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A STATE DEPARTMENT LAWYER LOOKS AT THE
IRANIAN HOSTAGE CRISIS/

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Bonn, March 12, 1983

It is a great pleasure for me to be here this evening. When I was asked some time ago to speak to you, it was suggested that I choose a subject with which I had some personal involvement. I was also told that there would be both lawyers and non-lawyers in the audience and that the subject, therefore, should be legally oriented but of broad interest. Given those criteria, I had little difficulty selecting a topic.

Soon after I joined the Office of the Legal Adviser at the State Department several years ago, I was assigned to the section of the office dealing with Near Eastern and South Asian affairs. Now I knew, in those summer months of 1979, that legal matters involving Iran would claim some portion of my time over the next few years. I did not imagine, however, that events were about to take place in Tehran that would alter the entire course of U. S.-Iranian relations and profoundly affect the lives of a great many people, both in and out of Government.

What came to be known as the "hostage crisis" made for high drama. It was human. It was political. It was historical. It was also legal. The hostage crisis brought with it a host of issues whose resolution would be important both for international law and for domestic U. S. law. Since Iranian legal issues were necessarily of concern to the office in which I worked, I became a "charter member" of a group of Government lawyers who would spend a considerable amount of time and energy grappling with the legal dimension of the hostage crisis.

I would like, then, to describe for you tonight the hostage crisis from the perspective of a State Department lawyer. It would be impossible, of course, to touch upon all of the legal aspects of the crisis. Indeed, there were many in which I was involved only marginally or not at all. I intend, rather, to focus on two of the high points: the U.S. case against Iran before the International Court of Justice — the "World Court" — and the litigation over the Algiers Agreement which resolved the crisis, culminating in the U.S. Supreme Court decision in **Dames & Moore v. Regan**. I hope to be able to convey to you some of the thoughts and concerns that underlay the preparation of these cases as well as some observations on the results.

What were our claims? We based our case on three multilateral conventions and a bilateral treaty: the two Vienna Conventions on diplomatic and consular relations; the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; and the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran. Iran, we argued, had violated and was continuing to violate the most fundamental provisions of these treaties, and in each case the World Court was empowered by the treaty or by a related protocol to pronounce judgment on those violations.

The jurisdictional aspect of the case is of concern mostly to specialists. I will not say more about it tonight except to observe that it was the jurisdictional argument, curiously enough, that provided us with one of the lighter moments in this otherwise somber enterprise.

In order to demonstrate that the Court had jurisdiction, it was necessary to show that a "dispute" existed between the United States and Iran. Now there was more to this than meets the eye. The dispute had to involve the interpretation or application of the treaties we were invoking. Moreover, Iran, you will recall, was not participating in the proceedings at all and, in fact, was refusing even to discuss the hostage crisis with the United States. And so it was that State Department lawyers found themselves drafting several pages of formal argument designed to prove the existence of the required "dispute" between the parties. I can assure you: they viewed their task with some measure of amusement. With our Embassy overrun, our diplomats held hostage, our Governments not talking to each other, and the world's media reporting on a daily basis the stream of accusations across the oceans, only a lawyer — some might say — could worry about whether there was a "dispute"!

On the substance of the case, our claims could not have been more straightforward. Consider, for a moment, some of the key provisions of the treaties we were invoking and you will immediately sense the clarity and strength of our case.

The 1961 Vienna Convention on Diplomatic Relations was the most critical of the treaties upon which we were relying. Article 29 of that Convention provides: "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

Article 22 provides that "[t]he premises of the mission shall be inviolable." Article 24 provides that "[t]he archives and documents of the mission shall be inviolable at any time and wherever they may be." Other articles ensure freedom from criminal jurisdiction, freedom from discriminatory treatment, free movement, free communication and much more. Could there be any doubt, we argued, that in the hostage crisis we were witnessing the most blatant violation of all of these principles?

The obligations in the Diplomatic Relations Convention were buttressed by those to be found in the three other treaties upon which our case rested.

The 1963 Vienna Convention on Consular Relations, the "sister treaty" to the Convention on Diplomatic Relations, was applicable to our consulates in Iran which were also attacked in November, 1979, and to our Embassy insofar as the Embassy exercised consular functions. In many respects, the provisions of the Consular Convention mirror those of the Diplomatic Convention. It was clear to us, therefore, that if Iran was violating the obligations of the Diplomatic Convention, as it surely was, it was also violating the parallel obligations of the Consular Convention.

The 1973 Convention, the third of the treaties involved here, had been adopted by the U.N. General Assembly in an effort to reinforce the protection afforded to diplomats. Article 4 of the Convention obligates each party to take all practicable measures to prevent the commission of crimes against diplomats, while Article 7 provides that a party in whose territory an alleged offender is present shall either extradite him or submit the case to competent authorities for purposes of prosecution. These provisions were applicable by their terms to the situation in Tehran and, accordingly, we invoked them.

The 1955 Treaty of Amity, finally, was one in a series of "friendship, commerce and navigation" treaties which the United States concluded with many countries, including the Federal Republic of Germany, during the years after the Second World War. Article II of our treaty with Iran contains a standard provision which turned out to be of great importance to us in this case. In that article Iran pledged that U.S. nationals within its territory would receive "the most constant protection and security" and that any who were in custody would receive "in every respect ... reasonable and humane treatment...." Who could claim, we argued, that the hostages had received the most constant protection and security, or that their treatment — being held largely incommunicado for months, often blindfolded and bound — had been reasonable and humane?

In describing to the Court Iran's multiple and flagrant violations of international law, we emphasized especially three elements of the situation whose recognition by the Court would be vital if we were to achieve the result we wanted.

First, Iran's actions were more than sins of omission. True, Iran had failed completely to take appropriate steps to protect our diplomats. But it was the Government's complicity that was so appalling. That was what made this hostage crisis both unique and profoundly disturbing. The Government in Iran had adopted the militants' acts as its own and was using the militants, in effect, as its agents. As a matter of law, we argued, the Government had thereby become directly responsible for what the militants were doing, even though the militants were not Government officials as such.

Second, while we were willing to concede the possibility of some very narrow exceptions to the rules of diplomatic inviolability, surely there was nothing that could justify Iran's actions in this case. International law, in other words, provided no defense.

Third, we stressed that the principles of diplomatic inviolability whose vindication we sought were of deep concern not simply to us but to all States, for they

hasten to add that the views that I will express tonight are my own and do not necessarily represent the views of my Government. I should also mention that I will make a special effort to bear in mind not only the number of non-lawyers in the audience but also the fact that English is a second language for most of you.

November 4, 1979, was a day that many Americans will not soon — or ever — forget. As news trickled in of the events that were unfolding in Tehran, our shock turned to outrage and our outrage demanded action. Freeing the hostages became, and for 15 months would remain, the Number One Priority of the Carter Administration. The early weeks following the seizure, in particular, were a time of absolutely frenzied activity within the Government. We engaged diplomatic channels. We sought out non-diplomatic intermediaries. We appealed to the United Nations Security Council. We made our case in the media. We banned the import of Iranian oil. We declared a national emergency and froze Iranian assets. Wherever and whenever we could, we pressed for the safe release of the hostages.

The storming of our Embassy and the seizure and detention of our diplomats offended all principles of decency and civilized conduct between nations. What we were witnessing in Tehran was also — we had no doubt — illegal. It could hardly be surprising, then, that during those hectic weeks of November the Government decided to bring an action against Iran before the World Court in The Hague. We would seek, it was determined, both permanent and temporary relief: a final judgment and an order of "interim measures of protection" pending the final judgment. Applications for both were filed on the very same day: November 29.

The proceeding on our request for interim relief was over in scarcely more than two weeks. In response to our appeal for urgent action, the Court held a hearing on December 10 and five days later issued an order calling upon Iran to return the Embassy to U.S. control and release the hostages immediately. The proceeding on the merits, however, was to take almost half a year before judgment was rendered. In view of the limitations of time, I will focus tonight only on the principal case, of which the proceeding for interim relief, in significant part, was but a preview.

It may be useful to pause for a moment at the outset to reflect on a question. What, in fact, did the United States hope to achieve with its case before the World Court? That question must be answered on several levels. Most directly, we wanted the Court to make a series of decisions. We wanted the Court to declare that Iran had breached its international legal obligations to the United States in numerous, specified ways and that the United States, therefore, was entitled to reparation in an amount later to be determined. We wanted the Court to order Iran to release the hostages immediately and not to put them on trial; to return the Embassy to U. S. control at once; and to submit for purposes of prosecution those persons responsible for the crimes that had been committed.

But would Iran obey the Court, and what if it refused? We might, of course, seek to have the U. N. Security Council enforce the Court's judgment under Article 94

of the U. N. Charter. But what if enforcement simply turned out to be impossible? With these questions, we enter another dimension of this proceeding. Whatever problems compliance and enforcement might present, it seemed clear that an emphatic pronouncement by the world's highest judicial authority — representing not just the West, but countries of every persuasion — could not help but add significantly to the pressure on Iran to come to its senses.

Indeed, we had still other objectives in pursuing the case against Iran. One deserves special mention. You may remember how bleak the winter months of 1979—1980 were for the institution of diplomacy. Around the globe diplomats were under assault as never before. Only weeks after the hostages were seized in Tehran, the American Embassies in Tripoli and Islamabad were burned. In Colombia, meanwhile, another hostage crisis was unfolding in the Dominican Embassy, where terrorists were detaining diplomats from no fewer than 14 countries. In short, for the institution of diplomacy, the signs of the future were both ominous and discouraging. With our case against Iran, we hoped for a contribution from the World Court that might help to stem this rising tide of violence. We hoped for a forceful and unambiguous statement that would make clear to every country in the world its fundamental legal obligations to protect diplomats and their Embassies.

With these as our objectives, you can now begin to see what some of the risks were in our World Court litigation. I think it is fair to say that we were never seriously concerned that we might "lose" the case as such. The facts and the law were so overwhelmingly in our favor that the Court simply had to find some merit in our case. But under the circumstances, "some" would not be good enough. Given our objectives as a whole, anything less than total or near-total victory could be of questionable value. To the extent that any aspect of the Court's decision could be used to bolster the Iranian position, our effort to combat the disease that was afflicting the institution of diplomacy — in Iran and elsewhere, then and in the future — would be undermined.

There were some possibilities, then, that did concern us. Might the Court, perhaps, reject some significant part of our request for relief? Might the Court's judgment in the case be badly fractured, with only bare majorities and numerous separate opinions? Might the Court refuse to accept some important element of our reasoning? Or finally, might the Court's language be something less than desired — weak, ambiguous, hedged?

While we surely did not expect results such as these to emerge, the possibility could not be wholly discounted. The Court, after all, included judges from countries in which Iran's asserted grievances would find some resonance. Iran, moreover, was not participating in this case, and we could not know how, if at all, the Court might attempt to compensate for that fact. But one thing we did know. If any such possibility materialized, the effect of any victory we might win would be seriously blunted.

Having all of this in mind, the small team of State Department lawyers set about to prepare the case against Iran.

were indispensable to a civilized international order. Indeed, the representatives from the Third World who criticized Iran's actions here knew this only too well. In a world without those principles, as they said, it was the weak who would be the biggest losers.

This, in brief, was our case against Iran.

By mid-March of 1980, the hostages had been in captivity for some 4½ months. It was at that point that the oral argument in the case took place, providing us with our best glimpse yet of what was on the Court's collective mind as it deliberated on the case. At the hearing, the Court focussed on a broad range of both factual and legal issues. The most probing and persistent inquiries, however, were directed to the question whether there were any conceivable circumstances that might form the basis for a justification of at least some portion of Iran's behavior. The Court, it seemed, was intent on making a special effort to ensure that Iran's side of the story was heard, even though Iran itself refused to tell it. When the hearing had concluded, we could only wait.

On May 24, some two months later, the Court at last handed down its ruling. By lopsided majorities, the Court decided that Iran had violated and was still violating its international legal obligations to the United States, and that Iran was under an obligation to make reparation to the United States, in an amount to be subsequently determined. **Unanimously**, the Court ordered Iran to release the hostages immediately and afford them safe passage to leave the country; to ensure that our diplomats were not put on trial; and to return the Embassy and its archives immediately to the custody of our protecting power.

It would, of course, take us far afield in tonight's discussion to analyze the Court's judgment in great depth. But let us look for a brief moment below the surface, beyond the bare result. To me, the Court's opinion was interesting in several respects.

Significantly, the Court accepted our argument on the issue of State responsibility. Iran's breaches were of two kinds, the Court said. During the early phase of the crisis, Iran had consciously failed to take appropriate steps to protect the U.S. Embassy and its personnel. Far worse, however, was what followed. The Court found that the Government in Iran had moved quickly to make the crime of the militants its own. The result of the Government's policy, the Court concluded, was

"fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated the continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailors of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible."

We could not have said it better ourselves.

It came as no surprise to us that the Court devoted a considerable portion of its opinion to an examination of the question whether any alleged crimes of the United States or other special circumstances could form the basis for a defense. On this issue, the Court noted that inviolability did not mean that a diplomat could not be briefly arrested in some very limited circumstances. Such exceptions, however, were wholly irrelevant to our case. Given the possibilities for expulsion of diplomats, closure of Embassies, and severance of diplomatic relations, there simply was no defense that the Court could or would accept. "The rules of diplomatic law," it said, "constitute a self-contained regime...." That regime provided a remedy for Iran's alleged grievances; it was not, most assuredly, the storming of the Embassy and the taking of hostages. At the same time, it is interesting to note that the Court did suggest that Iran's grievances — if proven to be based on fact — might later be relevant to the issue of damages.

One aspect of the Court's treatment of the international law violations that were so evident in this case remains puzzling. Search the opinion as you may, you will find no discussion of the 1973 Convention. The Court merely suggested, in a brief reference, that it did not find it "necessary in the present Judgment" to consider that Convention. Why not? The Court's opinion gives us no clue. On its face, the 1973 Convention seemed to call for the Iranian Government to "turn in" even its own officials for purposes of prosecution. That conclusion only highlighted the outrageous nature of what was happening in Tehran, but it was perhaps the unrealistic aspect of it that led the Court to decide, for the moment at least, not to deal substantively with the 1973 Convention.

On April 24 — after the oral argument but before the Court had rendered its judgment — a mission was undertaken, on President Carter's orders, to rescue the hostages by force. As you well know, the rescue mission was aborted. But we were anxious to see what effect the incident might have on the Court's ruling. As it turned out, the Court devoted only two paragraphs of its lengthy opinion to the rescue mission. The Court expressed its displeasure over an action which, it said, was of a kind calculated to undermine respect for the judicial process in international relations. It also recalled its earlier Order granting interim relief, which had called upon the parties to take no action to aggravate the situation. Still, the Court disposed of the issue with relative ease. The matter of the rescue operation, it determined, was simply not before the Court and could have no bearing on the case that was before the Court. I should mention that the Court's treatment of this question, however brief, was more than ample grist — as you might expect — for the lawyer's mill. A colleague of mine who worked on the case would later, with enviable skill, spin the Court's two paragraphs into an entire law review article!

Finally, I would observe that the Court also gave us the hard-hitting language for which we had hoped. Stressing the importance of the institution of diplomacy for the life of the international community, the Court recalled the memorable language of its earlier Order granting interim relief: "There is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds

and cultures have observed reciprocal obligations for that purpose." The Court then went on to sound an urgent warning:

"[I]n recalling yet again the extreme importance of the principles of law which it is called upon to apply in the present case, the Court considers it to be its duty to draw the attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international community of the present day...."

And so we got, with unanimous and near-unanimous majorities, nearly all the relief we had sought. The Court adopted our fundamental reasoning and gave us the forceful pronouncement we had wanted. What was the impact of the case? Did it help to resolve the hostage crisis? Will it help to forestall other such crises?

These are fair questions, but they have no easy answers. Obviously, it would have been far preferable — for the hostages and for international law — if Iran had complied with the ruling of the Court. It did not. Even so, the impact of the case cannot, in my view, be completely discounted. So many factors contributed, each in its own way, to making Iran ultimately receptive to a settlement of the hostage crisis. The World Court case must surely have had a place among them. We do know that the proceedings in The Hague were of sufficient concern to Iran that the withdrawal of the case from the Court became, in fact, an element of the final settlement. Looking beyond Iran, it must also be observed that the world's highest judicial body has now given us an authoritative interpretation of the international legal obligations that form the foundation of the institution of diplomacy. Such a pronouncement from a body representing, in the words of the Statute of the Court, the "main forms of civilization and ... the principal legal systems of the world" demands the respect of every government which professes to live by the rule of law.

The several months following the World Court proceeding were quiet ones. The diplomatic initiative, the U.N. initiative, the World Court initiative — all appeared, on the surface at least, to be bringing us no closer to a resolution of the crisis. Meanwhile, the fabric of our relationship with Iran was being torn ever further apart. In early April, the United States had formally severed diplomatic relations with Iran and expelled its diplomats from U.S. soil. In the economic front, the Treasury Department's regulations now encompassed a full-fledged trade and travel embargo. Iran's billions of dollars in assets, of course, remained frozen. As the lawsuits against Iran piled up, those assets were falling deeper and deeper into a legal abyss from which they would later be extricated only with great effort.

The winds of change began to stir in the fall of 1980. An earnest dialogue with Iran was underway with the Algerians as intermediaries. The negotiations were being conducted in strict secrecy at very high levels. By December, however, it was apparent to all that dramatic developments were taking place.

The breakthrough finally came in Algiers on January 19, 1981. No doubt many of you followed on television the long-awaited journey of the hostages as they flew first to Algiers, then to Wiesbaden, then home to the United States. The American nation rejoiced that the hostage crisis was finally over.

There were some of us in those days, though — the lawyers in particular — who quite clearly sensed that while one chapter in this story had concluded, another was about to begin. A reading of the Algiers Agreement which had brought about the release of the hostages was enough to persuade anyone of that fact.

The Algiers Agreement did more than secure the release of the hostages. It also provided for a restructuring of our relationship with Iran in several areas. Two were of special importance.

The first involved money — Iran's assets that had been frozen for over a year. Under the Algiers Agreement, almost \$8 billion, representing assets held by the Federal Reserve Bank of New York and by overseas branches of U.S. banks, changed hands only hours before the hostages were freed on January 20. Over half that amount was destined to be used to repay Iran's debts to certain banks. Less than \$3 billion was actually transferred to Iran.

The funds that flowed on January 20 did not comprise all of Iran's assets. In particular, one very important category of financial assets was not included: the funds that were held by commercial banks in the United States. Those assets were subject to judicial attachments that had been obtained, as security, by the hundreds of American claimants who had lawsuits pending against Iran in U.S. courts. Under the Algiers Agreement, the U.S. Government was obligated to "nullify" nearly all of those attachments and to bring about the transfer of the related assets within six months to a third-country bank. There the funds would be split; up to \$1 billion would be deposited in a special Security Account to be used to secure and pay claims against Iran, while the remainder would be transferred to Iran.

In addition to disposing of Iran's frozen assets, the Algiers Agreement also dealt with the various claims against Iran. As I mentioned earlier, it was agreed that the United States would withdraw its case from the World Court. The hostages, it was agreed, would be barred from bringing lawsuits against Iran. Most Americans with commercial claims against Iran, it was also agreed, would have to prosecute their claims not in U.S. courts, but rather in a special arbitral tribunal to be established in The Hague.

In short, American claimants were to see both their claims and the assets which secured them be transferred from the familiar home ground to an arbitral forum abroad whose features had not yet even begun to take shape. While most Americans relish a trip to Europe, at least some of these Americans had serious reservations about the trip they would now be obliged to take.

Presidents Carter and Reagan moved promptly to implement the terms of the Algiers Agreement. In the final hours of his Administration, President Carter issued an Executive Order nullifying those attachments against Iranian assets that

had been obtained after the freeze — almost all were in this category. The Order also directed the U.S. domestic banks holding the underlying assets to transfer them to the Federal Reserve Bank of New York for re-transfer abroad. Soon afterward, President Reagan followed with his own Executive Order, which declared that “[a]ll claims which may be presented to the Iran-United States Claims Tribunal under the terms of [the Algiers Agreement] ... are hereby suspended, except as they may be presented to the Tribunal.”

Could the President of the United States do this? Could he simply nullify judicial attachments and order the holders of Iranian assets to transfer them to a destination of his choosing? Perhaps most intriguing of all: could he simply declare whole categories of claims to be “suspended”? What did suspension even mean?

Lawyers at the State, Justice and Treasury Departments were convinced that the President of the United States did, indeed, have sufficient constitutional and statutory power to take actions such as these. Yet doubts persisted in other quarters. Most telling was the fact that, while President Carter’s transfer order had taken effect immediately upon issuance, the banks had not moved to comply. It was evident that a definitive judicial ruling would be needed; what we wanted was a judgment of the nation’s highest court upholding the President’s actions and effectively ordering compliance with the Executive Orders.

Thus it was that the Government determined to undertake what in other areas of activity might have been called a “nationwide campaign.” A brief stating the Government’s position on the effect of the Executive Orders would be drafted and filed in all of the hundreds of Iran-related cases pending throughout the country. Ultimately, it was thought, a win or a loss at a lower level would be less important than the appeals that would inevitably follow, since the appeals would bring the case to the Supreme Court. We were soon to discover, however, that getting the authoritative ruling we wanted would not be so easy. In fact, getting to the Supreme Court at all turned out to be, as they say, half the fun.

The team of lawyers that now began to prepare the Government’s brief knew well that there was no time to lose. Under the Algiers Agreement, you will remember, the United States was obligated to transfer the several billion dollars of Iranian assets held in U.S. domestic banks within six months; that meant by July 19. The United States was also obligated to bring the litigation in U.S. courts to a halt. If we failed to meet our obligations, the consequences could be grave. Not only could the entire arbitral process in The Hague be put in jeopardy, but Iran would even be in a position to assert, before the tribunal, a claim for breach by the United States. Now bear in mind that the Algiers Agreement included a provision stating that “[a]ny award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws.” The last thing the United States needed was a potentially enormous, enforceable judgment against it in favor of a country that had only just returned our hostages after more than a year in captivity.

The Government’s brief was completed in late February. Our case, in essence, was this:

The President, we argued, derived his power to nullify attachments and order the transfer of Iranian assets principally from the International Emergency Economic Powers Act. That Act had been passed by Congress only a few years earlier and was designed specifically to enable the President to deal with unusual and extraordinary threats to the national security, foreign policy or economy of the United States — threats such as that posed by the hostage crisis. The President had invoked the Act for the first time when he ordered the freeze of Iranian assets.

Section 1702 of the Act was the key provision. That section contains, in its critical subparagraph, what has aptly been called a “shopping list” of eight verbs and twelve nouns that can be combined to form nearly a hundred combinations, giving the President impressive power to deal with foreign assets once he has declared a national emergency. We pointed to the words of the statute — “regulate, direct and compel, nullify.” In resolving the hostage crisis, the President had done exactly what those words said he could do. Could the statute be read literally? Congress, we maintained, had intended no less. Nor did it make any difference, we said, that the Treasury Department had actually authorized the claimants to attach Iran’s frozen assets. Treasury regulations also expressly stated that such authorizations could be “amended, modified or revoked at any time” and that, without authorization, an attachment was “null and void.”

Since the President had exercised his power to revoke the authorization and nullify attachments against Iranian assets, the proper course of action for a court that had issued such an attachment was to vacate it, for it was now without any legal basis. That, in fact, is just what we asked hundreds of courts across the country to do.

But what about the President’s suspension of claims against Iran? Here it was the Constitution itself that was the central issue. What was involved, we argued, was the President’s power to settle the claims of U.S. nationals against foreign governments, in accordance with his constitutional authority to conduct the foreign affairs of the nation. While the amount of money at stake in the Iran case was unique, the principle involved was hardly new. The President had been settling private claims against foreign governments for nearly two centuries. Often he had settled them by referring them to arbitration, and often he had acted alone, as in this case, concluding the settlement not by a treaty approved by the Senate, but merely by “executive agreement.”

But was the settlement of claims by the President alone not an infringement of Congressional or judicial prerogatives? Certainly not, we argued. Congress had long acquiesced in the practice, effectively acknowledging that the President possessed the constitutional power to settle claims on his own. To be sure, with the Foreign Sovereign Immunities Act of 1976 Congress had established a comprehensive framework for the resolution — by the courts — of private claims against foreign governments. But there was nothing to suggest, in our view, that Congress had thereby intended to limit the well established practice of claims settlement by the President.

The courts, moreover, had explicitly recognized the practice on occasion, and had done so without raising the specter of Presidential overreaching. We stressed that even the settlement of a claim that was actually pending before a U.S. court — as many claims against Iran were — did not interfere with the jurisdiction of the court. It simply resulted in new substantive law which the court would have to apply. For this last proposition we cited a famous old case from 1801: **United States v. The Schooner Peggy**. There the Supreme Court had set aside a lower court judgment confirming an American's claim to a captured French ship, because a treaty had entered into force in which that claim had been renounced. I remember reading an unsympathetic editorial in a prominent business newspaper, in which the Government's reliance on a case of such ancient vintage was harshly ridiculed. As we shall see in a moment, the newspaper's editorialist would have done well to think twice before taking on **The Schooner Peggy**; he may not have known that the Court's opinion in that case was authored by one of America's great jurists, Chief Justice John Marshall.

In short, we believed that the President was exercising a constitutional right of historic proportions when he agreed to send American claimants to The Hague. There was nothing mysterious about "suspension" of claims. The President's Executive Order merely gave effect to the claims settlement: a claim that was to be arbitrated would have to be regarded, for domestic purposes, as "suspended" while the arbitration ran its course. The circumstances, therefore, called for every court in which such a claim was pending to postpone any further consideration of the claim, to "stay the litigation" in other words — and that is precisely what we asked the courts to do.

As we filed our brief throughout the country, we began to cast an anxious eye at the hundreds of pending Iranian cases, eagerly looking for the one that would prove to be the vehicle for a Supreme Court decision. What we wanted was a typical case presenting both of the critical issues, a case whose decision would dispose of the entire mass of Iranian litigation.

But which one? In the Southern District of New York, encompassing the commercial center of the nation, Judge Duffy had consolidated before him some 96 Iranian cases. That group, we had originally thought, would give us what we wanted. But it gradually became clear that this was not to be. Proceedings in the Duffy group of cases were becoming increasingly bogged down. As March turned to April and April to May, our concern began to grow, for still we had no test case for the Supreme Court.

It was at this point that we encountered a strange phenomenon. We began to win significant victories, and our success, paradoxically, was causing us difficulty. In May 22, in a case called **Chas. T. Main Int'l. Inc. v. Khuzestan Water & Power Authority**, the First Circuit Court of Appeals firmly upheld the President's implementation of the Algiers Agreement. The Court of Appeals for the District of Columbia Circuit then did the same in **American Int'l. Group, Inc. v. Islamic Republic of Iran**. But there was a problem. Our eye was on the Supreme Court.

Having won these cases, we ourselves were hardly in a position to appeal them. Yet those who had lost them were giving no signs that they intended to take them up to the Supreme Court. This was a curious twist indeed! Perhaps each claimant was reluctant to undertake the expense of litigation, when it seemed that someone else was bound to bring the issue to the Supreme Court soon for a decision that would determine the fate of all. Whatever the reason, the fact remained: no one was moving.

Now you will readily appreciate the tense situation that was developing. Our deadline for transfer of Iran's assets was July 19. The Supreme Court ordinarily recessed for the summer in early July. It was now June and we still had no case headed to the Supreme Court — to say nothing of the briefing, the oral argument, the Court's deliberations and the opinion-writing that would all have to precede a decision once we had a case.

What was needed was a stimulant, a powerful one, and the Treasury Department had the means to deliver it. For several months the Treasury Department's regulations had provided that, in view of the legal uncertainty, the Government would not seek to impose criminal or civil sanctions on persons who failed to transfer Iranian assets as ordered. On June 4, however, the Treasury Department suddenly announced a change in its regulations. It ordered all assets to be transferred to the Federal Reserve Bank of New York by June 19, and revoked the policy of non-prosecution. The stakes had been raised. But would it work? Or more to the point, could it work in time?

The tension finally broke on June 10. Relief came in the form of a case on the West Coast that had, to that point, received only scant attention. The case was called **Dames & Moore v. Donald T. Regan, Secretary of the Treasury**.

Dames & Moore was an American partnership, with an attachment against Iranian assets that had been nullified and with a contract claim against Iran — reduced to a judgment, in fact — that had been suspended. Dames & Moore had filed suit against the Government in late April, challenging the actions of the President in nullifying its attachment and suspending its claim. On May 28, the district court had upheld the President's actions and dismissed the complaint. Dames & Moore had then appealed to the Ninth Circuit. While the appeal was pending, Dames & Moore made a move that we in the Government could only greet with enthusiasm. Making use of an extraordinary procedural mechanism, it filed on June 10 a petition to have the Supreme Court review the case even **before** the Court of Appeals for the Ninth Circuit had issued a judgment. The Government quickly filed papers with the Supreme Court urging it to hear the case as a matter of the highest priority. The next day, June 11, the Supreme Court granted the petition. We finally had our test case.

At this point lawyers on all sides leaped into action to prepare briefs on an expedited — more accurately, a crash — basis. This first brief, ours, was due in a matter of days. Interestingly, many claimants quickly shed whatever reluctance they may have had and now filed with the Court their own *amicus curiae* briefs.

The arguments on both sides were expanded and more refined, but in their essence the same as I described earlier. We did, of course, have some special concerns as we approached what would be the ultimate test. While *Dames & Moore*'s claim appeared to be arbitrable, there were others that were not. Would the Supreme Court's opinion be broad enough to make it clear that the attachments were void regardless of whether the claim involved was arbitrable? On the suspension issue, we wondered what effect might flow from the fact that *Dames & Moore*'s claim had already been reduced to a judgment. This meant that the issue was being posed in the sharpest form. We wondered, too, about the so-called "taking" issue, which seemed to be increasing in prominence. Would the Court agree with the Government that the President's actions, at least up to that point, could not be regarded as constituting a taking of property for which just compensation would have to be paid?

We looked forward to the oral argument, hoping that it would give us a clue as to how the Court was approaching the case. When the hearing took place on June 24, however, we were dismayed to see the Court react to the Government's case with a strong dose of skepticism. As former Deputy Secretary Warren Christopher, our chief negotiator of the Algiers Agreement, looked on, the Court asked penetrating questions with often hostile overtones. Some of the Justices seemed clearly to be bothered by the deal that had been struck with Iran. Interestingly, the Court probed as much on the "taking" issue as on any other, pressing the Government to elaborate on its views. When the argument was finally over, there were some of us who had become a bit uneasy about the approaching judgment.

On July 2 the Supreme Court handed down its decision in *Dames & Moore v. Regan*. The process alone had been extraordinary. Within three weeks the petition for review had been filed and granted, hundreds of pages of argument had come before the Court, oral argument had been heard, the Court had deliberated, and now its opinion was in print!

The decision, as you know, was a resounding victory for the Government. Unanimously, the Court upheld the actions of the President in nullifying the attachments and directing the transfer of Iran's assets as well as in suspending claims; the hostage crisis had been resolved not only peacefully but lawfully. Let me share with you very briefly some aspects of the Court's opinion which, in my view, were most interesting.

On the question of the attachments and transfer of assets, the Court looked to the words of the Economic Powers Act and concluded, quite simply, that the statute meant what it said. "We ... refuse to read out of [section] 1702," the Court stated, "all meaning to the words 'transfer', 'compel,' or 'nullify.'" "Nothing in the legislative history required that result. To the contrary, the Court found that Congress had intended to enable the President to assert supreme authority over foreign assets during a national emergency. In this way, the Court observed, the President remained free to use such assets as a "bargaining chip" in dealing with a hostile country. The fact that in this case the attachments against Iranian assets had earlier been authorized was also of no consequence. The President could and

did revoke the authorization, and the attachments thereby became void. Moreover, as we had hoped, the Court made plain that those attachments were void regardless of what happened to the claims that they secured.

The question of claims suspension encompassed a cluster of issues on which the Court's opinion was equally illuminating. The Court noted that the President had long settled claims on his own. It observed that prior courts had recognized that the President had some power to settle claims in the interest of foreign relations. The Court also found, however, that Congress itself had implicitly approved of the practice. This was of critical importance to the Court, which cited the famous words of Justice Felix Frankfurter: "[A] systematic, unbroken executive practice, long pursued to the knowledge of Congress and never before questioned ... may be treated as a gloss on 'Executive Power' vested in the President...."

Still, the Court was unwilling to say that the President could settle claims under all circumstances. Its decision was very carefully limited, as the critical sentence reveals: "[W]here, 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."

Claimants' arguments concerning the Foreign Sovereign Immunities Act and interference with the judiciary gave the Court little trouble. It recognized that the Foreign Sovereign Immunities Act was designed to take the Executive Branch out of the business of making suggestions of immunity in cases against foreign governments. It was not persuaded, however, that the Act was also intended to divest the President of his power to settle claims. We were especially relieved to see this conclusion, since the Executive Branch itself had proposed and drafted the Foreign Sovereign Immunities Act. It would have been ironic, indeed, if the Court had found that the President, in effect, had unwittingly contributed to the stripping of his own power.

On the jurisdictional issue, the Court agreed with our contention that, in suspending claims, the President had acted on a substantive rather than a jurisdictional level. The fact that *Dames & Moore* had a judgment that was on appeal did not change the analysis. Indeed, the *Dames & Moore* case was a perfect illustration, the Court observed, of "the difference between modifying federal court jurisdiction and directing the courts to apply a different rule of law." And here the Court cited — you guessed it — *United States v. The Schooner Peggy*.

And what of the compensation issue? For all of the acute interest shown at the oral argument, the Court in the end disposed of this issue with surprising ease. Since the attachments had been conditional from the outset, the Court concluded, they had given the claimants no property interest for purposes of the Compensation Clause of the Constitution. The Court left open, however, the question whether the suspension of claims might constitute a taking of property, since that

question was premature. In any event, it said, there was no jurisdictional obstacle to an action for compensation in the Court of Claims.

While the opinion was certainly a solid affirmation of the President's exercise of power in resolving the hostage crisis, it is interesting to note that, in many respects, the Court seemed anxious to limit the effect of its decision. The broad sweep to be found in some other classic foreign affairs cases is largely missing here. Why? The Court itself suggested that the time pressure involved mandated caution, as did the truly awesome nature of the power to settle claims. Perhaps, too, the Court remained unpersuaded that the Algiers Agreement had really been a good deal for the claimants.

What, then, was the impact of **Dames & Moore v. Regan**? In the short term, the case opened the way for the transfer of most Iranian assets remaining in the United States and for the "transplant" of Iranian litigation from the United States to The Hague. In the longer term, the case establishes important guideposts for Presidential action in the areas of foreign asset control and claims settlement — guideposts that may also be of interest to American companies that do business in the more volatile regions of the world.

In any similar crisis in the future, it seems clear that the President's power over foreign assets will prevail over any private rights to those assets that arise after the President declares an emergency and asserts his power. At the same time, his authority to settle claims will be on firm ground so long as the settlement of claims is "necessary" to the resolution of a "major foreign policy dispute" and there is continuing Congressional acquiescence.

How would the Supreme Court deal with a case where the attachments against the foreign assets in question **pre-dated** the President's assertion of emergency power, and where the necessity of a claims settlement and Congressional acquiescence in such a settlement were **not** so clearly in evidence? That must remain, for now, an open question. I can tell you that the oral argument in that case is one that I would not want to miss.

We have seen, then, how the Iranian hostage crisis brought the U.S. Government first to the highest court in the world, then to the highest court in our own nation. In conclusion, I would suggest that the two cases make an interesting comparison. They were strikingly different in procedure and effect. The World Court case was uncontested, lasted half a year, included three days of oral argument, and produced a judgment with no immediate impact. The Supreme Court case was hotly contested, lasted but three weeks, included a few hours of oral argument, and produced a judgment that in short order moved billions of dollars and thousands of claims literally across the ocean.

The two cases, however, shared one thing in common. In each, it is fair to say that the hostage crisis led — as conflicts often do — to a significant development in the law. This unintended result must surely be the only good to come out of that sorriest chapter in the annals of diplomacy. Let us hope that we need never develop the law under those circumstances again.

Thank you.

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