

In the

# Supreme Court of the United States

DAMES & MOORE,

PETITIONER,

v.

DONALD T. REGAN, SECRETARY OF  
THE TREASURY, ET AL.

No. 80-2078

Washington, D.C.  
June 24, 1981

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Washington, D. C.

Wednesday, June 24, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 o'clock a.m.

APPEARANCES:

C. STEPHEN HOWARD, ESQ., Tuttle & Taylor, Inc., 609 S. Grand Ave., Los Angeles, California 90017; on behalf of the Petitioner.

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ERIC M. LIEBERMAN, ESQ., Rabinowitz, Boudin, Standard, Krinsky & Lieberman, 30 E. 42nd Street, New York, New York 10017; on behalf of Intervenor Bank Markazi Iran.

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1 QUESTION: What was the basis of the federal district  
2 court jurisdiction, Mr. Howard?

3 MR. HOWARD: The federal district court jurisdiction  
4 was premised on 28 USC Section 1330, and the provisions of the  
5 Foreign Sovereign Immunities Act, in particular Section 1605, the  
6 section that deals with whether or not certain states are immune  
7 from suit and sets out the grounds therein. Section 1330 pro-  
8 vides that if a state is not immune from suit and is otherwise  
9 served in accordance with the provisions of those sections, that  
10 personal jurisdiction and subject matter jurisdiction are auto-  
11 matically conveyed upon the federal district court.

12 QUESTION: So that it is not based upon diversity of  
13 citizenship?

14 MR. HOWARD: It was not. The diversity section was  
15 alleged in the jurisdictional allegation in that complaint and,  
16 frankly, it's a mistake. But the appropriate section was also  
17 alleged and that is the only section on which we claimed juris-  
18 diction in that lawsuit.

19 QUESTION: Mr. Howard, your lawsuit was not commenced  
20 until after the seizure of the hostages by Iran, was it?

21 MR. HOWARD: That is correct, that is correct. There  
22 were some negotiations between the parties prior to that event  
23 and those negotiations were not successful. They occurred in  
24 about September and October, if I recall correctly.  
25 The hostages were seized in early November and the lawsuit was

1 filed in mid-December.

2 QUESTION: Was that after the blocking order?

3 MR. HOWARD: It was after the blocking order; yes.

4 In that lawsuit, in February of 1981, after extensive litiga-  
5 tion below the Petitioner obtained a separate judgment against  
6 two of the defendants, the State of Iran, and the Atomic Energy  
7 Organization, and separate judgment was entered pursuant to  
8 Federal Rule of Civil Procedure 54(b). The lawsuit went on  
9 with respect to the bank defendants. The Petitioner commenced  
10 efforts to levy on its judgment on certain Iranian property in  
11 the State of Washington. And the case stood in that posture  
12 when Petitioner filed the lawsuit that is now before the Court.

13 That lawsuit was filed in reaction to the Algerian  
14 Declarations, which the Court would be familiar with, and the  
15 executive orders that were promulgated to enforce, carry out  
16 those Declarations.

17 In the Declarations, which were entered into on  
18 January 19, 1981, the President agreed -- and I would stress,  
19 the President, with no participation by the Congress -- we're  
20 not talking about a treaty, we're not talking about an act of  
21 Congress. The President agreed to terminate all litigation in  
22 the United States pending against Iran. He agreed to nullify  
23 all judgments and all attachments against the Iranians. He  
24 agreed to set up an international tribunal which would, if the  
25 agreement was carried out, have some security for judgments that

1 it might render. It would have a billion dollars.

2 Beyond that, and whether that tribunal will in fact  
3 be set up and operate and how long it will take and how certain  
4 its results will be, none of us know. The tribunal has an ex-  
5 clusion for its jurisdiction, for claims with certain forum  
6 selection clauses favoring Iran, and I have set forth in our  
7 briefs the text of that exclusionary clause and also the text  
8 of the forum selection clause that appears in the contract of  
9 Petitioner.

10 It is our position that Petitioner's chances of pro-  
11 ceeding in that tribunal are problematic. I don't think either  
12 the Government or Petitioner can establish with absolute cer-  
13 tainty how that tribunal would rule, but I think that we can  
14 bring to bear our own analysis on those two provisions and con-  
15 clude at a minimum that things do not look entirely bright for  
16 the Petitioner in that tribunal.

17 QUESTION: Is that the one that the Government has  
18 said it would urge, and urge the American petitioners before the  
19 tribunal to urge that there has been such a change of affairs  
20 that --

21 MR. HOWARD: As I understand the Government's position,  
22 in its way, in its brief, it's very careful, I notice, on this. It  
23 says that the clauses may not be binding; the word in the  
24 Government's brief is, may not be binding, because of changed  
25 circumstances, and that the Government is urging the individual

1 companies to take the position those are not binding clauses.  
2 Now, it is not at all clear that the tribunal will agree with that,  
3 and I must say, it is not at all clear to me, reading the text,  
4 whether the text of the Algerian Declarations even makes that  
5 argument availing, because it talks about binding contracts with  
6 clauses providing such and such. It doesn't say, "contracts  
7 with binding clauses," and I can't tell even whether the word  
8 "binding" modifies the word "contract" or modifies the word  
9 "clause." So, in any event, this is a tribunal that is going  
10 to be one-third Iranian, one-third U.S., and one-third presuma-  
11 bly some kind of neutral representatives, assuming the tribunal  
12 operates at all. And we simply have no way of predicting whe-  
13 ther or not we'll be able to have our claim in that court.

14 QUESTION: And who picks the neutral members, the  
15 so-called neutral members?

16 MR. HOWARD: As I understand it, they have to be mu-  
17 tually selected.

18 QUESTION: By the other members of the court?

19 MR. HOWARD: By the two adversary --

20 QUESTION: Haven't they been selected?

21 MR. HOWARD: The Government's brief advises us --  
22 none of this is in the record, but the Government's brief states  
23 that three arbitrators have been picked. I have no independent  
24 knowledge of that one way or the other.

25 QUESTION: Three United States arbitrators?



1 MR. HOWARD: And three neutrals, according to the  
2 Government's brief.

3 QUESTION: But the other six haven't been picked, have  
4 they?

5 MR. HOWARD: Again according to the Government's brief,  
6 the Iranians have named their three, the United States have  
7 named their three, and the other three have been selected al-  
8 though nothing has happened yet. They are going to -- accord-  
9 ing to the Government's brief, again -- have a meeting shortly  
10 for organizational purposes. In the meantime we're almost six  
11 months from the agreement and the so-called settlements that  
12 were supposed to take place before the tribunal have not taken  
13 place at all, to my knowledge.

14 Now, as I indicated, it's very unclear whether  
15 Petitioner can go to this tribunal or not.

16 QUESTION: Is there any suggestion that we have to  
17 decide whether they can or cannot -- whether you can or cannot  
18 go?

19 MR. HOWARD: No, I don't think that's a question  
20 that -- first of all, the Court couldn't dispositively resolve  
21 that in any event. As I understand it, that would be a ques-  
22 tion for the tribunal to resolve its own jurisdiction. I simply  
23 present the Petitioner's case to you as one in which it is  
24 hardly clear that we have any alternative remedy, although it is  
25 also my position that even if we have clear access to that

1 tribunal that the President is without power, acting alone, to  
2 take us out of the United States district court where the Con-  
3 gress put us and make us go there. Now, the executive orders --

4 QUESTION: Mr. Howard, before you leave the forum  
5 selection clause, has the district court in this case decided  
6 the effect of that clause on federal jurisdiction yet?

7 MR. HOWARD: No. The United States in its initial  
8 suggestions of interest that were filed in these cases in  
9 February stated that the courts should require the Iranians to  
10 take a position in the individual case as to whether or not it  
11 belonged in the tribunal or in the district court. And if,  
12 for example, Iran agreed that you couldn't go there, then the  
13 case could proceed, according to this early statement of  
14 interest.

15 QUESTION: Was that perfectly clear, or does Iran  
16 possibly take the position that the clause means what it says?

17 MR. HOWARD: I am confident Iran takes the position  
18 that the clause means what it says.

19 QUESTION: But has the district court passed on that  
20 contention of Iran?

21 MR. HOWARD: No. The Iranians in our case and to my  
22 knowledge in all cases have steadfastly refused to accept the  
23 invitation that they take a position. I believe -- you can ask  
24 Mr. Shack, but I believe their position is that they have no  
25 requirement to take a position in district court. There are the

1 accords, the President has purported to suspend all claims that  
2 may possibly go to the tribunal, and that's the end of it, for  
3 the district court.

4 QUESTION: No, I'm not sure I made my question clear.  
5 Putting to one side for a moment the tribunal --

6 MR. HOWARD: Right.

7 QUESTION: They might argue that instead of -- say  
8 there was no tribunal, would they agree that they'd have to  
9 litigate in the United States court as opposed to an Iranian  
10 court?

11 MR. HOWARD: Oh, no. I'm sure that the Iranians would  
12 take the position that the forum selection clause in our con-  
13 tract is enforceable. We take the position that because of  
14 changed circumstances it is our position that --

15 QUESTION: And the federal district court has not  
16 decided one way or the other on it?

17 MR. HOWARD: Did not decide that question, although  
18 that particular question was not contested in the hearing that  
19 took place on our judgment.

20 QUESTION: But, in any event, Mr. Howard, the form of  
21 your clause requires preliminary conciliation or arbitration  
22 by the three-member group?

23 MR. HOWARD: In Iran.

24 QUESTION: Before the clause, at least, requires you  
25 to go to the courts of Iran?

1 MR. HOWARD: That is correct. And the United States  
2 takes the position, as I understand, that because there is a  
3 prelitigation step, admittedly, in Iran and with the third  
4 arbitrator chosen by the Iranian Government, that therefore we  
5 are not committed to the sole jurisdiction of Iranian courts.

6 Now, that's an imaginative interpretation and I sup-  
7 pose if my client loses this case I may be someday trying to  
8 make that argument myself, but I'm not entirely confident that  
9 I'm going to succeed.

10 The Executive has now implemented these accords by  
11 in fact promulgating a series of executive orders, and those  
12 executive orders purport to nullify all attachments and to order  
13 the property that is secured by those attachments -- and proper-  
14 ty that's not secured by attachments -- back to Iran under the  
15 pain of criminal penalties. The Executive has not simply  
16 unfrozen the property, to let it be in the marketplace and to  
17 be moved by the Iranians or attached, as the litigation process  
18 may determine, but rather the Executive has ordered the property  
19 out of the country and has set criminal penalties for anyone  
20 who does not cooperate with that.

21 In a later executive order the Executive has suspended  
22 -- that's the word of the order -- all claims in the United  
23 States now against Iran, and indicated that -- unless it's  
24 absolutely clear that they can't go to the tribunal and given  
25 the United States's interpretation, no claim is absolutely,



1 is it absolutely clear it can't go to the tribunal. So that,  
2 in effect, all claims against the Iranians have been suspended.

3 QUESTION: Do you regard the later executive order  
4 signed by President Reagan as going further than the executive  
5 order signed by President Carter?

6 MR. HOWARD: In logic I think the answer to that is  
7 yes, because one of the issues before the Court is whether or  
8 not the Executive has the unfettered discretion to settle in  
9 his own whim, or for good reason, as he sees it, the claims of  
10 Americans against foreign states. It seems to me that if the  
11 Executive has that power -- and obviously I want to address  
12 that -- if the Executive has that power to settle a claim, I  
13 suppose he can also give away the security. So, in that sense,  
14 the order by President Reagan might be regarded as going fur-  
15 ther. I think it goes -- it certainly goes further in terms  
16 of infringements on court processes, although you get there  
17 only, I think, by an analytic process. All that it purports to  
18 do by itself is suspend the filing.

19 Now, the effect of these orders together on the  
20 Petitioner and its case is frankly devastating. We had a judg-  
21 ment against two parties we were in the process of trying to  
22 levy, we had a lawsuit going on against the rest of the parties  
23 with attachments; it's all wiped out. Our judgment is nulli-  
24 fied, our judgment levies are nullified, our attachments are  
25 nullified, we can't even keep suing the parties who were still

1 before the district court, and our only alternative is to go  
2 to The Hague with the time and expense that's involved there  
3 and quite possibly be told that we're not entitled to present  
4 our claim there, and even if we are they only have a small  
5 fraction of the money that's necessary to pay off the claims.

6 For that reason, we filed an action below seeking  
7 injunctive and declaratory relief against the Secretary of the  
8 Treasury, and as indicated in the briefs the Government filed  
9 a cross-motion under 12(b)(6) to dismiss, our motion was  
10 denied, and the Government's motion was granted, and the dis-  
11 trict court has indicated in its memorandum that he did reach  
12 the merits, if you will, of these constitutional issues pre-  
13 sented, because he indicated that he ruled on the basis of the  
14 arguments made by the Government.

15 QUESTION: Do you think the district court ruled on  
16 your takings clause claim?

17 MR. HOWARD: You mean on the forum selection clause?

18 QUESTION: No, on your Fifth Amendment -- .

19 MR. HOWARD: We presented that argument to the  
20 district court. It is hard for me to know what-all thoughts  
21 went through his mind; we certainly argued the taking in our  
22 memorandum. The Government only fleetingly addressed it, as I  
23 recall, in its papers. The argument certainly has been rejected  
24 by the district court.

25 QUESTION: Incidentally, Mr. Howard, your attachments

1 were obtained based on licenses that you secured under the  
2 regulations?

3 MR. HOWARD: Well, we didn't actually go secure them  
4 in the sense of making an application. The Executive, I think  
5 through the Secretary of the Treasury, promulgated a series of  
6 regulations in which he said, judicial proceedings are autho-  
7 rized. And then a subsequent regulation says, the authorization  
8 for judicial proceedings includes attachments. And so we did  
9 proceed to attach with those regulations in effect, although  
10 it is our position that under the case of Zittman v. McGrath  
11 the Executive do not have the power to prevent those attach-  
12 ments, so why --

13 QUESTION: So you could have got them without --

14 MR. HOWARD: That's right. So long as they didn't  
15 interfere with his freezing program. So long as they didn't  
16 interfere with his freezing program we could get them anyway.  
17 Now --

18 QUESTION: Then you don't think, this is a part of  
19 your legal argument, I'm sure, you don't think Zittman was  
20 overruled or limited by Orvis?

21 MR. HOWARD: No, I think Orvis deals with a different  
22 question.

23 QUESTION: Yes, well, you can wait; I guess you can  
24 wait on that.

25 QUESTION: Well, both of them deal with the TWEA,

1 don't they, which was in effect repealed by the IEEPA?

2 MR. HOWARD: Well, they both deal with the Trading  
3 With the Enemy Act in situations in which the Alien Property  
4 Custodian exercised his power to vest, a power the President  
5 does not have --

6 QUESTION: Under the IEEPA?

7 MR. HOWARD: -- under the International Emergency  
8 Powers Act. In both cases, the Alien Property Custodian vested  
9 the property. In one case he purported to vest only whatever  
10 the enemy had and the other, in the Orvis case he vested --  
11 it's called a res vesting; he took it.

12 And the Court in Orvis -- first in Zittman, they said,  
13 the attachment is good as between debtor and creditor, as long  
14 as it doesn't interfere with the freeze program that the Presi-  
15 dent is trying to carry out. But in Orvis he did a res vesting  
16 and the Court said, when the Alien Property Custodian takes the  
17 property, when he seizes it and vests it under a power he  
18 doesn't have now, he takes free of the attachment. And so the  
19 creditor in Orvis was not secured, not able to get his property  
20 back under Section 9 of that Act, but became an unsecured credi-  
21 tor under Section 34 of that Act, none of which protections do  
22 we have in this case.

23 QUESTION: I'll wait until the legal part of your argument.

24 MR. HOWARD: I at least understand, Mr. Justice  
25 White, where you want me to address my argument.



1 QUESTION: That's all right; go ahead.

2 MR. HOWARD: Never before in American history has a  
3 President, acting alone without Congress, without two-thirds of  
4 the Senate, attempted to do what the President of the United  
5 States has attempted to do in this case. Never has a President  
6 acting alone taken claims pending before United States district  
7 courts, validly and enforceably there under congressional  
8 statute, and taken them out of those courts and put them in an  
9 international tribunal. Never. Never before has a President  
10 acting alone or acting under any statutory authority that now  
11 exists, or acting under the Trading with the Enemy Act, even in  
12 its older form, never has a President acting alone attempted to  
13 transfer out of the country valuable assets of a foreign coun-  
14 try that serve as potential security for the claims of American  
15 citizens, leaving them unpaid and without any practical remedy.

16 QUESTION: Well, if the President is acting pursuant  
17 to a statute, he's hardly acting alone, is he?

18 MR. HOWARD: I agree with you completely.

19 QUESTION: But you say that even under --

20 MR. HOWARD: Just historically.

21 QUESTION: Even with or without congressional agree-  
22 ment, you say this has never happened?

23 MR. HOWARD: He's never done it. Never happened.

24 QUESTION: How about with the aid of a treaty?

25 MR. HOWARD: With the aid of a treaty at least we

1 have similar cases to the present case.

2 QUESTION: It has happened, hasn't it?

3 MR. HOWARD: Certainly.

4 QUESTION: And the Schooner, how about the Schooner  
5 Peggy?

6 MR. HOWARD: Exactly. That is a treaty case. And  
7 then, let me quite clear about this. We do not contend that  
8 the political departments of the Government acting together  
9 could not do everything that has been done. They could,  
10 although they would have to pay for the taking. But they could  
11 do everything that's been done. The question is whether the  
12 President can do it, acting alone, without two-thirds of the  
13 Senate, without the majority of both houses of Congress.

14 QUESTION: Well, then, I take it you say that if  
15 we construe, if the IEEPA is construed to authorize the  
16 President to take these steps, you agree that it's constitu-  
17 tional in this --

18 QUESTION: But they might have to pay.

19 QUESTION: They might have to pay.

20 MR. HOWARD: Yes. We do not contend that the Emer-  
21 gency Powers Act is unconstitutional. We do contend that it  
22 doesn't cover this case. And even if it does, it doesn't  
23 cover everything that was done. That goes to Mr. Justice  
24 Rehnquist's question. The order suspending the claims is not  
25 justified by that Act. I don't think anyone seriously

1 contests that.

2 QUESTION: If it does cover the claims -- would you  
3 still agree that it was a constitutional statute?

4 MR. HOWARD: If, to the extent that the Emergency  
5 Powers Act --

6 QUESTION: In other words, is this a case of only  
7 statutory construction?

8 MR. HOWARD: Only as to the transfer of the assets,  
9 Mr. Justice, only as to the transfer of the assets. It remains  
10 a very thorny constitutional question, whether the President  
11 can dip into the courts and pull cases out. Because --

12 QUESTION: Even if expressly authorized to do so by  
13 Congress, both houses of Congress?

14 MR. HOWARD: No -- well, I don't think the Government  
15 seriously contends that the International Emergency Powers Act  
16 authorized the President to take those cases out of court.  
17 They do contend, quite seriously, that it authorized them to  
18 send the property back. But hypothetically --

19 QUESTION: I thought you conceded a moment ago that  
20 if the statute clearly authorized the President to do what he  
21 did in this case --

22 MR. HOWARD: Yes?

23 QUESTION: Then you wouldn't question the constitu-  
24 tional power of the Congress to authorize the President to do  
25 so, but would say that the only constitutional question then

1 remaining would be just compensation under the Fifth Amendment?

2 MR. HOWARD: A taking. I think that's correct. If  
3 the statute in fact authorized everything here --

4 QUESTION: Are you referring to the -- you're not re-  
5 ferring to the Hostages Act? You're referring to the  
6 IEEPA?

7 MR. HOWARD: I am; yes; if that statute were to be  
8 construed to authorize everything, although none of the courts  
9 below have adopted that argument. What they have said is that  
10 it authorized him to send the assets back. That's all they  
11 have found that the International Powers Act authorizes.

12 QUESTION: Judge Breyer was the first -- wasn't he?

13 MR. HOWARD: Yes, Judge Breyer did. I'm sorry. When  
14 I said the courts, I was referring to majorities. That is cor-  
15 rect. Now, perhaps I should turn, in fact, to the International  
16 Emergency Powers Act, because that seems to be the first ques-  
17 tion, in a sense.

18 This statute is a very old statute, it's been before  
19 the Court many times in prior forms. The language of the  
20 statute is hodgepodge. The syntactic structure, you have seven  
21 verbs in the disjunctive, followed by fourteen nouns in the  
22 disjunctive. That's 98 combinations of things the President  
23 can do. And wait, let's see what he can do them to: any pro-  
24 perty in which either the foreign country or any citizen has  
25 any interest -- not a fee interest; any interest, and not only



1 is it the foreign country or the citizen, it's any foreign  
2 country; not just the foreign country that happens to have pro-  
3 voked the emergency. This statute, if literally read, says  
4 that if I bought a house and needed a swing loan for my down  
5 payment and I had a neighbor who was a Canadian citizen and lent  
6 me some money and I put a third trust deed on my house, and we  
7 had an emergency with the Iranians, the President could make me  
8 deed the house to the Ayatollah. That's what the statute says.

9 QUESTION: And you agree that would be constitutional?

10 MR. HOWARD: No. Well, maybe I went too far.

11 QUESTION: I thought you had, with the sole exception  
12 of your right to just compensation for it.

13 MR. HOWARD: If the -- it is our position that the  
14 Congress could in fact by statute --

15 QUESTION: Have authorized precisely that.

16 MR. HOWARD: -- have authorized that. Sure, that  
17 would be a taking for public use, for which I would then seek  
18 compensation.

19 QUESTION: Right.

20 MR. HOWARD: That's correct. But our position is that  
21 it can't be read literally. That just simply doesn't make any  
22 sense, that if you look --

23 QUESTION: Or as pointed in actual treaties here,  
24 you're not questioning the constitutionality or the validity  
25 of the treaties, are you?

1 MR. HOWARD: Absolutely not. Absolutely not.

2 QUESTION: Well, then, what about, why do we worry  
3 about all these hypothetical cases? This is not an overbreadth  
4 case. I mean, supposing it does authorize some things that  
5 couldn't be upheld; couldn't uphold? What difference does it make?

6 MR. HOWARD: The hypothetical is offered only to  
7 show that in trying to figure out what dimensions to give to  
8 the statute, you can't just go by the words.

9 QUESTION: Well, we know that it authorized this  
10 freeze and you don't contest the validity of this freeze.

11 MR. HOWARD: That's correct. But the freeze --

12 QUESTION: And therefore you don't contest the valid-  
13 ity of applying this statute to this bundle of assets.

14 MR. HOWARD: That is correct. That is correct, but  
15 this statute, our position is, this statute authorizes the  
16 President to unfreeze, to unfreeze. He's entitled to freeze,  
17 and he can unfreeze. But the structure of the statute is that  
18 under the Trading With the Enemy Act, he had two broad powers,  
19 and the cases and the articles that we've cited, contemporaneous  
20 with that Act, I think make relatively clear that the bundle of  
21 words that we're dealing with now was always referred to as the  
22 freezing or the blocking power. That's the freezing or the  
23 blocking power. Under the Trading with the Enemy Act he was  
24 also entitled to vest, he could take the property himself and  
25 use it for the benefit of the United States, although if he did

1 that he was obligated ultimately to distribute to the creditors  
2 of the country from whom he took it.

3 In enacting the Emergency Powers Act the Congress took  
4 away the power to vest. Now, in the Trading with the Enemy Act,  
5 if you just look at that statute by itself, it seems, to me at  
6 least, inconceivable that the President could when he vested, he  
7 was required to hold the assets and ultimately distribute them  
8 to American creditors. It seems inconceivable that the freezing  
9 power would have allowed him to simply send the assets back to  
10 the other country.

11 QUESTION: Mr. Howard --

12 MR. HOWARD: Away from the creditors.

13 QUESTION: I suppose you agree that Congress could  
14 have passed a statute -- and of course it has, in some respects  
15 in the Foreign Sovereign Immunities Act -- but it could have a  
16 statute and say, property of foreign countries shall not be  
17 subject to attachment in the United States.

18 MR. HOWARD: That's correct.

19 QUESTION: And they could also authorize the President  
20 on particular occasions to immunize foreign property from  
21 attachment. Now, you have to argue that the powers of the  
22 President under the IEEPA, including the power to freeze, did  
23 not allow him to put out an order, an enforceable order im-  
24 munizing Iranian property from attachment. You have to argue  
25 that.

1 MR. HOWARD: No, I wouldn't -- I do argue that.

2 QUESTION: Well, I don't know why, because --

3 MR. HOWARD: Because even if you could immunize from  
4 attachment, Mr. Justice, even if you could immunize --

5 QUESTION: Well, I'm just talking about the attach-  
6 ment issue, I'm not talking about the claim.

7 MR. HOWARD: I understand, but nevertheless, he  
8 couldn't send the property back. All he can do is unfreeze. He  
9 has the power to freeze and block, and when he decides that  
10 it's appropriate to --

11 QUESTION: I know, but that wouldn't do you any good  
12 as far as your attachment is concerned. If the President has  
13 immunized Iranian property from attachment and he's done it  
14 legally pursuant to his statutory powers, your attachment isn't  
15 worth a plug nickle, it wouldn't seem to me.

16 MR. HOWARD: That depends on whether or not he, in  
17 his regulatory scheme, made that attachment revocable or not.

18 QUESTION: Right. And I know what you argue, that  
19 he -- do you concede he had the power to license?

20 MR. HOWARD: Not if my attachment didn't interfere  
21 with his freeze power.

22 QUESTION: I know you have to argue that, but if we  
23 happen to disagree with you on that, then the only question is,  
24 a construction of his order as to whether the revocability part  
25 of it intended to be revocable retroactively.



1 MR. HOWARD: Yes, but there's yet another question,  
2 Mr. Justice, which is in some sense the most paramount one.  
3 Can he send the property back? Because, as a practical matter,  
4 if he unfreezes, we will all be at the courthouse getting new  
5 attachments.

6 QUESTION: Well, I know, but if your attachment isn't  
7 worth anything, you certainly haven't been deprived of any  
8 property by the vacators of your attachments?

9 MR. HOWARD: If my attachment is not worth anything,  
10 yes. Yes, I think that's correct.

11 QUESTION: And that's whether or not he can send the  
12 property back.

13 MR. HOWARD: Well, no --

14 QUESTION: If it isn't going to do you any good as far  
15 as attachments are concerned, the property could remain here  
16 as long as his order immunizing it from attachment -- your  
17 attachment isn't worth anything.

18 MR. HOWARD: Oh, as far as -- that's correct. But  
19 our position is that even if he can, even if he could immunize  
20 it from attachment, the most he can do is freeze the property  
21 and keep that immunization in effect, and some day he's got to  
22 unfreeze.

23 QUESTION: Well, now, I'm very interested in what  
24 your argument is as to whether he has the power to immunize the  
25 property from attachment, which he purports to do when he

1 demands a license to attach. Now, why do you think the IEEPA  
2 does not authorize the President to relieve foreign property  
3 from the burdens of attachment?

4 MR. HOWARD: Because it is the same words that are in  
5 the Trading with the Enemy Act that are construed by the Court  
6 in Zittman, and the Court in Zittman says that if the attach-  
7 ment doesn't require a transfer of ownership or possession and  
8 they distinguish Propper v. Clark on that basis, it doesn't  
9 require transfer of ownership or possession, or otherwise  
10 interfere with the freezing -- for example, I suppose, if com-  
11 pleting the attachment required moving the property in some  
12 way that the President felt took it out of his control, if  
13 the provisional remedy interferes with the freeze, then, of  
14 course, he can regulate or prohibit it.

15 QUESTION: Of course, there were licenses in Orvis,  
16 weren't there?

17 MR. HOWARD: There may have been -- the claimant in  
18 Orvis was not licensed. The plaintiff in Orvis was not  
19 licensed. He had an unlicensed attachment. Had he had a  
20 licensed attachment, he would have won the case. But he was  
21 unlicensed and the Court held that an unlicensed attachment  
22 is an junior right when the President vests; something he can't  
23 do here; he can't do here.

24 QUESTION: Mr. Howard, let me test your suggestion  
25 that there's no power to send the assets out of the country.

1 What if at the time of the initial freeze order the President  
2 had also promulgated another regulation saying that on January  
3 19 of next year I propose to do the following with the assets,  
4 which in fact he later did. And that in the meantime attach-  
5 ments may take place but they will only be effective in the  
6 event that my program falls through. But if it does go through  
7 then the assets will, pursuant to the freeze order, be taken  
8 out of the country. Would you say that would have been invalid?

9 MR. HOWARD: Yes, he can't -- there's nothing that  
10 allows him to send the property out of the country.

11 QUESTION: What if he froze and said, next week I'm  
12 going to ship all of these assets out of the country? Could he  
13 have done that?

14 MR. HOWARD: Pardon?

15 QUESTION: What if he'd frozen on whatever the date  
16 of the freeze was and said, ten days from now all of these  
17 assets are going to be shipped over to the Bank of England?

18 MR. HOWARD: And anybody who doesn't do it will go  
19 to jail? Because that's where it now sets.

20 QUESTION: Yes.

21 MR. HOWARD: He can't do that under the freeze.  
22 That's not freezing, that's not freezing, that's moving --  
23 that's vesting and taking the property away.

24 QUESTION: All he can do under your view is maintain  
25 the status quo?

1 MR. HOWARD: That's right. He can administer the pro-  
2 perty. I mean, he can do the things you need to do to sell it.

3 QUESTION: Well, say, as a matter of administration  
4 I'm going to send it over to the Bank of England so it will be  
5 free from attachments? And your view is he can't do that, as  
6 I understand it.

7 MR. HOWARD: Yes. That's a difficult question, I must  
8 admit; that's right around the borderline. But I'm trying to  
9 talk about a difference between freezing and controlling and  
10 blocking this property, and under the Trading with the Enemy  
11 Act he could then take step two and take it, but he can't --

12 QUESTION: Yes, well, reaching the vesting question --

13 MR. HOWARD: Right. But he can't. He can't do that,  
14 and I admit, I freely admit, that there are words in the stat-  
15 ute to compel a transfer, just as he could compel me to transfer  
16 my house, but never was that done. And it couldn't have been  
17 done because that would obviously have frustrated American  
18 creditors who were to be protected if he vested.

19 QUESTION: Your answer to Justice Stevens' question  
20 is based on the existence of the IEEPA, isn't it? Not just on  
21 the president's power alone?

22 MR. HOWARD: That's correct. That's correct. On  
23 the issue of the President's power alone, the Government has  
24 put in a lot of historical information which they say amounts  
25 to a practice, a consistent practice of the Executive to do just



1 what he has done here. And our position is that these examples  
2 and these precedents, in fact, have been totally stood on their  
3 head. That is to say, historically, Americans with claims  
4 against foreigners were disabled. They had to deal with the  
5 sovereign immunity doctrine. First it was absolute, then  
6 restricted but not applied very consistently. Even if they  
7 could get around immunity they had no way of getting personal  
8 jurisdiction over the foreign states, so they had to try to work  
9 out some quasi-in-rem jurisdiction and if they ever got as far  
10 as a judgment they couldn't enforce it, there were no execution  
11 provisions in this country for the enforcements of judgments  
12 against foreign states.

13 So that, before the Foreign Sovereign Immunities  
14 Act, there was no practical way to really sue a foreign state  
15 in this country. And naturally, what happened is, individuals  
16 went to the Government and said, please help us, we have been  
17 hurt, our property has been expropriated, or they breached  
18 this contract, or whatever the claims were. And the Executive,  
19 in service to the American citizens, has tried to settle many  
20 of those claims and to be sure, occasionally a citizen has been  
21 unhappy with the result that the Executive may have obtained.  
22 But the history is of using diplomacy to aid the private citi-  
23 zen, not to sacrifice the rights of the citizen to aid a diplo-  
24 matic goal. It's totally turned around here.

25 The Foreign Sovereign Immunities Act was intended

1 to put a category of these claims into the courts and out of  
2 the process of diplomatic settlement. Now, the Government takes  
3 the position that the Foreign Sovereign Immunities Act deals  
4 only with immunity, it doesn't have anything to do with  
5 settlement. I think that that really rather misses the point.  
6 Immunity is a way of deciding which track you're going to be  
7 in. Are you going to litigate? Or are you going to try to  
8 settle it diplomatically? And immunity is the device by which  
9 that procedural choice is made, and this is not something that  
10 has escaped people in the past.

11           Let me quote if I may, please, from Mr. Justice  
12 Stone, Chief Justice at the time, in the very case that is  
13 the leading case on absolute sovereign immunity, *Ex Parte Peru*,  
14 and there the Secretary made a suggestion of immunity, and  
15 the Chief Justice says, "When the Secretary elects, as he may,  
16 and he appears to have done in this case" -- and I might say,  
17 there's nothing in the record other than his assertion of sove-  
18 reign immunity -- "when he elects to settle claims against the  
19 vessel by diplomatic negotiations between the two countries  
20 rather than by continued litigation in the courts, it is of  
21 public importance that the action of the political arm of the  
22 Government taken within its appropriate sphere be promptly  
23 recognized."

24           Now, the point is that the Chief Justice recognizes  
25 that the immunity decision is a choice. You assert it because

1 you're going to now try the diplomatic settlement rather than  
2 litigation. And similarly, in testimony before the House  
3 committee, in enacting the Foreign Sovereign Immunities Act,  
4 the Justice Department -- Witness: Mr. Ristau -- says, "A  
5 successful plea of sovereign immunity interposed by a state  
6 does not terminate the claim. Rather, the claim is merely  
7 transferred to the diplomatic arena, which is ill-suited for  
8 the settlement of private law or commercial disputes."

9 Now, the Congress has decided in the Foreign Sovereign  
10 Immunities Act that certain classes of cases shall not be  
11 transferred to the diplomatic arena, that the litigants shall  
12 be given the powers and the rights that go with litigation in  
13 this country, and they have redefined the jurisdiction of  
14 the United States district courts --

15 QUESTION: I take it that Act also recognizes attach-  
16 ments in certain circumstances?

17 MR. HOWARD: It does.

18 QUESTION: Including this one?

19 MR. HOWARD: That's certainly our position. The  
20 Government obliquely questions that in its brief, but I take it  
21 that that issue is not here before the Court. It does recog-  
22 nize attachments in certain circumstances and, more importantly,  
23 not only does it recognize attachments, for the first time in  
24 United States history it has execution provisions. You can do  
25 something with a judgment if you get it.

1           The Foreign Sovereign Immunities Act accomplished  
2 four things. It codified the restrictive principle of sove-  
3 reign immunity; it put the sovereign immunity decision entirely  
4 in the courts, entirely in the courts. The Executive was to be  
5 taken out of the process; no more politics. The legislative  
6 history is full of this talk, we don't want to have individuals'  
7 claims being resolved by international policy considerations.  
8 The case, Rich v. Naviera, the Cuban hijacking and the Eastern  
9 Airlines hijacking, was in front of them at that very time,  
10 where the Executive had traded an immunity decision to get the  
11 plane back. And they were very unhappy with that decision.

12           So they put this in front of the courts, and they  
13 put in provisions for service of process, which was effectively  
14 a way of getting personal jurisdiction over a foreign citizen,  
15 which you could never do before, and they put in execution pro-  
16 visions. So now there were real lawsuits -- .

17           QUESTION: The IEEPA was passed the year after that.

18           MR. HOWARD: That's correct.

19           QUESTION: So that presumably Congress was delegating  
20 to the President some authority belonging to the political  
21 branches that might be inconsistent with the FSIA?

22           MR. HOWARD: That is theoretically possible but it's  
23 pretty hard to read the language of the FSIA that way. The only  
24 argument that I have heard which admittedly was accepted by one  
25 judge, although interestingly enough he said, I accept this



1 argument because I am terrified by the Executive's claim to  
2 this inherent settlement power which it could use at any time,  
3 not even in an emergency or not, that judge did find appealing  
4 the argument that IEEPA prohibits -- I have to pick out the  
5 magic words -- prohibits a citizen from exercising a right with  
6 respect to Iranian property. And he said, I think filing a  
7 lawsuit is such an act.

8 Now, I guess I'd want to say two things to that. First  
9 of all, the traditional Government argument has been that some-  
10 how the President could freeze the claim, the claim of the  
11 United States citizen. That doesn't work out very well because  
12 it's pretty hard to say that the claim of the U.S. citizen  
13 against Iran is property in which the Iranians have an interest.  
14 So that one doesn't work.

15 But this other one, that Judge Breyer went for, I  
16 think, is equally unavailing because a lawsuit isn't the exer-  
17 cising of a right with respect to property. If you get a judg-  
18 ment and you go out and try to get some property, then you're  
19 exercising a right with respect to property. But we do not  
20 deny that the Executive, as long as the emergency continues,  
21 could prevent execution, he could freeze and he could stop the  
22 assets from being transferred to the particular judgment credi-  
23 tor. But it would be, it seems to me --

24 QUESTION: Why couldn't he stop prejudgment attach-  
25 ments, then?

1 MR. HOWARD: Because they don't interfere with his  
2 freeze. The execution, Mr. Justice White, would take the pro-  
3 perty away from the President. But if the attachment simply  
4 lies there as a lien, not preventing the President his use of  
5 the property --

6 QUESTION: I take it, if there hadn't been the freeze,  
7 if the President had taken no action, your lawsuit under the  
8 FSIA would have been perfectly proper and you could have gotten  
9 judgment and levied?

10 MR. HOWARD: I wouldn't be here.

11 QUESTION: But the Government says the President is  
12 authorized by the IEEPA to take it out of the judicial track  
13 and put it in the diplomatic.

14 MR. HOWARD: The Government does make that argument.  
15 It's made in a half --

16 QUESTION: At least, that the President is empowered  
17 to stop your lawsuit and to lift your attachments.

18 MR. HOWARD: I think it's pretty hard. You've got  
19 to stretch the words even of that statute, to say that he's  
20 authorized to stop the lawsuit.

21 The time that I had asked the Marshal to hold me to  
22 on the opening argument has expired.

23 MR. CHIEF JUSTICE BURGER: Mr. Lee.

24 ORAL ARGUMENT OF REX E. LEE, ESQ.,  
25 ON BEHALF OF THE FEDERAL RESPONDENTS

1 MR. LEE: Mr. Chief Justice; may it please the Court:

2 There is every indication that if you look at the  
3 situation just from the standpoint of the claimants themselves  
4 in this case, the entire body of American claimants taken as a  
5 whole, that their situation today is much better than it was  
6 prior to the November 14, 1979, order before the Government ever  
7 entered this picture.

8 On the one hand the problems that the claimants faced  
9 absent any kind of action by the Government included these.  
10 There were serious problems in most of the cases with respect  
11 to jurisdiction. In many of the cases there were also both  
12 sovereign immunity and active state defenses, and with regard  
13 to the attachment or the property that might be available for  
14 the levy of execution following judgments, if any were ever  
15 entered, the November, 1979, order was made in response to re-  
16 ports that the Government of Iran was about to withdraw its  
17 funds.

18 Now, contrast that with the circumstances that exist  
19 because of the acts that were taken by the President, his  
20 January 19 orders and the subsequent order of President Reagan  
21 on February 24. In the first place, all problems of jurisdic-  
22 tion, sovereign immunity, and act of state have been stripped  
23 away. In addition, there is a settlement account in the amount  
24 of \$1 billion that is established, and the Government of Iran  
25 has guaranteed to pay all of the claims, both expropriation and

1 commercial claims, presently estimated to be on the order of about  
2 2,500. And that when the settlement account drops below --

3 QUESTION: 2,500 claims -- ?

4 MR. LEE: That is correct; that is correct. That when  
5 this settlement account drops below one-half million dollars,  
6 then the Government of Iran is obligated to replenish it.

7 QUESTION: How would that be enforced if the Govern-  
8 ment of Iran -- ?

9 MR. LEE: Traditional ways that international obliga-  
10 tions are enforced. Their obligation, their stature in the  
11 community of nations is at stake.

12 QUESTION: Well, those traditional forces didn't seem  
13 to prevail in the seizure of the hostages themselves, did they?

14 MR. LEE: There is another available remedy because  
15 of this settlement, Justice Stewart, that was also not available  
16 prior to the agreement itself, and that is that any of the  
17 tribunal's awards are enforceable in the courts of any country  
18 in the world.

19 QUESTION: But that doesn't answer the Chief Justice's  
20 question.

21 MR. LEE: No, it does not, and of course this Court  
22 cannot know and no one can know to what extent any country may  
23 conform with its international obligations.

24 QUESTION: And the more you read the newspapers, the  
25 more doubts you have.



1 MR. LEE: Yes, and yet, Justice Rehnquist, I think  
2 that it would be improper for an American court to base a judg-  
3 ment on the assumption that a foreign nation will or will not  
4 conform to its obligations.

5 QUESTION: We're not dealing here with an assumption.  
6 We're dealing with an historical fact.

7 MR. LEE: Historical fact also includes the fact that  
8 in addition to the settlement fund in the initial amount of  
9 \$1 billion, which is more than they had in the first place --

10 QUESTION: Yes?

11 MR. LEE: -- they do also have the right to go into  
12 the courts of any country in the world and when you take into  
13 account the fact that we're dealing here with a country that  
14 is very active in commercial oil international transactions,  
15 the likelihood that there will be assets available in many  
16 countries of the world is rather high. And even --

17 QUESTION: Unless Iran isolates itself totally from  
18 the rest of the world and -- ?

19 MR. LEE: From the rest of the world, and it would be  
20 paying a very high price if it did that, of course.

21 QUESTION: Mr. Lee, how much are we really talking --

22 QUESTION: -- collectibility of your judgment in  
23 terms of your right to get the judgment, do we?

24 MR. LEE: Well, all I'm saying is, Justice Stevens,  
25 that while it is true, as this Court said in United States v.

1 Pink, that this kind of authority in the President has a much  
2 broader use than just the assurance of the rights of American  
3 claimants. But this is one of the bargaining chips, if you  
4 will, this is part of a leverage that the President can and  
5 should use in achieving the normalization of relations with  
6 foreign countries.

7 My only point is that in this case the body of Ameri-  
8 can claimants taken as a whole is much better off than they were  
9 prior to the time that the Government ever entered this picture.  
10 Now there may --

11 QUESTION: That goes to whether it was a good deal  
12 or not, it doesn't go to whether the President had the power  
13 to make the deal.

14 MR. LEE: That is correct.

15 QUESTION: Well, but so far in your argument, you're  
16 just telling us what a good deal it was.

17 MR. LEE: Well, all I am saying is, Justice Stewart,  
18 that the proposition that this was used solely as a bargaining  
19 chip for the release of the hostages does not tell the entire  
20 story. And with respect even to the question --

21 QUESTION: Thus far your entire argument has just  
22 been directed to what a favorable, how much all these claimants  
23 have been helped.

24 MR. LEE: Well, so far I've only been going for five  
25 minutes and I do intend to get to --

1 QUESTION: I know.

2 MR. LEE: This was solely a matter of flushing out  
3 the facts. Let me come, then, to the legal issue. Or, let  
4 me cover one other matter insofar as the facts are concerned,  
5 and that is these forum clauses.

6 Even there the claimants are considerably better off  
7 because of the fact that with the agreement they do have an  
8 additional argument that was not available to them initially  
9 flowing from the combination of Article V, which refers to,  
10 specifically, to changed circumstances, and Article II, which  
11 talks about the fact that it must be a binding contract which  
12 in turn can tie back to Article V.

13 Turning then to the law. In our view, there is a  
14 single issue that undergirds both of the questions, that is,  
15 both the question of power to nullify attachments and transfer  
16 assets, and also the power to settle claims. And it concerns  
17 the power of the President to act in an international crisis  
18 whose nature and magnitude are such that if it to be resolved  
19 it has to be resolved by one person and one person alone, and  
20 under our system of argument that person is the President.

21 QUESTION: Mr. Lee, is this independent of any  
22 compensation clause question?

23 MR. LEE: That is correct, and I hope to get to the  
24 compensation --

25 QUESTION: What is the Government position on that?

1 MR. LEE: The Government's position on compensation  
2 is this, Justice Rehnquist, that the Petitioner's claims for  
3 compensation are premature at this time. The reason that  
4 they're premature is that no one knows whether they have suf-  
5 fered any damage or not because we don't know and we cannot know  
6 that unless and until the tribunal has completed its work.

7 QUESTION: So the Government doesn't concede they  
8 would have any remedy under the Just Compensation Clause of the  
9 Fifth Amendment if in fact they do suffer loss?

10 MR. LEE: Well, I find it difficult to take the posi-  
11 tion that the exception that Judge Duffy found in the Tucker  
12 Act jurisdiction under the treaty exception could be applicable.  
13 And the reason is that under this Court's decision in Hughes  
14 Aircraft v. United States, that turns on whether "plaintiff's  
15 claim could conceivably exist independently of and separate and  
16 apart from the subject treaty." And this one, I think, simply  
17 doesn't.

18 QUESTION: So, am I to conclude that you suggest it  
19 would not be inappropriate in this case, or that the issue of  
20 the remedy in the Court of Claims may be decided?

21 MR. LEE: Well, I think --

22 QUESTION: I thought the Government's position up to  
23 now had been that that issue was premature also.

24 MR. LEE: Well, I think it is premature and the rea-  
25 son that it's premature is because of the fact that we don't



1 know as of this point in time whether or not any damage has  
2 been suffered or will be suffered by these claimants.

3 QUESTION: You mean that's because of the availability  
4 of other fora?

5 MR. LEE: That is correct.

6 QUESTION: The arbitration commission is one and what,  
7 the courts of Iran are another?

8 MR. LEE: Well, principally what the --

9 QUESTION: And as for this Petitioner, there is, I  
10 gather, also this intermediate --

11 MR. LEE: Conciliation effort.

12 QUESTION: Yes.

13 MR. LEE: Because, under President Reagan's February  
14 24 order, all that happens to these federal claims is that they  
15 are suspended, they are not terminated, and in the event that  
16 the tribunal determines that it does not have jurisdiction,  
17 then that suspension itself is terminated and they can proceed  
18 with their claims.

19 QUESTION: Well, then, do I understand, the Govern-  
20 ment does not take the position that the mere availability of  
21 another forum or fora, merely that, answers the taking claim?

22 MR. LEE: Well, it makes it --

23 QUESTION: How about steel or -- ?

24 MR. LEE: It makes it premature in this case --

25 QUESTION: That wasn't my question. Do you take the

1 position that the mere availability of these other fora in and  
2 of itself takes, answers the taking claim?

3 MR. LEE: No. It does not. It is conceivable --

4 QUESTION: It may be at the end of the road they'd  
5 still have a taking claim but not until they've gone to the  
6 end of the road. Is that correct?

7 MR. LEE: That is correct, Justice Brennan.

8 QUESTION: Well but then, doesn't the Government have to  
9 answer the question, what if they go through all these steps  
10 and come back and can show a loss, then do they have a takings  
11 claim?

12 MR. LEE: Justice Rehnquist, I think the answer to  
13 that is no, but it need not be answered in this case. But to  
14 be --

15 QUESTION: But if it does --

16 MR. LEE: But if it does --

17 QUESTION: You suggest what the answer is, is it?

18 MR. LEE: That is correct; that is correct.

19 QUESTION: That there is no takings, and that the  
20 President can violate the Bill of Rights on his own?

21 MR. LEE: No, no; no. Clearly that is not. But that  
22 rather --

23 QUESTION: If there's still a taking, you think  
24 there's a remedy for it?

25 MR. LEE: That is correct, and that remedy is the

1 Tucker Act.

2 QUESTION: Yes.

3 MR. LEE: Because the treaty exception simply does  
4 not apply.

5 QUESTION: Mr. Solicitor General, do I understand you  
6 to say there has been no termination provided for in this  
7 agreement? No termination of the claims?

8 MR. LEE: They have been suspended.

9 QUESTION: Your opening brief says there has been a  
10 termination. Your opening brief also says the agreement pro-  
11 vides for a termination. Look on page 7.

12 MR. LEE: The language of the --

13 QUESTION: It's the first full paragraph. "The Agree-  
14 ment states that 'the purpose of both parties' is 'to terminate  
15 all litigation'". . . . and it goes on --

16 MR. LEE: Yes. Those are the Algerian Declarations.

17 QUESTION: Yes, that's what we're talking about,  
18 isn't it?

19 MR. LEE: That is correct. That that was the pur-  
20 pose, was to terminate.

21 QUESTION: But you're saying that that purpose is not  
22 accomplished?

23 MR. LEE: Well, the implementing order did not go  
24 quite that far. And the relevant order here is President  
25 Reagan's order of February 24, It says that the claims are

1 suspended, and the effect is this, that in the event that a  
2 tribunal determines that it does not have jurisdiction, then  
3 the suspension is lifted and they're free to pursue the remedy  
4 in the courts.

5 QUESTION: If you settle a claim, Mr. Solicitor  
6 General, don't you terminate it?

7 MR. LEE: No, not necessarily, it's more --

8 QUESTION: Really?

9 MR. LEE: Well, it is settled in the sense that,  
10 Justice Powell, that it is suspended in the courts. That  
11 doesn't mean that they lose the case. Something like absten-  
12 tion, they simply hold onto it.

13 QUESTION: That was not my experience in practising  
14 law.

15 MR. LEE: To await the outcome, to await the outcome  
16 of the determination by the tribunal. In the event that the  
17 tribunal determines that it does not have jurisdiction, then  
18 they are free to pursue their claim in the court. In the event  
19 that the tribunal determines that they do have jurisdiction,  
20 then it is terminated.

21 QUESTION: I'm puzzled by perhaps the same question  
22 that Justice Powell has asked. But I understand under the  
23 executive order they're suspended, which means that if the  
24 tribunal says, we have no jurisdiction, they could be refiled  
25 in a federal court. Would that not violate the treaty,



1 the Algerian Declaration?

2 MR. LEE: That is a question, of course, for another  
3 day.

4 QUESTION: You don't have a position on that yet?

5 MR. LEE: No, I certainly do not. We think that the  
6 right position is that it is consistent with the general  
7 objective. That matter of terminating the claims was a state-  
8 ment that was made at the beginning, a broad statement of  
9 purpose, and our position would be that the suspension, await-  
10 ing the outcome of the determination by the tribunal, is  
11 generally consistent with that -- .

12 QUESTION: Well, Mr. Lee, I take it then the Govern-  
13 ment position is that we certainly shouldn't decide in this  
14 case or in any other one that the tribunal does not have juris-  
15 diction?

16 MR. LEE: Of course not. And I --

17 QUESTION: Well, I don't know, that's not so clear.  
18 The argument's pretty strong, at least in some of the cases  
19 pending around, that the treaty would exclude some of these  
20 claims. It seems to be, looks clear, and -- but if the tribunal  
21 does not have jurisdiction and the claimant is remitted to  
22 the courts and he gets a judgment, what the treaty has done,  
23 since the United States promised to end all suits, in the in-  
24 stance I am posing, that suit wouldn't be over. If there was a  
25 judgment, however, it would not be enforceable anywhere else

1 in the world, would it?

2 MR. LEE: That is correct.

3 QUESTION: So, just because in international law the  
4 United States will have broken its treaty obligation.

5 MR. LEE: Well, there might conceivably be an argu-  
6 ment to that effect, at that point in time. I'd like to  
7 come to --

8 QUESTION: I'm sorry, Mr. Lee, I confess I'm a little puz-  
9 zled exactly what the Government's position is as to what if any  
10 part of the taking question we should answer?

11 MR. LEE: We think, Justice Brennan, well, my end of  
12 that, and here is our position. We think that you could decide  
13 at this time that there is no taking.

14 QUESTION: Either as to the attachments or the -- ?

15 MR. LEE: Either as to the attachments or the claim  
16 settlement. And briefly, the reason is this. As to the  
17 attachments, it's because the only attachments in any of the  
18 cases that are at issue here, were attachments that were secured  
19 pursuant to the revocable license.

20 QUESTION: So there's no property --

21 MR. LEE: That is correct. They derive their life  
22 from that license and that license has now been canceled.

23 QUESTION: Now, what about the claim settlement?

24 MR. LEE: All right, now as to the claim settlement,  
25 it turns on this matter that we've just been talking about.

1 All that the President has done is to suspend those claims.  
2 Part of them, the tribunal will determine that it has no juris-  
3 diction. As to those, there has been no taking because they  
4 can come back into court. Sans attachment, to be sure, but  
5 those attachments also owed their life to the license.

6 Now, with regard to the others, where the tribunal  
7 either determines that to make an award or not to make an  
8 award, then the only way that you could say that there has been  
9 a taking is to say that by settlement of a dispute through  
10 another alternative means of dispute resolution is a taking.  
11 And particularly in today's world, with all the attention that  
12 is being given to the matter of alternative means of dispute  
13 resolution, it would be very unfortunate for this Court to  
14 enter a judgment that settlement through alternative means of  
15 dispute resolution raise Article III problems.

16 QUESTION: How do you distinguish your answer to  
17 Justice Brennan from the decision in the railroad reorganization  
18 cases?

19 MR. LEE: Well, it may be -- those of course are --  
20 the difference there is differences in degree. And it's a  
21 question of imminence and the Court may well want to say.  
22 The way I distinguish it is, that we simply cover the water-  
23 front, in my view, with all of the actions that the President  
24 did and that there is a solid basis for this Court to say that  
25 under no circumstance can there be a taking, because you have

1 both the attachments covered by the license point and you also  
2 have the claim settlement authority covered by the fact of the  
3 suspension.

4 QUESTION: Well, at least, Mr. Lee, it seems to me  
5 your very assertion that the taking question is premature with  
6 respect to the claims is an assertion that as of right now  
7 there has been no taking. You have to at least say that,  
8 don't you?

9 MR. LEE: Yes, as of right now, there certainly  
10 has not been a taking. Now, to finish it on out, what you  
11 could not do today is to say that there has been a taking.  
12 I think you can today say there has not. What you could not  
13 do today is to say that there has, and that would bring you  
14 to the question that everyone wants me to answer and that I  
15 think I have answered, and that is, in that event is there a  
16 remedy? And the answer to that is, it seems to me, as I read  
17 that treaty exception to the Tucker Act, that there is.

18 QUESTION: That's the United States position, not  
19 just Mr. Lee's, I take it?

20 MR. LEE: That is correct. Now coming to the ques-  
21 tion of the authority of the President to transfer the assets  
22 and nullify the attachments, it is agreed on all sides that that  
23 is covered by the IEEPA, and I think little more need be said  
24 by that. That puts it in Category One of Justice Jackson's  
25 three categories. I understand Mr. Howard's statement that it



1 is very broad language, but I think that relates only to the  
2 taking question, which I've already covered, and does not per-  
3 tain to the President's power.

4           Moreover, coming out of this Court's declarations in  
5 United States v. Pink and the Curtiss-Wright case, there is  
6 certainly a great deference in these matters of delegations of  
7 broad authority to the President. And indeed, in the IEEPA  
8 itself, it says that this power will be exercised only with  
9 respect to an unusual and extraordinary threat which amounts to  
10 a national emergency.

11           Let me come then to what I regard as the hardest  
12 problem in the case, and that is, this power of the President  
13 to settle outstanding claims. There is no question that this  
14 aspect of the case does not fit as neatly within any identifi-  
15 able congressional statute as does the first powers. We think,  
16 for openers, that the Court of Appeals for the District  
17 of Columbia was exactly right, or at least the two judges who  
18 agree with us on this issue, that it falls within the Hostage  
19 Act. Let me say just briefly that it falls squarely within  
20 the exact language of the Hostage Act. There is some question  
21 whether this old 1868 statute was really intended to deal with  
22 this particular --

23           QUESTION: Are you speaking of the 1868 statute?

24           MR. LEE: Yes, sir.

25           QUESTION: The District of Columbia Court of Appeals?

1 I thought only Judge McGowan took that?

2 MR. LEE: Judge McGowan, but also Judge Jamèson  
3 agreed with him on that issue. There was a separate opinion,  
4 but --

5 QUESTION: By Judge Mikva, who explicitly disagreed.

6 MR. LEE: That is correct. Judge Mikva was on the  
7 other side of that one.

8 QUESTION: And is this Hostage Act, is that what it's  
9 always been called?

10 MR. LEE: Well, there's some dispute about that also.  
11 That is one of the raging debates as to whether it's always  
12 been called the --

13 QUESTION: But there's no doubt that it was enacted  
14 in terms by Congress in 1868, was it not?

15 MR. LEE: That is correct. And whatever else Congress  
16 did or did not intend to do, it's clear that Congress intended  
17 to give to the President the kind of power that they gave him,  
18 and to express their view in the exact language that they used,  
19 and that --

20 QUESTION: That's an extraordinary power. It gives  
21 him, according to your submission, it gives him anything short  
22 of the war power. In other words, last fall, the President  
23 could have made a deal and put you as a hostage and exchanged  
24 you for one of the hostages and brought him home, according to  
25 your argument, you or me.

1 QUESTION: Not Justice Marshall, perhaps.

2 MR. LEE: And that is the argument against using  
3 this statute in this instance. But if there is no question  
4 that if there is a defect in that respect, it is a defect  
5 essentially with Congress, particularly when you take into  
6 account what this Court said in Curtiss-Wright and United  
7 States v. Pink about the way you approach the congressional  
8 authorizations in the area of foreign affairs.

9 But let me go on, now, to what I think is an even  
10 more significant point in this respect. And that is, that  
11 even if you can't fit it within -- even if you were to decide  
12 that the Hostage Act does not apply, Justice Jackson in the  
13 guidelines that he gave indicated that you get the additional  
14 force of Article I power added to Article II power when you  
15 have the implied approval of Congress. This simply is not an  
16 area in which the interbranch relationships between Congress  
17 and the President have been characterized by contention and by  
18 interbranch struggle. Rather, it has been an area in which  
19 there has been a continuing recognition by Congress of the  
20 existence of claims settlement authority and periodic enactments  
21 to support it.

22 For example, at the time that the IEEPA was enacted,  
23 the Congress observed that one of the reasons that it authorized  
24 blocking orders was that they are "generally the most effective  
25 means of achieving settlement of United States claims." And in

1 addition, in such enactments as the International Claims Settle-  
2 ment Act and the work of the Foreign Claims Settlement Commission  
3 and the periodic reenactment by Congress reflecting the work  
4 of that Commission, in the reports that are made to Congress  
5 under the IEEPA, and generally just across the boards, this  
6 has been an area in which the Legislative Branch has recognized  
7 the existence of claims settlement authority and has periodi-  
8 cally acted to implement and to support it. Now, the --

9 QUESTION: Well, Mr. Lee, let me quote to you, if I  
10 may, Article V of the China Settlement Agreement, signed by  
11 Secretary Kreps and her corresponding Chinese official, which  
12 is heavily relied on in the Government because it's a 1979  
13 document. And it says, "After the date of the signature of  
14 this agreement neither Government will present to the other on  
15 its behalf or on behalf of another any claim encompassed by  
16 this agreement. If any such claim is presented directly by a  
17 national of one country to the Government of another, that  
18 Government will refer it to the Government of the national who  
19 presented the claim."

20 Now, that doesn't strike me as ousting the United  
21 States courts of jurisdiction of a claim.

22 MR. LEE: I agree.

23 QUESTION: So, does that support your claims -- ?

24 MR. LEE: Oh, no. It does not get us to the Article  
25 III question. All it gets us to is the fact that the claims



1 settlement authority does exist, that it is an authority that  
2 is of longstanding recognition and practice, and that it is one  
3 that has long been recognized by Congress. I intend to come  
4 to the Article III question in just a moment.

5 I just would like to -- well, I'd like to say before  
6 I get there, that in addition to congressional recognition this  
7 is an authority that in the language of the Court of Appeals  
8 for the District of Columbia, quoting Professor Henkin, "is an  
9 established international practice reflecting traditional  
10 international theory."

11 But this Court in *United States v. Pink* characterized  
12 it as a modest implied power of the President as to which  
13 effectiveness in handling the delicate problems of foreign rela-  
14 tions requires no less. And finally, it is a practice so well  
15 established that it is reflected as black-letter law in Section  
16 213 of the Second Restatement of the Foreign Relations Law  
17 of the United States. So we're not dealing here with something  
18 that is just a newcomer in this particular case, and the propo-  
19 sition --

20 QUESTION: We aren't governed by the Restatement  
21 though, are we?

22 MR. LEE: No, no, of course not. But all I'm saying  
23 is that it is a practice that is well recognized, well estab-  
24 lished, recognized not only by the decisions of this Court in  
25 *Pink*, and it has a long paragraph on the importance of claims

1 settlement authority by scholars and by Congress itself.  
2 And that is as a prelude to this point, Justice Rehnquist, that  
3 the proposition that a bill that was drafted and lobbied by the  
4 two Executive Branch departments that most depend and utilize  
5 that claims settlement authority, would have had as its purpose  
6 to take away that very authority without ever saying so, almost  
7 borders on the absurd. And indeed, the few references in the  
8 Foreign Sovereign Immunities Act to claims settlement authority  
9 are to the effect that it exists.

10 Even the quote from Mr. Ristau, which Mr. Howard re-  
11 ferred to, acknowledges the existence of the claims settlement  
12 authority. And that brings me to the question, what about  
13 jurisdiction and what about settlement of the claims through  
14 submitting them to arbitration?

15 The Court of Appeals -- both of them -- for the 1st  
16 Circuit and the District of Columbia correctly reasoned that  
17 this was an effort not to modify the power of the courts, the  
18 jurisdiction of the courts, to decide this case, but rather the  
19 substantive rule of law that the courts are to apply. All the  
20 focus of all of the executive orders is very careful on the  
21 claim, on the nature of the claim that is held by the claimants  
22 and not on the power of the courts. And as a consequence, the  
23 judge in this case correctly dismissed this case, dismissed  
24 the complaint for failure to state a claim on which relief could  
25 be granted.

1           Now, the fact is, of course, that as a result of some-  
2 thing that the Government has done, American courts will not be  
3 deciding some of these cases. But there are a number of in-  
4 stances in which that circumstance is true, that has never been  
5 thought to give rise to Article III problems.

6           For example, the Government may settle a case after  
7 it is pending in court. In addition, prior to 1976, the Govern-  
8 ment frequently appeared in court and suggested that sovereign  
9 immunity applied, and that had the effect of taking the case  
10 away from the courts. And finally, it persists to this day that  
11 the Government may take a position with respect to act of state  
12 that has the effect of taking the case out of the courts.

13           Now, on this issue, Schooner Peggy is absolutely  
14 dispositive. When Mr. Howard takes the position that with  
15 respect to the basic issue of claims settlement authority  
16 Schooner Peggy is distinguishable because it was a treaty,  
17 parenthetically, my answer to that is this. That it's true  
18 that Schooner Peggy did involve a treaty, but when by the time  
19 you combine the holding and the rationale in Schooner Peggy  
20 with the rationale, with the statement by this Court in Pink  
21 concerning settlement authority, that those two taken together  
22 make a pretty powerful argument for the existence of settlement  
23 authority. But with regard to the --

24           QUESTION: Even by the President himself?

25           MR. LEE: By the President himself; that is correct.

1 as a matter of his Article II power.

2 QUESTION: Well, how do you -- do you disagree, then,  
3 with Justice Frankfurter's statement in the steel seizure cases  
4 that just because the power does not reside in the President  
5 doesn't mean that the Government as a whole doesn't have it,  
6 and just because the Government as a whole has it doesn't mean  
7 that the President by himself can exercise it?

8 MR. LEE: I do agree with that statement, Justice  
9 Rehnquist, and it is of course consistent with the trichotomy,  
10 if you will, by Justice Jackson in that same case, that it's  
11 simply a matter, if you have both the President acting with his  
12 Article II power and Congress acting with its Article I power,  
13 then it's all the stronger. And if you have the Congress taken  
14 away, then it's weaker.

15 But coming back to the point of claims settlement  
16 authority, Justice Frankfurter also said -- this is the clearest  
17 statement that you have anywhere -- in United States v. Pink,  
18 that it is simply indisputable that the President has the claims  
19 settlement authority.

20 But, coming back to the question of jurisdiction,  
21 Schooner Peggy may or may not be distinguishable on the basic  
22 issue of the President's claims settlement authority. We think  
23 that Peggy plus Pink makes a pretty powerful combination in that  
24 respect. But on the issue of jurisdiction Schooner Peggy is  
25 absolutely dispositive, and a ruling could not come down by this



1 Court that what the President did here amounts to an Article  
2 III violation without overruling Schooner Peggy for this reason:  
3 Schooner Peggy is an a fortiori case from Dames &  
4 Moore on this issue, because what you had in Schooner Peggy was  
5 a final judgment, which we do not have in this -- excuse me --  
6 there was a judgment out of the circuit court entitling the  
7 claimants in that case to their prize.

8 QUESTION: Why don't you have -- you have that here.

9 MR. LEE: Well, except that --

10 QUESTION: You have a judgment of a district court.

11 MR. LEE: But that judgment was entered in violation  
12 of the President's freeze order and --

13 QUESTION: Well, that just begs the question.

14 MR. LEE: All right; all right. Maybe it's not a for-  
15 tiori. I think it is, but I'll concede for the moment that it's  
16 not. The point is this that while that judgment was pending,  
17 or while review of that judgment was pending before this Court,  
18 the President entered into a treaty which was approved by the  
19 Senate depriving this Court of jurisdiction.

20 QUESTION: Well, it didn't really, did it? It just  
21 said, it just said it changed the rule of law.

22 MR. LEE: That's right. It changed the rule of law.

23 QUESTION: The Court said that the appellate court  
24 should apply the law as it finds it on appeal, and the law  
25 then changed.

1 MR. LEE: That is correct.

2 QUESTION: It wasn't a jurisdictional decision, was  
3 it?

4 MR. LEE: I stand corrected. It changed the rule of  
5 law. And that's exactly what has happened --

6 QUESTION: And that was a treaty, not any executive  
7 agreement.

8 MR. LEE: That is right. And that brings me to the point.

9 QUESTION: Well, Mr. Lee, I think it's rather impor-  
10 tant, and jurisdiction strikes me as quite the wrong approach,  
11 based on Schooner Peggy. The argument that the judiciary was  
12 stripped of jurisdiction, finding it in the executive,  
13 was answered by saying, no, it didn't.

14 MR. LEE: That is correct.

15 QUESTION: It just created a new rule of law which  
16 it was the duty of the appellate court to apply.

17 MR. LEE: And that is exactly the point that I'm try-  
18 ing to make.

19 QUESTION: Then are you withdrawing all this juris-  
20 dictional -- ?

21 MR. LEE: What I'm saying is that it is not a juris-  
22 dictional point.

23 QUESTION: I should say not.

24 MR. LEE: That what the Court said in Schooner Peggy  
25 is that it was not a matter of jurisdiction. Chief Justice

1 Marshall made it very clear that all that they were doing  
2 there --

3 QUESTION: No intrusion on the judicial power.

4 MR. LEE: That is correct. And now my point is this,  
5 that if you did look at what happened in Schooner Peggy, as a  
6 jurisdictional matter, the President could no more do it with  
7 the advice and consent of the Senate than he could do it on his  
8 own. And that's the only point that I'm making. I apologize  
9 for that confusion, but our point is not that they were dealing  
10 with jurisdiction, and in fact the Court made it very clear in  
11 that Schooner Peggy case that if subsequent to the judgment and  
12 before the decision of the appellate court a law intervenes and  
13 positively changes the rule of law which governs, the law must  
14 be obeyed.

15 QUESTION: And your position, I take it, is that the  
16 President by himself under his Article II powers may change the  
17 law of the land that the Court must apply?

18 MR. LEE: In a case where he is exercising --

19 QUESTION: Well, in this case. In this case.

20 MR. LEE: In this case, that's right, under the  
21 facts and circumstances --

22 QUESTION: And without a treaty or without acting  
23 pursuant to any statute.

24 QUESTION: And there Schooner Peggy doesn't support  
25 you because it was a treaty.

1 MR. LEE: It was a treaty, that is correct. But I  
2 think that the treaty distinction is irrelevant insofar as the  
3 distinction between the dispositive rule of law, supplying the  
4 rule of law is concerned.

5 QUESTION: Well, why do you think the Constitution  
6 talks about --

7 QUESTION: We're getting into two quite separable  
8 and different issues here.

9 MR. LEE: That is correct.

10 QUESTION: One is, did the President have power to do  
11 this? And secondly, if as you say he did, then all he did was  
12 change, all that happened was, not the ousting of the jurisdic-  
13 tion of the federal courts, but a change in the substantive law.

14 MR. LEE: That is correct. And it is our position --

15 QUESTION: They're two separate issues.

16 MR. LEE: That is absolutely correct, and it is our  
17 position that he has the power to do that, pursuant to his  
18 Article II power, but in this particular case, for reasons  
19 that I've discussed just a moment ago, that he also had the  
20 support of the Article I power behind him for the reasons --

21 QUESTION: Primarily the 1868 statute?

22 MR. LEE: That's one. And the other is the implied  
23 authority that comes from the continuing pattern of cooperation  
24 between Congress and the President.

25 QUESTION: On foreign policy, foreign relations



1 matters. You're limiting that, aren't you?

2 MR. LEE: Oh, without any question, without any ques-  
3 tion, in these foreign relations matters.

4 QUESTION: But what you're saying is that what the  
5 President did has the same ultimate consequence as though  
6 Congress and the President in the usual legislating function  
7 adopted new substantive law.

8 MR. LEE: That is correct.

9 QUESTION: It's binding.

10 MR. LEE: That is correct, Mr. Chief Justice. Except  
11 that we're saying, in addition, that in this case you also have  
12 the additional force of the congressional directive behind it.  
13 Significant in that respect, that in enacting the IEEPA  
14 Congress clarified that nothing in that Act was intended "to  
15 impede the settlement of claims of United States citizens  
16 against foreign countries."

17 And that brings me back to where I started, and that  
18 is that the principle that has to govern both of the questions  
19 in this case is this, that a crisis such as that which we under-  
20 went in this country for 14 months does not occur often. But  
21 on those rare occasions when it does occur, followed by the  
22 opportunity for settlement on honorable and reasonable terms,  
23 then someone has to have the authority to decide whether to  
24 settle it or not. And this is your point, Mr. Chief Justice,  
25 that it does fall within the foreign affairs powers.

1 Someone has to be able to act, to act without delay, and to  
2 act with authority. Under our system of government that has to  
3 be the President. I submit that it would simply be unaccept-  
4 able for this nation or any other to lack that kind of power  
5 under that kind of circumstance. It would, as this Court said  
6 in Pink, be in derogation of sovereignty itself.

7 QUESTION: Well, on the steel seizure cases, President  
8 Truman's order was posited on the emergency that he felt  
9 existed and he shut down the steel mills in the Korean conflict.  
10 And yet this Court decided against him.

11 MR. LEE: Oh the -- there was one proposition,  
12 Mr. Justice Rehnquist, on which all opinions in the steel sei-  
13 zure case were in agreement and that is that this was one of the  
14 cases that Justice Jackson would have said fell within the  
15 category three; that is, where he had acted against the will of  
16 Congress and in our view, this is either a category two or a  
17 category one case, because of the fact that he has acted with  
18 power of something more than just his own Article II power, but  
19 that in any event his Article II power would have been suffi-  
20 cient.

21 For these reasons, we respectfully submit that on  
22 those rare occasions when a crisis such as that that occurred  
23 does occur and the opportunity for settlement occurs, then some-  
24 one has to have the power to act. That is what the President  
25 did in this case. Fortunately, he acted with the authority of

1 Congress as well as his own behind him. The other issues  
2 concerning possible taking are completely separate, but what  
3 he did in connection with the settlement of claims, the  
4 nullification of attachments, and the transfer of assets, fell  
5 well within his powers, both as supported by Congress and also  
6 under Article II.

7 MR. CHIEF JUSTICE BURGER: Mr. Shack.

8 ORAL ARGUMENT OF THOMAS G. SHACK, JR., ESQ.,

9 ON BEHALF OF INTERVENOR-RESPONDENT ISLAMIC REPUBLIC OF IRAN

10 MR. SHACK: Mr. Chief Justice; may it please the  
11 Court:

12 Despite the plethora of briefs and the numerous  
13 parties in amici, the questions presented to the Court in this  
14 proceeding are not particularly abstruse. They do not require  
15 broad sweeping pronouncements from the Court.

16 I would submit that the attachment issues are essen-  
17 tially and simply issues of statutory construction and should  
18 be governed by the basic principle that statutes should be  
19 construed so as to avoid conflicts between them and in terms  
20 of international law statutes should be construed in such a  
21 way as not to cause a breach of an international agreement or  
22 international law.

23 I have in the limited time four simple points which I  
24 would like to address. The first, the Government of the United  
25 States and the Government of the Islamic Republic of Iran

1 executed an international agreement between the parties on  
2 January 19, 1981. Both of the sovereigns are in the process of  
3 implementing their obligations under the agreement and each  
4 expects the other sovereign to continue to fulfill those obli-  
5 gations. As a matter of international law it is a well recog-  
6 nized principle that an international agreement is binding  
7 despite any contrary domestic law.

8 QUESTION: Well, Mr. Shack, what if that agreement  
9 had included a provision sending Justice Stewart to Teheran  
10 indefinitely?

11 QUESTION: Now that he's resigned --

12 QUESTION: Do you think that would still be binding?

13 MR. SHACK: Well, I think that Justice Stewart would  
14 probably have to pack a bag and -- the short answer is, to  
15 whatever extent such an agreement would infringe upon the con-  
16 stitutional rights of a citizen and was struck down as being  
17 unconstitutional, it would not be binding as a matter of domes-  
18 tic law, and I doubt that anyone would try to put Justice  
19 Stewart on a plane. But whether the United States would be in  
20 violation of such an agreement and thus answerable for damages  
21 in such an event, I think that under international law it  
22 would be.

23 QUESTION: But that isn't the question that we're  
24 facing here, is it?

25 MR. SHACK: No, that is not the question that we are



1 faced with here today. The basic question is, there is an  
2 agreement between the two countries, the United States is under  
3 an obligation to accomplish, to restore Iran to its financial  
4 position as it existed prior to November 14, 1979, and to  
5 accomplish that the United States has to assure the free  
6 mobility of Iran's assets within this jurisdiction.

7 If the United States does not in fact accomplish the  
8 restoration of Iran's financial position, and if it in fact does  
9 not accomplish satisfaction of the obligations imposed under  
10 paragraphs 4 through 9 of the Declarations, specifically the  
11 transfer of specific categories of assets to Iran, then the  
12 United States would arguably be in violation of the agreement  
13 and under international law liable for damages. Since the  
14 international tribunal which has been referred to today does in  
15 fact exist, and since it does in fact have jurisdiction over  
16 disputes of this nature between the parties, then the tribunal  
17 would be in a position and arguably has the authority to impose a  
18 damage judgment against the United States in the full amount of  
19 Iran's assets as they exist in this country.

20 QUESTION: What if part of the agreement had provided  
21 that for one year no one should criticize the Ayatollah in this  
22 country? Would the United States be liable for damages if  
23 any person in this country criticized the Ayatollah?

24 MR. SHACK: Well, again, despite the inconsistency  
25 with domestic law, the United States would be obligated by

1 virtue of its good faith commitment to attempt to accomplish the  
2 objectives of the agreement. It is unlikely that any Executive  
3 would knowingly or willfully attempt to deliberately circum-  
4 scribe the rights of a citizen or citizens.

5 QUESTION: But you're saying that under international  
6 law they are bound to carry out an agreement if such an Execu-  
7 tive would have done so.

8 MR. SHACK: Yes, I would suggest that that is true.  
9 If the Executive had made such an agreement, the United States  
10 would be obligated to attempt to carry out the obligations of  
11 the agreement.

12 I observe that this international principle which says  
13 that international law is binding regardless of domestic law  
14 also leads me to the fourth point, which is that the courts of  
15 this country have traditionally construed domestic law in such  
16 a way as wherever possible not to cause a breach of an inter-  
17 national agreement with a foreign sovereign.

18 Under the Algerian Declarations, as I mentioned a  
19 moment ago in answer to your question, Justice Rehnquist, the  
20 United States is obligated to restore Iran's financial position  
21 as it existed prior to November 14, 1979, and to assure the  
22 free mobility of its assets within this jurisdiction by that  
23 date. As I said, that's paragraphs 4 through 9 and the trigger  
24 date on that requirement is July 19 of this year.

25 Additionally, the United States has other obligations

1 under the agreement. It's obligated under General Principle B  
2 of the General -- there are two basic declarations. There's a  
3 General Declaration which sets forth the general rights and  
4 responsibilities or obligations of the parties, and the second  
5 declaration which essentially establishes the international  
6 arbitral tribunal and which sets forth the basic operating  
7 procedures for that tribunal.

8 But under the general principles, general agreement  
9 or general principles, the United States is also obligated to  
10 terminate all legal proceedings in the United States, in the  
11 courts of the United States. It's obligated to nullify all  
12 attachments and judgments. It's obligated to prohibit all fur-  
13 ther litigation on the claims which are the subject of the  
14 agreement, and it's obligated to bring about the termination  
15 of the claims through binding arbitration. Those are the  
16 general principles which bind the United States. There are  
17 others, but those are the salient ones for purposes of this  
18 proceeding.

19 Both parties, as I've said, have agreed to the estab-  
20 lishment of an international tribunal for the satisfaction of  
21 the American claimants, or claims of the respective nationals  
22 against the others. Iran, however, has --

23 QUESTION: May I ask a question on that point? What  
24 is your understanding of the obligation of the United States  
25 with respect to claims now pending in American courts, which

1 will not be received by the tribunal?

2 MR. SHACK: Mr. Justice Stevens, what is my under-  
3 standing of the obligation of the -- ?

4 QUESTION: The United States. The suspension of  
5 those claims in compliance with its obligation under  
6 the treaty?

7 MR. SHACK: Yes, the clear language of the agreement  
8 seems to require that.

9 QUESTION: No, I'm not -- I didn't say that it  
10 would require, is that satisfaction of the American obligation  
11 under the treaties, to have the claims suspended, merely sus-  
12 pended subject to reinstatement if the arbitration tribunal  
13 refuses jurisdiction?

14 MR. SHACK: Well, the tribunal itself will probably  
15 be the ultimate judge of that since it has jurisdiction on such  
16 matters, but the clear language requires termination rather  
17 than suspension. Presumably the United States in any dispute  
18 on that matter would submit to the tribunal that suspension  
19 has accomplished the same thing and that termination will follow  
20 adjudications or awards by the tribunal. But until --

21 QUESTION: No, I'm talking about cases in which the  
22 tribunal declines jurisdiction. And as I understand your posi-  
23 tion, they should decline jurisdiction of some of these claims.  
24 Is that not correct?

25 MR. SHACK: The agreement provides that where there



1 is a specific forum clause containing specific language with  
2 respect to Iran's jurisdiction that those cases will not go to  
3 the jurisdiction of the tribunal; yes.

4 QUESTION: And does it satisfy the United States'  
5 obligation under the treaty, merely to suspend those claims  
6 pending the decision of whether the tribunal takes jurisdiction?

7 MR. SHACK: Yes.

8 QUESTION: Is it fair to ask you a more technical  
9 question? You've addressed it in your main brief. In the  
10 Orvis case -- you're familiar with it?

11 MR. SHACK: Yes.

12 QUESTION: If the President had not vested the assets  
13 in that case, there had been no vesting order, just the freeze  
14 followed by an attachment, would the Trading with the Enemy Act  
15 have allowed the President to unfreeze the assets and return  
16 the assets to the foreign nation free of the attachment?

17 MR. SHACK: I believe that it would.

18 QUESTION: Well, Orvis said that the attachment was  
19 good against the foreign country. It wasn't good against the  
20 President's vesting, but it was perfectly good despite the  
21 freeze against the foreign debtor. Now, how can you say what  
22 you've just said?

23 MR. SHACK: Well, I believe the -- I believe that the  
24 power of the Executive -- or the power of the Congress to  
25 attach the assets of the foreign sovereign is, when it's

1 zpecifically enunciated, prevails.

2 MR. CHIEF JUSTICE BURGER: Your time has expired.

3 MR. SHACK: Thank you, Mr. Chief Justice. With one  
4 moment, I'd just like to conclude.

5 Iran is in fact fulfilling its obligations under the  
6 agreement by appointing arbitrators and the arbitral tribunal  
7 is in existence and operating, and as of July 1 will be meeting  
8 with respect to establishing new procedures.

9 MR. CHIEF JUSTICE BURGER: Mr. Lieberman.

10 ORAL ARGUMENT OF ERIC M. LIEBERMAN, ESQ.,

11 ON BEHALF OF INTERVENOR BANK MARKAZI IRAN

12 MR. LIEBERMAN: Mr. Chief Justice and may it please  
13 the Court:

14 No litigant nor lower court has challenged the exist-  
15 tence of an undisputed emergency crisis situation which prompted  
16 the Executive's action here. Thus the issue before this Court  
17 is not whether the Executive generally may settle the claims of  
18 United States nationals against foreign states, although his-  
19 torically he's done so. Rather the question is a narrower one  
20 dealing with whether he may do so in such an international  
21 crisis. Put this way, the question highlights the reason why  
22 the Executive's power to settle claims both historically and  
23 doctrinally has been held to be a necessary element of the  
24 foreign affairs power.

25 The claims are more than mere bargaining chips in

1 the sense that one might -- the suggestion was, send somebody  
2 over to a foreign state in exchange for some other benefit that  
3 the Government of the United States might obtain from the for-  
4 eign state. Rather, the claims themselves create an impediment,  
5 a barrier, to normal foreign relations. Potentially they do,  
6 historically they have, and in this instance they have.

7 You have in effect a confrontation between citizens  
8 of this country and a foreign state.

9 QUESTION: Are you saying this power exists in the  
10 President without any congressional delegation?

11 MR. LIEBERMAN: Absolutely. However --

12 QUESTION: What if Congress said that the President  
13 shall not in the future settle any foreign claims?

14 MR. LIEBERMAN: That would raise substantial constitu-  
15 tional questions.

16 QUESTION: And the President signed the bill?

17 MR. LIEBERMAN: The President -- that President may  
18 have signed the bill but the question is whether constitutionally  
19 that Congress and that President can limit the power of the  
20 Presidency as an institution. Fortunately, that is a question,  
21 that kind of constitutional confrontation is not before this  
22 Court. What you have is a pattern, an historical pattern, of  
23 congressional acquiescence in approval of and facilitation of  
24 the President's foreign claims settlement power. And this  
25 pattern continued contemporaneously with the enactment of the

1 Foreign Sovereign Immunities Act and afterward. The very  
2 Congress which considered the Foreign Sovereign Immunities Act  
3 and enacted it in 1976 considered amendments to something called  
4 the Case Act, which required the Executive to make reports to  
5 Congress whenever he entered into executive agreements.

6 Several Congressmen introduced amendments to the  
7 Case Act which would have given Congress the right to override  
8 executive agreements by concurrent resolution or otherwise.

9 The Executive Branch -- the State Department, the  
10 Justice Department -- at the same time they were asking the  
11 Congress to pass the Foreign Sovereign Immunities Act, which  
12 after all the Executive Branch drafted, at the very same time  
13 they appeared before the committees in Congress and said, don't  
14 pass this act limiting the executive agreement power. They  
15 canvassed the historical exercise of it, they focused particu-  
16 larly on the claims settlement power, on this Court's opinions  
17 in Belmont and Pink, and they argued that it would be unconsti-  
18 tutional for the Congress to limit the executive power in this  
19 way, particularly with respect to claims settlement agreements.  
20 They focused on that in their arguments to Congress. Congress,  
21 of course, did not enact the act, the very same Congress which  
22 did enact the Foreign Sovereign Immunities Act, without a word  
23 that it was doing anything to undermine the historical claims  
24 settlement power.

25 QUESTION: Well, under your theory they didn't really



1 need to enact the Act, did they?

2 MR. LIEBERMAN: I'm not sure I understand the question.

3 QUESTION: Well, on what you've been saying up to now,  
4 with the broad general powers of the President, they didn't  
5 need the Act, did they?

6 MR. LIEBERMAN: The Foreign Sovereign Immunities Act?

7 QUESTION: Yes. The President didn't need it, did he?

8 MR. LIEBERMAN: The Foreign Sovereign Immunities Act  
9 did not deal with the claims settlement power. That's my point.  
10 One year later Congress did not think that it had done anything  
11 to undermine the Claims Settlement Act when it enacted the  
12 International Economic Powers Act, because that Congress, while  
13 it limited some of the Trading with the Enemy Act powers in  
14 times of peacetime national emergency, it specifically said  
15 these limitations do not affect the President's power to settle  
16 the claims of United States nationals against foreign states.

17 Now, if the Congress had thought that it had taken  
18 that power away a year earlier when it enacted the Sovereign  
19 Immunities Act, it wouldn't have bothered to say that when  
20 we're enacting the Emergency Economic Powers Act, we're not  
21 taking that power away.

22 There's another point about the Emergency Economic  
23 Powers Act that is worth emphasis. Pursuant to that Act the  
24 President must make reports to the Congress when he invokes  
25 his IEEPA powers. He must say what he has done and why he's

1 done it. And the Congress may then consider whether he has  
2 acted improperly and by concurrent resolution, not a statute,  
3 it can override the President's actions. And that was done  
4 precisely here. The President, both Presidents, made reports  
5 to the Congress as to what they did. The Congress held hear-  
6 ings, three different committee hearings; they are mentioned in  
7 our brief.

8           The Senate Committee issued a report; there was no  
9 resolution. Some of the claimants came in and asked the  
10 Congress to exercise its powers to block the implementation of  
11 the Algerian Declarations. If the Congress didn't think there  
12 was a problem, as a matter of fact, the Senate report indicated  
13 a continuing recognition of the executive power to settle  
14 claims and a feeling among the Committee that this power was  
15 necessary if the United States Executive was to deal with an  
16 equal with foreign states.

17           So that what you have here are both political branches  
18 of the United States Government recognizing this power.  
19 Congress has set the terms for its review of executive imple-  
20 mentation of the IEEPA powers. And it has found that there  
21 hasn't been a problem there. I think under those circumstances  
22 it becomes a political question, it's a question committed to  
23 the political branches. Congress is not disenabled from acting  
24 here. It can exercise its power if it feels that there has been  
25 a violation and if it doesn't feel that there has been

1 a violation.

2 QUESTION: Well, then, you're not relying just on the  
3 President acting all by himself. You are deriving some support  
4 from the IEEPA end?

5 MR. LIEBERMAN: Oh, absolutely. What I meant before  
6 is that even in the absence of any kind of Congressional facili-  
7 tation, approval, acquiescence, the President would have the  
8 power. But here you have an historical pattern going back to  
9 the earliest days of the Republic, of both political branches  
10 acting together, recognizing the power, approving the power,  
11 Congress enacting statutes to facilitate the President's exer-  
12 cise of the power, congressional hearings in which Congress  
13 continually -- it echoes throughout the entire history of  
14 the country, Congressmen recognizing the executive power,  
15 stating, of course the Executive -- this is all detailed in the  
16 Appendix B to our brief.

17 QUESTION: Mr. Lieberman, does your -- this is a  
18 political question -- argument go also to the taking issue?

19 MR. LIEBERMAN: In a sense, yes, Mr. Justice Brennan,  
20 but --

21 QUESTION: In that the whole works should be dis-  
22 missed out of the courts?

23 MR. LIEBERMAN: Well, the question of compensation.  
24 If there is going to be compensation for a taking, of course,  
25 Congress has to provide the funds and it has to provide the

1 mechanism for the determination of whether or not there's been  
2 a taking and how much. So in that sense it's a political ques-  
3 tion.

4 But here -- and this is the second point that I  
5 wanted to raise -- here there has been a remedy created; there  
6 is the Tucker Act. I agree with the Government, it took a while  
7 for them to come around to our point of view, but finally they  
8 have, that the Tucker Act is no bar, I mean that Section 1502  
9 is no bar to a Tucker Act -- I believe your question before  
10 as to whether, isn't that a complete answer?, is yes, abso-  
11 lutely, it's a complete answer. The Tucker Act provides a  
12 remedy at law. A remedy at law if available precludes equitable  
13 relief. That's one of the oldest principles of law there is.

14 QUESTION: A Court of Claims remedy doesn't solve the  
15 takings question. You still have to decide there was a taking.

16 MR. LIEBERMAN: Oh, I'm not saying there was a taking.

17 QUESTION: Well, you were.

18 MR. LIEBERMAN: Then, I'll correct myself. I am not  
19 saying there was a taking. As a matter of fact, with respect  
20 to the attachments, our position is the same as the Government's.  
21 There was no taking.

22 QUESTION: Whether there was a taking still remains  
23 to be decided.

24 MR. LIEBERMAN: That's right. But if there was a  
25 taking --



1 QUESTION: But that's a remedy there. If we don't  
2 decide that there was a taking, that would be on the threshold  
3 in the Court of Claims.

4 MR. LIEBERMAN: That's correct. My point is --

5 QUESTION: My problem on your political question argu-  
6 ment is going to suggest that we couldn't, it's none of our  
7 business to decide whether there was a taking or not.

8 MR. LIEBERMAN: Well, I don't think --

9 QUESTION: You don't go that far?

10 MR. LIEBERMAN: I don't think the question is before  
11 this Court.

12 QUESTION: That's not my question. I'm asking whether  
13 your political question submission embraces whether or not we  
14 should decide whether it's -- or even address the taking issue.

15 MR. LIEBERMAN: I think to the extent that the Court  
16 addresses the taking issue, it should hold that there is a  
17 Tucker Act remedy.

18 QUESTION: All right. Then we do address it, you  
19 suggest?

20 MR. LIEBERMAN: Yeah. And that that is a complete  
21 answer.

22 QUESTION: The claim is that there has been a taking  
23 right now, and that the taking question is not premature, so it  
24 is at least -- something that is before us.

25 MR. LIEBERMAN: I agree with the position of the

1 Government, the attachment issue is --

2 QUESTION: Of course you do. I know --

3 MR. LIEBERMAN: -- there is no taking by the attach-  
4 ment issue because, for the very reason stated by the Govern-  
5 ment, the attachment of the Petitioner came secondarily to the  
6 Government's assertion of a paramount federal interest over  
7 these assets.

8 QUESTION: But one of the issues in this case is  
9 whether there's been a taking like --

10 MR. LIEBERMAN: Yes, and clearly there has not been a  
11 taking at this time.

12 QUESTION: Well, that's your submission; yes. I under-  
13 stand that.

14 MR. LIEBERMAN: I think this means my time is up.

15 MR. CHIEF JUSTICE BURGER: Your time has expired now,  
16 Mr. Lieberman.

17 Mr. Howard, somewhere, at your own convenience in  
18 your rebuttal time, for my part I'd like to have you touch on  
19 something which we have touched on the periphery but not the  
20 core, at least in my view. And that is, how the President of  
21 the United States exercising his Article II powers to conduct  
22 foreign relations can do so if he cannot have regulatory power  
23 over suits, just hypothetically, relations, negotiations, very  
24 sensitive negotiations, whether hostages or some other problems  
25 being conducted and 250 or 2,500 or 25,000 American citizens are

1 going to bring suits against that other government. Obviously  
2 that would impair, have an impact on the negotiations. Now,  
3 if the President can't do that under his Article II powers,  
4 how can he carry out those powers?

5 ORAL ARGUMENT OF C. STEPHEN HOWARD, ESQ.,

6 ON BEHALF OF THE PETITIONER -- REBUTTAL

7 MR. HOWARD: I'd like to start immediately with that,  
8 Mr. Chief Justice. I think that there are two points to be  
9 made. First of all, there are lots of things that impair the  
10 President's ability to negotiate with a hostile foreign country.  
11 He can't write a check on the Treasury. He can't send the  
12 assets of my client over directly. He can't even send  
13 Mr. Justice Stewart. There are many things that he might want  
14 to do, there are many things that might solve the problem, that  
15 might make negotiation easier, which are outside of his power.

16 But the second answer is, if it is important for the  
17 President to have this particular power, to have this particular  
18 power to regulate suits against the foreign hostile power party  
19 while negotiating with him, then the place to address that need  
20 is the Congress, not the Supreme Court. He should go to Con-  
21 gress and say, I can't conduct foreign relations without  
22 this power and the Congress --

23 QUESTION: Meanwhile, in the situation we have here,  
24 the hostages wait until Congress acts, or some delicate nego-  
25 tiations with the People's Republic of China, for example, must

1 mark time?

2 MR. HOWARD: First, there's a systematic matter. If  
3 the Executive believes he needs this authority I think he ought  
4 to go to Congress and get it, although in the hearings in the  
5 Foreign Sovereign Immunities Act enactment, the Executive said  
6 he didn't need it. The Executive specifically said, the pres-  
7 sures that we get from foreign powers to settle these kinds of  
8 disputes, and particularly these commercial disputes, are a  
9 problem for us. Please take this away. This isn't a question  
10 of conflict between Congress and the Executive. They agreed  
11 that this kind of claim should be in the courts and not before  
12 the Executive.

13 If the Executive needs the power, let's say in this  
14 particular case he needs the power, now, to deal with these law-  
15 suits. In fact, let me tie this together with Mr. Shack's  
16 talking about the agreement and whether it's enforceable or not.  
17 And what would be the consequences if this Court were to find  
18 that these Acts were outside the power of the President?

19 First of all, the Reagan Administration has very care-  
20 fully never taken a position as to whether this is an enforce-  
21 able agreement under international law. And quite frankly, one  
22 of the many principles of international law is that agreements  
23 entered into under duress with a gun at your head aren't  
24 enforceable, just as they aren't in many civilized countries.  
25 So that if this agreement is struck down, they may very well



1 defend on that ground. Now, they may very well make arguments  
2 like, damages, your man isn't entitled to all this \$4 billion  
3 back. They would have to prove that they wouldn't lose it again  
4 in the tribunal.

5 QUESTION: Who would raise this duress defense?

6 MR. HOWARD: The United States. United States.

7 QUESTION: Surely not Iran?

8 MR. HOWARD: No. The United States would.

9 QUESTION: Yes.

10 MR. HOWARD: But if the Administration believes that  
11 it's in its interest, in its foreign policy interest to go  
12 through with this agreement, it can do it.

13 QUESTION: But realistically, when a great sovereign  
14 has negotiated an agreement, even under duress or pressure,  
15 but having reached an agreement, can the sovereign then question  
16 it on that kind of a ground?

17 MR. HOWARD: That, I think, is a question for neither  
18 the Court nor for me. That's a question for the President and  
19 the Congress. If the Congress wants the Administration to go  
20 through --

21 QUESTION: Are you talking about Congress or the  
22 President? Not just the President, you say?

23 MR. HOWARD: If we are correct that some of the things  
24 that the President agreed to do are outside of his power  
25 acting alone, then he needs the Congress. He can do one of

1 two things. He can go across the street and convince two-thirds  
2 of the Senate to ratify a treaty. He can do this if he can  
3 get two-thirds of the Senate to go along with him. He can do  
4 this if he can get a majority of the Congress --

5 QUESTION: Are you saying you'd have no case if he  
6 had done that?

7 MR. HOWARD: That's right, I believe that, unfor-  
8 tunately, fortunately or unfortunately, either one is quite  
9 clear. A treaty, properly enacted treaty can override a prior  
10 Act of Congress. I think the Foreign Sovereign Immunities Act  
11 could be overridden by a treaty, but not by an executive agree-  
12 ment, and in fact --

13 QUESTION: Not the Bill of Rights, can't be overridden  
14 like --

15 MR. HOWARD: No, I'm not talking about the taking of  
16 it. I'm just talking about the powers. One of the problems  
17 here is that there is a suggestion, I think, that goes through  
18 the questioning, that this problem all goes away if it's a  
19 taking, and that we can just go to the Court of Claims.  
20 Unfortunately, there's a big catch. There is no remedy for  
21 an unauthorized taking. If we are right on the power questions,  
22 then we have no remedy, because no one is liable for an unau-  
23 thorized taking. That is the law which is cited in our brief.

24 QUESTION: Mr. Howard, I'm not sure I asked you when  
25 you were first up, but the question I asked one of your

1 colleagues, in Orvis if there had been no vesting, the lien,  
2 the attachment, would always have been good against the foreign  
3 sovereign?

4 MR. HOWARD: Even an unlicensed attachment. The  
5 attachment in Orvis was unlicensed.

6 QUESTION: Yes, and doesn't -- the President could,  
7 your position is, could not have transferred those assets free  
8 of that attachment?

9 MR. HOWARD: That is correct.

10 QUESTION: And that's what -- and Orvis did say that  
11 the attachment was good against the -- .

12 MR. HOWARD: That's absolutely correct.

13 QUESTION: Now, do you have any further argument  
14 about that? Is there any case or any other cases that indi-  
15 cate the same thing? Zittman, I guess.

16 MR. HOWARD: Well, that's the Government's best case.  
17 Orvis is the jewel in their crown.

18 QUESTION: Well, I know, but Orvis -- but Orvis said  
19 that the lien was good against a foreign sovereign.

20 MR. HOWARD: That's right, that's right. And our  
21 position is that --

22 QUESTION: Williams said it wasn't good against the  
23 President, once he had vested.

24 MR. HOWARD: Under the Trading with the Enemy Act,  
25 and this gets back to some of the questions that

1 Mr. Justice Stevens was asking. Under the Trading with the  
2 Enemy Act the President was not empowered to take away, to  
3 undercut, to remove the rights of American citizens. He was  
4 entitled to undercut rights of foreign powers.

5 QUESTION: Your argument about the Trading with the  
6 Enemy Act is no stronger than it is under the IEEPA, is it?  
7 It's the same language, isn't it?

8 MR. HOWARD: It's the freezing --

9 QUESTION: Except for the vesting?

10 MR. HOWARD: The freezing language is the same.  
11 The vesting language is not there.

12 QUESTION: What authority, do you say, what authority?  
13 Is Orvis your best case for saying that he would have no author-  
14 ity -- in Orvis -- to have transferred the assets to the  
15 foreign nation without a vesting free of the attachment?

16 MR. HOWARD: I would say two things. Number one, no  
17 President ever did it. And that ought to tell us something.  
18 No President ever did it or tried it. But secondly, wouldn't  
19 it have been crazy to have a rule that said, if the President  
20 takes the property, he has to hold it for the American credi-  
21 tors? He takes it under his vesting power; he has to hold it  
22 for American creditors. But under the freeze he can send it  
23 back free and clear? That doesn't make any sense.

24 QUESTION: Well, that's just your argument in this  
25 respect. Shouldn't you make the same crazy-sort-of-a-notion



1 argument as you do with the IEEPA?

2 MR. HOWARD: No, I say that since he couldn't do it  
3 under Trading with the Enemy Act, because that would have made  
4 the statute crazy.

5 QUESTION: Well, wait a minute. Are you suggesting  
6 the only possible purpose of a freeze order under the Trading  
7 with the Enemy Act is to protect American creditors?

8 MR. HOWARD: No, no. Obviously, it was --

9 QUESTION: There are many other purposes.

10 MR. HOWARD: First, was to thwart the enemy, and to  
11 make sure the enemy couldn't get access to its own property.

12 QUESTION: And support the war effort in various  
13 different ways, too.

14 MR. HOWARD: That's right. But if the President --

15 QUESTION: It may have nothing to do with American  
16 creditors, and that could be true of freezes as well as vesting  
17 orders.

18 MR. HOWARD: Although once he vested he had to --  
19 yeah, there was a whole claims procedure set up to satisfy even  
20 unsecured creditors, people who didn't have property at all  
21 but who had a claim against that particular nation.

22 QUESTION: Well, Mr. Howard, don't you think there's  
23 something to Professor Henkin's statement in his treatise on  
24 international law, or international agreements, in 1972, that  
25 the Court of Appeals for the District of Columbia Circuit

1 adopted, that these things really don't fit neatly into black  
2 and white fields, and that it's kind of a skewed situation.  
3 Belmont and Pink came up in connection with a lump sum settle-  
4 ment case. Youngstown Sheet and Tube came up in connection  
5 with an entirely different situation. This comes up with an  
6 entirely different situation, that to try to piece together  
7 a very neat set of precedents each of which is reconcilable with  
8 one another may just be impossible. And that since each case that  
9 comes here kind of comes out of a particular event, there just  
10 may not be much jurisprudence that we can rely on or lay down here.

11 QUESTION: Witness Zittman and Orvis.

12 MR. HOWARD: I'm sorry. I haven't heard a question I  
13 can answer.

14 QUESTION: That was just a tag end.

15 MR. HOWARD: Mr. Justice Rehnquist, I couldn't agree  
16 more with the fundamental proposition. There isn't any prece-  
17 dent here. You, the Justices of the Supreme Court, are going  
18 to make new law in this case, that no matter what you decide,  
19 you're going to make new law. And that is the state of the  
20 record.

21 As far as Mr. Henkin's treatise is concerned, the  
22 first and foremost thing about it is what you said, it was  
23 written in 1972. So it was written before the Foreign Sovereign  
24 Immunities Act, it was written before the Executive and the  
25 President agreed to take certain claims and put them in

1 American courts. And I don't think that the Schooner Peggy  
2 rule of law analogy is quite appropriate, putting apart the  
3 treaty issue. In Schooner Peggy there was a new rule of law,  
4 and it was, the plaintiff loses. That was the new rule of law.  
5 There's no -- tell me what the new rule of law here is? The  
6 new rule of law is, you can't be in this Court --

7 QUESTION: The new law here is the plaintiff loses.

8 MR. HOWARD: No, the Government won't concede that.  
9 The rule of law is the plaintiff goes to another court. If  
10 it's not --

11 QUESTION: Well, the rule of law is you lose in this  
12 case.

13 MR. HOWARD: But it's not a substantive rule of law.  
14 It's not a substantive rule of law. It says, you go someplace  
15 else and try.

16 QUESTION: No, but you're arguing with Schooner Peggy  
17 now, saying that's not a substantive rule of law.

18 MR. HOWARD: No, no. Schooner Peggy wasn't, go to  
19 another court; it is, you lose.

20 QUESTION: That's right, if you lose. But the only  
21 reason you lose is we've decided you should lose; you can't  
22 have this prize money. --

23 QUESTION: The President so far hasn't quite decided  
24 that my client should lose.

25 QUESTION: I don't know whether that's so different

1 from saying, you can't have this attachment.

2 MR. HOWARD: No, I'm saying, the President is saying,  
3 I'm not going to decide whether you win or lose but I'm going  
4 to make you go to a different court than the one the Congress  
5 put you in.

6 QUESTION: Well, if the Government also, though,  
7 defends the dismissal?

8 QUESTION: Of this case, isn't it?

9 QUESTION: On the grounds that there's no cause of  
10 action.

11 MR. HOWARD: I believe that is their position.

12 QUESTION: Which means that there's a new rule of law.

13 QUESTION: The principle of the action brought after --

14 MR. HOWARD: The Government's position is that our  
15 judgment, our final judgment, which surmounted all these alleged  
16 difficulties that we've been relieved of, has been annulled.  
17 That's the Government's position.

18 QUESTION: Well, they say it's converted into a claim,  
19 which is what was in the Schooner Peggy case too. They're  
20 saying it's really no more than a claim because the appellate  
21 process hasn't run its course yet.

22 MR. HOWARD: I think perhaps that it was a mistake for  
23 me to engage in dialogue about whether it's a new rule of law  
24 or not, because it does obscure the most important point. We  
25 concede that by treaty the President and two-thirds of the



1 Senate could say, we changed our minds, we don't want these  
2 commercial cases, at least not this bunch or these kinds or  
3 these situations, have to watch out for attainder problems.  
4 But they could, in fact, alter the rules of the Foreign Sove-  
5 reign Immunities Act. But it wasn't done. It wasn't done by  
6 treaty.

7 QUESTION: It might be a taking, but they --

8 MR. HOWARD: It would still be a taking; you would  
9 still have to pay for it. But at least it would be authorized.  
10 But in the current situation our position is that if the present  
11 Administration wants to go through with this, they've got to  
12 get two-thirds of the Senate or get the majority of each house  
13 of Congress and appropriate the money.

14 QUESTION: Let me go back to my original hypothetical,  
15 somewhat. If the President is negotiating in some delicate,  
16 sensitive foreign relations matter, whether like the hostages  
17 or others, and you prevailed in this case, would not the other  
18 sovereign in negotiation say, well, we are glad to treat with  
19 your ambassador, your envoy, but before we conclude anything  
20 we want your Supreme Court to pass on whether the President  
21 has exceeded his powers. Isn't that a natural consequence of  
22 your position?

23 MR. HOWARD: If the Court were to rule for the Peti-  
24 tioner, and there are future negotiations going on in which the  
25 other power wants to achieve some results in courts, I'd say

1 the President had better go to the Congress first and get that  
2 authority.

3 QUESTION: I'm putting you in the negotiation, and  
4 the foreign sovereign doesn't say, go to Congress. The foreign  
5 sovereign having heard from this Court once or perhaps on  
6 several occasions says, we want to get an opinion from your  
7 Supreme Court before we come to any agreements with you because  
8 they're the last word.

9 MR. HOWARD: I think if the Court were to rule our  
10 way, that it would be rather clear, then, that the President  
11 couldn't do that, and that's not something that he could  
12 bargain with.

13 QUESTION: And you suggest that would not impair the  
14 President's power to conduct foreign relations and national  
15 defense problems?

16 MR. HOWARD: The President's inability to compromise  
17 or give away claims pending in court would of course be -- if  
18 he couldn't do that, that's one less thing that he can't do --  
19 it's one more thing that he can't do. But he also can't write  
20 a check on the Treasury.

21 QUESTION: Well, he can't conscript or raise and  
22 support armies either.

23 MR. HOWARD: There are a lot of them. Pardon?

24 QUESTION: He can't raise and support armies. That's  
25 a power entrusted to Congress.

1 MR. HOWARD: That's right. And many things that a  
2 President can't do in trying to deal with a foreign power. He  
3 has limitations.

4 QUESTION: And of course, one of your arguments is  
5 that he's been forbidden to do this.

6 MR. HOWARD: Forbidden, I think, is too strong a  
7 word. I think --

8 QUESTION: All right, it's been, that it's inconsistent  
9 with the Foreign Sovereign Immunities Act.

10 MR. HOWARD: The two, the Executive and the Congress  
11 got together, and they agreed that this should be outside of  
12 the Executive. They should be free of pressure. Now, if the  
13 Executive were, if the arguments made by my adversaries were  
14 correct, the Executive is right back in the box. Every time  
15 a suit called a commercial suit now is filed, the foreign power  
16 who doesn't like it has the same kind of opportunity that he  
17 had before to come to the State Department and now, he doesn't  
18 say, would you suggest immunity? It's, would you mind settling  
19 my case? I think we'll be able to conclude that other matter much  
20 more expeditiously. And that's precisely what both branches  
21 of the Government, the President and the Congress, said they  
22 didn't want to happen.

23 Here we had an emergency; no one doubts that. And  
24 it happened. But it's in emergencies that lines get crossed  
25 that shouldn't be crossed and that this Court should draw.

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I'll conclude.

MR. CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

(Whereupon, at 11:59 o'clock a.m., the case in the above-entitled matter was submitted.)



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No. 80-2078

DAMES & MOORE

V.

DONALD T. REGAN, SECRETARY  
OF THE TREASURY, ET AL.

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