistent executive assertions of unilateral power, the Congress has gone so far as to veto presidential actions, as when it cut off funding for the bombing of Cambodia in 1974<sup>117</sup> and when it prohibited CIA activity in Angola in 1976.<sup>118</sup>

On most occasions, however, congressional regulation of the President's foreign affairs and emergency powers has not been so dramatic. Overall, congressional enactments in the war powers area have evinced an awareness that the President has control over the day-to-day operation of the military. Congress, being a deliberative body, is ill-suited to such decisionmaking. Thus, the War Powers Resolution,<sup>119</sup> which redefined the allocation of warmaking power between the two branches, took a more restrained approach to the problem. By focusing on procedural safeguards such as consultation and notice requirements,<sup>120</sup> the resolution gave the President the authority to react to developments in the military arena quickly and decisively where needed, but retained ultimate, longer-term control in the Congress.

In the closely-related area of national and international emergencies, Congress has sought to strike the same balance between executive and legislative decisionmaking. When faced with an emergency, the President has broad discretion under section 1702 of the Emergency Powers Act<sup>121</sup> in choosing the appropriate response, subject only to the

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114. *Id.* at 654 (Jackson, J., concurring).

115. In August 1964, following a North Vietnamese gunboat attack on American vessels in the Gulf of Tonkin, President Johnson sought and obtained passage of the Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964). The resolution allowed the President "to take all necessary measures to repel any armed attack against the forces of the United States and . . . to take all necessary steps, including the use of armed force, to assist any [SEATO] member" requesting defense assistance. *Id.* The Republic of Vietnam was a member of SEATO. Therefore, when it requested assistance, the President's response was plainly authorized by Congress.

116. The constitutional debate on the subject of presidential warmaking powers is well reviewed in 2 R. FALK, *THE VIETNAM WAR AND INTERNATIONAL LAW* 597-834 (1969).

117. The Joint Resolution Continuing Appropriations for Fiscal Year 1974, Pub. L. No. 93-52, § 108, 87 Stat. 134 (1973).

118. Foreign Assistance and Related Programs Appropriations Act, Pub. L. No. 94-330, § 109, 90 Stat. 776 (1976); International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 404, 90 Stat. 757 (1976).

119. 50 U.S.C. § 1541 (1976 & Supp. III 1979).

120. *Id.* § 1542 (consultation); *id.* § 1543 (notice).

121. *See* note 88 *supra*.

notification and consultation procedures established to protect congressional oversight authority.

Under this allocation of decisionmaking power, and consistent with Justice Jackson's analysis, the courts should interpret the President's substantive emergency powers broadly, while taking great care to ensure that the President respects and fulfills the procedural requirements of the Act. This conclusion provides the solution to the apparent conflict between section 1702 of the Emergency Powers Act and section 1609 of the Immunities Act, a solution that depends on the distinction between normal and emergency times.<sup>122</sup> In normal times, statutes such as the Immunities Act will govern, but in times of emergency the balance of authority must shift. The President must have the power to deal with an emergency quickly and effectively, and the Emergency Powers Act evinces a congressional intent that he have that power. Statutes that consider only the allocations of decisionmaking power under normal circumstances must not inhibit the President's ability to develop and implement strategies for dealing with emergencies. The Immunities Act is such a statute. Therefore, the Emergency Powers Act must be interpreted as giving the President the power to suspend, void, or nullify Iran's immunity from prejudgment attachment.

### C. *Presidential Exercise of Emergency Powers*

The final question is whether the President intended to use the power to suspend Iran's sovereign immunity in his executive order freezing Iranian assets. Neither the order itself nor the Iranian Assets Control Regulations,<sup>123</sup> issued by the Treasury Department to implement the order, specifically addresses sovereign immunity, and while one regulation does authorize prejudgment attachment,<sup>124</sup> it does not explicitly authorize such attachment in contravention of sovereign immunity. The regulation is subject to any prohibition established in other statutes, proclamations, orders, or regulations,<sup>125</sup> and is therefore subject to the requirements of the Immunities Act.<sup>126</sup> Resolution of this issue therefore depends on the proper interpretation of the executive order.

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122. See *United States v. Yoshida Int'l, Inc.*, 526 F.2d 560, 578 (C.C.P.A. 1975).

123. 31 C.F.R. §§ 535.101-535.904 (1980).

124. *Id.* § 535.418. See note 71 *supra*.

125. *Id.* § 535.101(b):

No license or authorization contained in or issued pursuant to this part shall be deemed to authorize any transaction to the extent that it is prohibited by reason of the provisions of any law or any statute other than the International Emergency Economic Powers Act, as amended, or any proclamation order or regulation other than those contained in or issued pursuant to this part.

126. Thus, the authorization of prejudgment attachment affects only the executive order itself, permitting attachment where the order might be interpreted as prohibiting it.

Since the order does not mention sovereign immunity specifically, it would be difficult to interpret it to suspend that immunity. The conclusion of the *New England Bank* court that the assets freeze necessarily implied a suspension of sovereign immunity is not convincing. While the executive order did suspend one set of rights with regard to Iran's assets—the rights to transfer them to other parties and to remove them from the jurisdiction—it did not suspend *all* property rights. Rights of immunity from judicial process are distinct from rights of transfer, and the suspension of the former should not be presumed from the suspension of the latter.

Even if the President did intend to suspend Iran's immunity from prejudgment attachment in freezing its assets, his method of doing so runs afoul of the Emergency Powers Act's notice requirements. In authorizing such an action, Congress placed great importance on procedural safeguards such as notice and consultation in order to avoid presidential abuse of power.<sup>127</sup> In interpreting the President's use of that power, the courts should follow Justice Jackson's analysis in *Youngstown*, and should protect Congress' authority by holding the President to the Act's requirements.<sup>128</sup> Since the President failed to notify Congress that he had suspended the Immunities Act as it applied to Iran, the courts should hold that such a suspension was illegal, and cannot be judicially enforced.

Arguably, however, the President satisfied the notice requirement by reporting to Congress that he had delegated rulemaking power to the Treasury Department. In that case, the regulation permitting prejudgment attachment would be conclusive, and since the Immunities Act, having been suspended, could not limit the scope of that authorization, it would permit attachment of all of Iran's frozen assets. Such an interpretation of the notice requirement, however, would subvert a major objective of the Emergency Powers Act by virtually eliminating presidential accountability to Congress for specific actions taken. The President could simply delegate to a cabinet officer the power to take any actions that he does not want reported to Congress. With some minor regulations, congressional notice may not be necessary, but the abrogation of a nation's sovereign immunity is not a minor regulation. In order to be effective, it must be clearly and directly reported to Congress. The President's failure to make such a report, and thus his failure to satisfy the procedural requirements of the Emergency Powers Act, should be fatal to his use of that power.

Thus, the executive order freezing Iran's assets should not be inter-

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127. See notes 119-21 and accompanying text *supra*.

128. See notes 111-14 and accompanying text *supra*. See generally C. SANDS, 1 SUTHERLAND STATUTORY CONSTRUCTION §§ 3.24-3.25 (4th ed. 1972).

preted as suspending Iranian sovereign immunity. Neither the order nor the regulations promulgated under it clearly expresses such an intent, and if it was implied, it cannot take effect due to the President's failure to report his action to Congress. Therefore, prejudgment attachment is unavailable in the frozen assets cases under the Immunities Act, the Treaty of Amity, and the Emergency Powers Act, and all such attachments must be either denied or dissolved.

### III

#### NULLIFYING THE ATTACHMENTS PURSUANT TO EXECUTIVE AGREEMENT

On January 19, 1981, the United States and Iran reached an executive agreement to end the long stalemate between the two countries.<sup>129</sup> In return for the release of the American hostages, the President basically agreed to restore the financial position of Iran, in so far as possible, to that existing before the hostage crisis. As a part of the agreement, President Carter insured the mobility and free transfer of all Iranian assets within American jurisdiction.<sup>130</sup> More specifically, the President agreed to terminate all legal proceedings in American courts involving claims of American nationals "against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration."<sup>131</sup>

The arbitration procedure, as set forth in the agreement, calls for the establishment of an international arbitration tribunal composed of representatives of the United States, Iran, and Algeria.<sup>132</sup> The tribunal would rule on individual claims and, where warranted, would make binding arbitration awards, which would then be paid out of an escrow account in the name of the Central Bank of Algeria.<sup>133</sup> The account would have an original balance of one billion dollars, to be withheld from the Iranian assets transferred out of the U.S.<sup>134</sup> If the account drops below 500 million dollars, Iran would be required to deposit sufficient assets to return it to the 500 million dollar level until the President of the international arbitration tribunal has certified that all

129. S.F. Examiner, Jan. 19, 1981, special section (End of the Crisis/A Full Report), at B, col. 3.

130. Declaration of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, *reprinted in* S.F. Chronicle, Jan. 20, 1981, § 1, at C, col. 1 [hereinafter cited as Hostages Agreement].

131. *Id.*

132. Agreement concerning the settlement of claims, Jan. 19, 1981, *reprinted in* S.F. Chronicle, Jan. 20, 1981, § 1, at D, col. 1.

133. Hostages Agreement, *supra* note 130, at C, col. 1.

134. *Id.* at C, col. 3.

arbitrational awards have been paid.<sup>135</sup>

In order to implement the agreement, the American government must nullify the prejudgment attachments granted against Iran. These arguments in favor of nullification appear promising.

First, the executive branch could appear on appeal as *amicus curiae* in the frozen assets cases and argue that the prejudgment attachments should not have been granted by the trial courts. As shown above, the district courts were incorrect in holding that Iran had waived its sovereign immunity from prejudgment attachment<sup>136</sup> or that the President intended to abrogate Iran's immunity in exercising his powers under the Emergency Powers Act.<sup>137</sup> In *New England Bank*, there is an additional argument in favor of dissolution of the attachments. In that case, the district court's decision to grant the attachments rested on its determination that President Carter has suspended Iran's sovereign immunity in freezing its assets. Without the freeze, the court held, Iran would be immune from prejudgment attachment. The President's termination of the freeze pursuant to the agreement thus removed the basis for the attachments, and the appellate court should therefore order their dissolution. A second approach would be based on the President's authority under section 1702(a)(1) of the Emergency Powers Act to "direct and compel . . . [the] transfer . . . [or] transportation . . . of . . . any right . . . involving [] any property in which any foreign country or national thereof has any interest."<sup>138</sup> By ordering the transfer of the Iranian assets to the Central Bank of Algeria pursuant to the executive agreement,<sup>139</sup> the President in effect has nullified the attachments. No property remains to be attached; thus, the attachments have been deprived of all practical meaning, since they neither secure a potential judgment nor create a preference.

Finally, the President could argue that the executive agreement itself is binding on the courts. The Supreme Court has stated, that the President is the "sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress."<sup>140</sup> Thus, executive agreements, including Litvinov assignment, which settled private claims arising out of the Soviet expropriation of American property, have the same legal force

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135. *Id.*

136. See notes 22-63 and accompanying text *supra*.

137. See notes 123-28 and accompanying text *supra*.

138. 50 U.S.C. § 1702 (Supp. III 1979).

139. President Carter already took this action. Exec. Order No. 12,276, 46 Fed. Reg. 7,913 (1981).

140. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (dictum).



as treaties.<sup>141</sup> Under the supremacy clause,<sup>142</sup> they therefore prevail over conflicting state law. The executive agreement between Iran and the United States, since it is in the foreign affairs field and contradicts no federal statute, therefore should be determinative on those questions it addresses. The agreement calls for the dissolution of the attachments; this pronouncement should be binding on the courts.

A virtue of the first approach is that it would preclude any claims that the United States government, by providing for a nullification of the attachments, deprived plaintiff creditors of property without just compensation in violation of the fifth amendment. No fifth amendment violation was possible because the attachments either were erroneously granted in the first place or dissolved as a matter of law when the conditions on which they were founded disappeared. The second and third approaches, on the other hand, assume that the attachments were initially valid, thus permitting at least an allegation of an illegal taking. Such claims, however, would be without merit.

Prejudgment attachments probably are property interests within the meaning of the fifth amendment.<sup>143</sup> However, the courts have accorded the President considerable freedom to settle international claims in favor of the United States and its nationals without fear of fifth amendment liability. In *United States v. Pink*,<sup>144</sup> for example, the Supreme Court held that the fifth amendment "could not stand in the way" of an executive agreement securing an assignment from the Soviet government of all expropriated assets located in the United States in satisfaction only of the claims of the United States and its nationals. Although the fifth amendment protects aliens, the court held that foreign creditors of an expropriated Russian corporation had no taking claim against the United States, even where they had previously obtained a judgment in a state court and had attached funds on deposit for the corporation.<sup>145</sup> However, the Court reserved judgment on the question whether the President could override attachment priorities granted by state law to American creditors in order to achieve an equitable settlement in which the American creditors share pro rata.<sup>146</sup> The

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141. *United States v. Belmont*, 301 U.S. 324, 330-32 (1937). See also *United States v. Pink*, 315 U.S. 203, 222-26 (1942).

142. U.S. CONST. art. VI, § 2.

143. See *Armstrong v. United States*, 364 U.S. 40, 44-46 (1960) (materialmen's liens are property interests).

144. 315 U.S. 203, 228 (1943).

145. *Id.* at 211, 228. The Court relied, in part, on precedent holding that the fourteenth amendment does not preclude a state from according priority to American creditors over creditors who are nationals of foreign countries. *Id.* This reliance is misplaced. The Litvinov agreement did more than give priority to American nationals; it nullified the interests of foreign nationals altogether.

146. *Id.* at 227.

executive agreement with Iran raises that issue.

Executive nullification of the attachments will constitute a violation of the fifth amendment only if it will "substantially impair" creditors' rights as defined by state law.<sup>147</sup> Prejudgment attachments serve two purposes: securing potential judgments and establishing priorities to the attached assets over subsequent liens. Neither purpose is "substantially impaired" by the President's actions in this regard. While the arbitration agreement makes the question of priorities irrelevant, since Iran has promised that all arbitration awards will be paid in full,<sup>148</sup> it actually improves plaintiffs' security interests, since they are no longer limited to the value of the attached property. Only if Iran fails to fulfill its obligations under the agreement will the plaintiffs' rights be harmed, and such a possibility cannot be recognized by the courts, since the good faith of Iran in making those obligations is a foreign affairs matter upon which the judgment of the executive branch is conclusive.<sup>149</sup> Thus, plaintiffs are actually better off under the arbitration agreement than they were with prejudgment attachments. Any fifth amendment claim based on the substitution of the provisions of that agreement for the attachments must therefore fail.

#### CONCLUSION

Overall, the courts have not performed well during the Iranian crisis. On the question of prejudgment attachment, many of them have used strained interpretations of the relevant documents and actions to grant attachments. In *New England Merchants National Banks v. Iran Power Generation and Transmission Co.* the court took a novel approach, looking beyond the provisions of the Treaty of Amity to the President's powers under the International Economic Emergency Powers Act. While the focus of the *New England Bank* court is correct, its reasoning on the issue of presidential intent is unconvincing. The opin-

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147. Cf. *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 517-18 (1937); *Wright v. Vinton Branch*, 300 U.S. 440, 457 (1936); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 594-602 (1935) (while able to override individual creditors' priorities in furtherance of the bankruptcy policy of treating all creditors equally, Congress may not enact legislation substantially impairing creditors' rights under state law).

148. See text accompanying note 135 *supra*.

149. See *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 765-70 (1972) (opinion of Rehnquist, J.) (Executive has exclusive power over the conduct of relations with foreign governments, and judiciary should defer to its judgments in order to avoid embarrassing the conduct of foreign affairs). See also *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) ("the courts of one country will not sit in judgment on the acts of the government of another done within its own territory"). Judicial second-guessing of the Executive's conclusions as to Iranian intentions for future action is therefore improper. Of course, in the event of an actual breach by Iran, an American court would be free to take notice and fashion an appropriate remedy.

ion is overly conceptual and is necessarily vague, and leaves the status of the attachments after the return of the hostages unresolved.

In retrospect, the frozen assets cases have shown that the judiciary is not equipped to resolve a foreign affairs crisis such as that presented by the embassy takeover in Iran. As this Comment has demonstrated, such crises are better left to the President, who can gauge the circumstances quickly and efficiently and can react to them in a variety of congressionally-authorized means. The courts should inquire only into whether the President has fulfilled the statutory requirements in taking the actions chosen, and should thereafter defer to the executive's decisions. In that way, the President will be best able to deal with the problems of international crises in a manner that is in the best interests of the United States and its nationals.

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