SECTION B: EXECUTIVE AGREEMENTS

The next case revisits the doctrine adopted by the Court in Youngstown Sheet & Tube Co. v. Sawyer (Chapter 7) as well as Justice Jackson's famous concurrence. Chief Justice Rehnquist clerked for Justice Jackson at the time that *Youngstown* was argued and decided.

STUDY GUIDE: In the next case what constitutional power is the President exercising? Do you see any similarity between the issue presented here and that presented in the Dormant Commerce Clause area? Is Chief Justice Rehnquist addressing the problem of interpreting congressional silence, or is he dealing instead with the issue of determining whether or not Congress was silent? Does the Court's analysis suggest that, when Congress has not specifically addressed a particular circumstance it may not have anticipated, considerable care must be taken before concluding that the President has acted "illegally"?

DAMES & MOORE v. REGAN

453 U.S. 654 (1981)

JUSTICE REHNQUIST delivered the opinion of the Court.

The questions presented by this case touch fundamentally upon the manner in which our Republic is to be governed. Throughout the nearly two centuries of our Nation's existence under the Constitution, this subject has generated considerable debate. We have had the benefit of commentators such as John Jay, Alexander Hamilton, and James Madison writing in *The Federalist Papers* at the Nation's very inception, the benefit of astute foreign observers of our system such as Alexis de Tocqueville and James Bryce writing during the first century of the Nation's existence, and the benefit of many other treatises as well as more than 400 volumes of reports of decisions of this Court. As these writings reveal it is doubtless both futile and perhaps dangerous to find any epigrammatical explanation of how this country has been governed. Indeed, as Justice Jackson noted, "[a] judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves." Youngstown Sheet & Tube Co. v. Sawyer (1952) (concurring opinion). . . .

On November 4, 1979, the American Embassy in Tehran was seized and our diplomatic personnel were captured and held hostage. In response to that crisis, President Carter, acting pursuant to the International Emergency Economic Powers Act (hereinafter IEEPA), declared a national emergency on November 14, 1979, and blocked the removal or transfer of "all property and interests in property of the Government of Iran, its instrumentalities and controlled entities and the Central Bank of Iran which are or become subject to the jurisdiction of the United States." . . . Exec. Order No. 12170.

On January 20, 1981, the Americans held hostage were released by Iran pursuant to an Agreement entered into the day before and embodied in two Declarations of the Democratic and Popular Republic of Algeria. . . . The

Agreement stated that "[i]t is the purpose of [the United States and Iran] . . . to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration." In furtherance of this goal, the Agreement called for the establishment of an Iran-United States Claims Tribunal which would arbitrate any claims not settled within six months. Awards of the Claims Tribunal are to be "final and binding" and "enforceable . . . in the courts of any nation in accordance with its laws." Under the Agreement, the United States is obligated "to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration."

On April 28, 1981, petitioner filed this action in the District Court for declaratory and injunctive relief against the United States and the Secretary of the Treasury, seeking to prevent enforcement of the Executive Orders and Treasury Department regulations implementing the Agreement with Iran. In its complaint, petitioner alleged that the actions of the President and the Secretary of the Treasury implementing the Agreement with Iran were beyond their statutory and constitutional powers and, in any event, were unconstitutional to the extent they adversely affect petitioner's final judgment against the Government of Iran and the Atomic Energy Organization, its execution of that judgment in the State of Washington, its prejudgment attachments, and its ability to continue to litigate against the Iranian banks. . . .

The parties and the lower courts, confronted with the instant questions, have all agreed that much relevant analysis is contained in *Youngstown*. Justice Black's opinion for the Court in that case, involving the validity of President Truman's effort to seize the country's steel mills in the wake of a nationwide strike, recognized that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." Justice Jackson's concurring opinion elaborated in a general way the consequences of different types of interaction between the two democratic branches in assessing Presidential authority to act in any given case. When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." When the President acts in the absence of congressional authorization he may enter "a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." In such a case the analysis becomes more complicated, and the validity of the President's action, at least so far as separation-of-powers principles are concerned, hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including "congressional inertia, indifference or quiescence." Finally, when the President acts in contravention of the will of Congress, "his power is at its lowest ebb," and the Court can sustain his actions "only by disabling the Congress from acting upon the subject."

Although we have in the past found and do today find Justice Jackson's classification of executive actions into three general categories analytically useful, . . . Justice Jackson himself recognized that his three categories represented "a somewhat over-simplified grouping," and it is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition. This is particularly true as respects cases such as the one before us, involving responses to international crises the nature of which Congress can hardly have been expected to anticipate in any detail. . . .

Although we [decline] to conclude that the IEEPA or the Hostage Act directly authorizes the President's suspension of claims for the reasons noted, we cannot ignore the general tenor of Congress' legislation in this area in trying to determine whether the President is acting alone or at least with the acceptance of Congress. As we have noted, Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, "especially . . . in the areas of foreign policy and national security," imply "congressional disapproval" of action taken by the Executive. Haig v. Agee (1981). On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to "invite" "measures on independent presidential responsibility," *Youngstown* (Jackson, J., concurring). At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in by the President. It is to that history which we now turn.

Not infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are "sources of friction" between the two sovereigns. United States v. Pink (1942). To resolve these difficulties, nations have often entered into agreements settling the claims of their respective nationals. . . . Consistent with that principle, the United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries. Though those settlements have sometimes been made by treaty, there has also been a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate. Under such agreements, the President has agreed to renounce or extinguish claims of United States nationals against foreign governments in return for lump-sum payments or the establishment of arbitration procedures. . . . It is clear that the practice of settling claims continues today. Since 1952, the President has entered into at least 10 binding settlements with foreign nations, including an $80 million settlement with the People's Republic of China.

Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement. This is best demonstrated by Congress' enactment of the International Claims Settlement Act of 1949. The Act had two purposes: (1) to allocate to United States nationals funds received in the course of an executive claims settlement with Yugoslavia, and (2) to provide a

procedure whereby funds resulting from future settlements could be distributed. To achieve these ends Congress created the International Claims Commission, now the Foreign Claims Settlement Commission, and gave it jurisdiction to make final and binding decisions with respect to claims by United States nationals against settlement funds. By creating a procedure to implement future settlement agreements, Congress placed its stamp of approval on such agreements. Indeed, the legislative history of the Act observed that the United States was seeking settlements with countries other than Yugoslavia and that the bill contemplated settlements of a similar nature in the future.

Over the years Congress has frequently amended the International Claims Settlement Act to provide for particular problems arising out of settlement agreements, thus demonstrating Congress' continuing acceptance of the President's claim settlement authority. . . . In addition to congressional acquiescence in the President's power to settle claims, prior cases of this Court have also recognized that the President does have some measure of power to enter into executive agreements without obtaining the advice and consent of the Senate. In United States v. Pink, for example, the Court upheld the validity of the Litvinov Assignment, which was part of an Executive Agreement whereby the Soviet Union assigned to the United States amounts owed to it by American nationals so that outstanding claims of other American nationals could be paid. . . .

In light of all of the foregoing—the inferences to be drawn from the character of the legislation Congress has enacted in the area, such as the IEEPA and the Hostage Act, and from the history of acquiescence in executive claims settlement—we conclude that the President was authorized to suspend pending claims pursuant to Executive Order No. 12294. As Justice Frankfurter pointed out in *Youngstown*, "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President by §1 of Art. II." Past practice does not, by itself, create power, but "long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent." . . . United States v. Midwest Oil Co. (1915). Such practice is present here and such a presumption is also appropriate. In light of the fact that Congress may be considered to have consented to the President's action in suspending claims, we cannot say that action exceeded the President's powers. . . .

Just as importantly, Congress has not disapproved of the action taken here. Though Congress has held hearings on the Iranian Agreement itself, Congress has not enacted legislation, or even passed a resolution, indicating its displeasure with the Agreement. Quite the contrary, the relevant Senate Committee has stated that the establishment of the Tribunal is "of vital importance to the United States." We are thus clearly not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority.

Finally, we re-emphasize the narrowness of our decision. We do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities. . . . But where, as here, the settlement

of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where, as here, we can conclude that Congress acquiesced in the President's action, we are not prepared to say that the President lacks the power to settle such claims. . . .

Section C: The Legislative Veto

ASSIGNMENT 2

While the next case concerns the rather narrow issue of "one-house legislative vetoes" of Presidential acts, it also addresses the broader issue of how such separation-of-powers matters are to be addressed. Justice White's opinion has become well-known for its application of a "functional" approach, as compared with the more "formalist" analysis of Chief Justice Burger.

Study Guide: Can you identify any difference between the method used by the Court in resolving this case and that used by Justice White in his concurrence?

INS v. CHADHA
462 U.S. 919 (1983)

Chief Justice Burger delivered the opinion of the Court.

[This case] presents a challenge to the constitutionality of the provision in 244(c)(2) of the Immigration and Nationality Act, authorizing one House of Congress, by resolution, to invalidate the decision of the Executive Branch, pursuant to authority delegated by Congress to the Attorney General of the United States, to allow a particular deportable alien to remain in the United States. . . .

We turn now to the question whether action of one House of Congress under 244(c)(2) violates strictures of the Constitution. We begin, of course, with the presumption that the challenged statute is valid. Its wisdom is not the concern of the courts; if a challenged action does not violate the Constitution, it must be sustained. . . . By the same token, the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government and our inquiry is sharpened rather than blunted by the fact that congressional veto provisions are appearing with increasing frequency in statutes which delegate authority to executive and independent agencies: "Since 1932, when the first veto provision was enacted into law, 295 congressional veto-type procedures have been inserted in 196 different statutes as follows: from 1932 to 1939, five statutes were affected; from 1940-49, nineteen statutes; between 1950-59, thirty-four statutes; and from 1960-69, forty-nine. From the year 1970 through