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Recent Decisions

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RECENT DECISIONS

Separation of Powers—CONGRESSIONAL ACQUIESCENCE TO EXECUTIVE DISCRETION IN FOREIGN AFFAIRS

The Supreme Court of the United States has often struggled with the question of the scope and nature of the President's power over foreign affairs. This question is most pertinent when a private citizen's rights are sacrificed for foreign affairs considerations.

Two recent cases, *Haig v. Agee*[1] and *Dames & Moore v. Regan*,[2] indicate how much power the President has assumed over foreign affairs. In both cases, a citizen's rights had been infringed by presidential action. In each case, the Supreme Court held that the Executive Branch had sufficiently broad powers over foreign affairs to justify its actions.

This note examines past court holdings in the foreign affairs area which have established the analytical method applied by the Supreme Court to such questions. The notes then explores how this analysis applies to *Haig v. Agee* and *Dames & Moore v. Regan*. Finally, guidelines are suggested for deciding future cases where the President's exercise of authority over foreign affairs infringes upon the rights of a private citizen.

I. Historical Background

In determining the bounds of presidential authority, the Supreme Court has followed the analytical method suggested by Justice Jackson in *Youngstown Sheet & Tube v. Sawyer*.[3] In his concurring opinion, Justice Jackson outlined three categories of interaction between the President and Congress when determining the scope of presidential authority:[4]

(1) when the President acts pursuant to express or implied authorization from Congress, wide judicial interpretation and strong presumptions of validity follow executive action.[5]

(2) When the President acts in absence of congressional authorization, he enters a "zone of twilight" where the Court considers all

1 453 U.S. 280 (1981).
2 453 U.S. 654 (1981).
3 343 U.S. 579 (1952).
4 *Id.* at 634 (Jackson J., concurring).
5 *Id.* at 635.

circumstances, including congressional silence and inertia.[6]

(3) When the President acts in opposition to Congress, the Court sustains the action only by disabling Congress in that area.[7]

In determining presidential authority over foreign affairs in the face of congressional silence (Jackson's twilight zone) the Supreme Court developed a test in *Kent v. Dulles* and *Zemel v. Rusk* (Kent-Zemel).[8] Essentially, the Kent-Zemel test looked at whether Congress had acquiesced, by its silence, in a consistent administrative *practice*. Congressional silence under this circumstance was viewed as an implied authorization of the exercise called into question.

II. Haig v. Agee

In *Haig v. Agee*, the Supreme Court expanded the Kent-Zemel test to allow a broader exercise of presidential authority in the foreign affairs area. *Haig* involved an ex-CIA agent, Phillip Agee, who allegedly began a campaign to expose undercover CIA agents and hamper the CIA wherever and whenever possible.[9] This campaign violated an express contract between Agee and the CIA, prejudiced American intelligence gathering ability, and encouraged violence against the disclosed agents.[10] Great Britain, France and Holland each deported Agee due to this campaign.[11]

The Secretary of State revoked Agee's passport in December 1979 pursuant to an administrative regulation derived from the 1926

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6 *Id.* at 637.

7 *Id.*

8 The *Kent-Zemel* test arises from the Supreme Court's decisions in Kent v. Dulles (357 U.S. 116 (1958)) and Zemel v. Rusk. 381 U.S. 1 (1965). In *Kent*, the Court held that the Secretary of State did not possess the power to refuse passports to former communists. The Court reasoned that the 1926 Passport Act contained an implied congressional authorization for passport refusals under circumstances where a consistent administrative practice had arisen. However, the 1926 Act had not delegated the authority to revoke passports for membership in the communist party because the practice of denying passports for that reason was so infrequent that Congress had not been put on notice. The Court in *Kent* narrowly construed the congressional delegation of power because the fifth amendment freedom to travel was involved. In *Zemel*, however, the Supreme Court allowed the Secretary of State to impose a restriction on travel to Cuba. Looking at the Secretary of State's imposition of area-wide restrictions both before and after the 1926 Passport Act, the Court concluded that the practice was substantial and consistent enough to impute congressional authority by acquiescence.

Taken together, *Kent* and *Zemel* established the test for an implied grant of congressional authority to the President in foreign affairs. Before Haig v. Agee, the test was limited to executive *practice*. The *Kent - Zemel* test is now expanded to executive *policy*.

9 *Haig*, 453 U.S. at 283.

10 *Id.* at 284-85.

11 *Id.* at 283 n.1.

Passport Act.[12] The revocation notice[13] explained the reasons for the passport revocation and Agee's right to an administrative hearing on the revocation's validity. Agee, however, immediately sued the Secretary of State in the United States District Court for the District of Columbia. Agee contested the passport revocation on the grounds that the regulation which authorized the revocation was outside the congressional delegation of authority and that the regulation's application violated Agee's Constitutional rights.[14]

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12 22 U.S.C. § 211(a) (1976) (The 1926 Passport Act).

> AUTHORITY TO GRANT, ISSUE, AND VERIFY PASSPORTS
>
> The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports. Unless authorized by law, a passport may not be designated as restricted for travel to or for use in any country other than a country with which the United States is at war, where armed hostilities are in progress, or where there is imminent danger to the public health or the physical safety of United States travellers. July 3, 1926, c 772, § 1, 44 Stat. 887; Oct. 7, 1978, Pub. L. 95-426, Title I, § 124, 92 Stat. 971.

22 C.F.R. § 51.70(b)(4) (1979): 51.70 *Denial of passports* (b) A passport may be refused in any case in which: . . . (4) The Secretary determines that the national's activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States . . . . 22 C.F.R. § 51.71(a): 51.71 *Revocation or Restriction of Passports* A passport may be revoked, restricted or limited where: (a) The national would not be entitled to issuance of a new passport under § 51.70.

13 The December 23, 1979 notice read (in part):

> The Department's action is predicated upon a determination made by the Secretary under the provisions of [22 C.F.R.] Section 51.70(b)(4) that your activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States. The reasons for the Secretary's determination are, in summary, as follows: Since the early 1970's it has been your stated intention to conduct a continuous campaign to disrupt the intelligence operations of the United States. In carrying out that campaign you have traveled in various countries (including, among others, Mexico, the United Kingdom, Denmark, Jamaica, Cuba, and Germany), and your activities in those countries have caused serious damage to the national security and foreign policy of the United States. Your stated intention to continue such activities threatens additional damage of the same kind."

453 U.S. at 286.

14 Agee actually contested the passport revocation on five grounds:

> He alleged that the regulation invoked by the Secretary, 33 C.F.R. § 41.70(b)(4) (1980), has not been authorized by Congress and is invalid; that the regulation is impermissibly overbroad; that the revocation prior to a hearing violated his Fifth Amendment right to procedural due process; and that the revocation violated a Fifth Amendment liberty interest in a right to travel and a First Amendment right to criticize government policies.

453 U.S. at 287.

The District Court[15] granted Agee's motion for summary judgment because the 1926 Passport Act did not authorize the Secretary of State to revoke passports for national security reasons.[16] The United States Court of Appeals for the District of Columbia[17] affirmed. Both lower courts interpreted the *Kent-Zemel* test to require a substantial and consistent administrative practice in order to imply authorization from Congressional silence.[18] The few instances of passport refusals for national security reasons[19] did not constitute a sufficient practice to imply congressional approval of presidential authority to revoke passports for national security reasons.

The United States Supreme Court,[20] reversing the lower courts, found implied congressional authorization for the Secretary of State's revocation of passports for national security reasons.[21] In his majority opinion, Chief Justice Burger cited *Kent v. Dulles*[22] and *Zemel v. Rusk*[23] for the rule that congressional silence in response to a long-standing administrative *policy*, showed implied congressional authorization through acquiescence.[24] The Court reasoned that the President should not be faulted merely for having had few opportunities available to exercise his policy.[25]

With this decision, the Supreme Court rejected the lower courts' analysis that the *Kent-Zemel* test requires a substantial administrative *practice*. Nor did the Court choose to expand the concept of substan-

15 Agee v. Vance, 483 F. Supp. 729 (D.D.C. 1980).

16 *Id.* at 732.

17 Agee v. Muskie, 629 F.2d 80 (D.C. Cir. 1980).

18 629 F.2d at 87; 483 F. Supp. at 732.

19 Although the district court considered only the one prior passport revocation under 22 C.F.R. § 51.70(b)(4) (483 F. Supp. at 731), the circuit court considered the two passport refusals before the 1926 Passport Act and the three passport refusals during the 1950's. 629 F.2d at 86.

20 Haig v. Agee, 453 U.S. 280 (1981).

21 *Id.* at 290.

22 357 U.S. 116 (1958). Discussed at note 13 *supra*.

23 381 U.S. 1 (1965). Discussed at note 13 *supra*.

24 453 U.S. at 303.

25 Chief Justice Burger wrote:

> [I]f there were no occasions—or few—to call the Secretary's authority into play, the absence of frequent instances of enforcement is wholly irrelevant. The exercise of a power emerges only in relation to a factual situation, and the continued validity of the power is not diluted simply because there is no need to use it.
>
> The Secretary has construed and applied his regulations consistently, and it would be anomalous to fault the Government because there were so few occasions to exercise the announced policy and practice. Although a pattern of actual enforcement is one indicator of Executive policy, it suffices that the Executive has 'openly asserted' the power at issue.

453 U.S. at 302.

tial practice to include a consistant policy *coupled* with a few actual applications.[26] Rather, the Court relied upon dicta from cases which indicated that a consistent *policy*, standing alone, is sufficient[27] to imply authorization from congressional silence.

The majority dismissed Agee's argument that his passport revocation violated his first amendment freedom of speech and his fifth amendment right to travel. The Court found that the passport revocation inhibited Agee's disclosure of confidential information rather than his right of free speech.[28] The Court also distinguished between inter*state* and inter*national* travel, affirming that Agee's international travel can be regulated without violation of the fifth amendment due process clause.[29] The national security and foreign policy considerations involved outweighed Agee's right to international travel with a United States passport.

In his dissent, Justice Brennan narrowly construed the *Kent-Zemel* test as requiring a substantial and consistent practice before finding a congressional delegation of authority.[30] He commented on the majority's "whirlwind" treatment of Agee's Constitutional claims,"[31] stating that a consistent administrative policy is insufficient notice to imply congressional authority in "an area fraught with important Constitutional rights."[32] Justice Brennan felt that revoking Agee's passport impinged a first amendment right, but the governmental interest in national security may have outweighed Agee's right of free speech in this particular instance.[33]

Haig v. Agee illustrates the Court's reluctance to undermine an executive policy when Congress did not limit the extent of executive power and did not expressly object to its application. Due to this reluctance, the Court extended the *Kent-Zemel* test. Henceforth, cases falling within Justice Jackson's second category require only a consis-

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26 Judge MacKinnon, dissenting from the court of appeals decision, (629 F.2d at 87), chose this view. The Supreme Court could easily have agreed with MacKinnon that a substantial practice existed in this case and need not have expanded the *Kent-Zemel* test.

27 *Kent*, 357 U.S. 116 (1958); *Zemel*, 381 U.S.1 (1965); Udall v. Tallman, 380 U.S. 1 (1965); Norwegian Nitrogen Co. v. U.S., 288 U.S. 294 (1933); Costanzo v. Tillinghast, 287 U.S. 341. *See Haig*, 453 U.S. at 300.

28 453 U.S. at 308. The Court even questioned whether the first amendment protections applied outside the United States.

29 *Id.* at 306, [citing Califano v. Aznavorian, 439 U.S. 170, 176 (1978)].

30 *Id.* at 318.

31 *Id.* at 320 n.10.

32 *Id.* at 318.

33 *Id.* at 320 n.10.

tent administrative policy, rather than practice, to be upheld as within the presidential authority.

III. Dames & Moore v. Regan

In *Dames & Moore v. Regan*,[34] the Supreme Court held that the President has broad powers during a national emergency to settle private claims against a foreign country through executive agreement. Under the International Emergency Economic Powers Act [IEEPA],[35] the President can freeze a foreign country's assets, transfer those assets from the United States and nullify any previously licensed attachments against those assets.[36] The President can also suspend private claims before United States courts unless Congress disapproves.[37]

On November 4, 1979, Iranian students seized American diplomats and personnel stationed at the American Embassy in Tehran.[38] The Iranian government supported the capture and threatened to withdraw its assets from the United States.[39] President Carter thereafter declared a national emergency under the IEEPA.[40] He froze all Iranian assets in the United States, prohibited prejudgment attachment on those assets unless licensed by the Treasury Department and prevented entry of any final judgment affecting the frozen Iranian assets.[41]

In December, an American firm, Dames & Moore, sued Iran over a contract dispute.[42] The District Court issued prejudgment at-

34 453 U.S. 654 (1981).

35 50 U.S.C. § 1701 et. seq, (1976).

36 453 U.S. at 675.

37 *Id.* at 686.

38 N.Y. Times, May 17, 1981, (Magazine (Special Issue)), at 55-58.

39 *Id.*

40 Exec. Order No. 12170, 44 Fed. Reg. 65729 (1979). The declaration of national emergency is required by the IEEPA, 50 U.S.C. § 1701(a). The national emergency must involve an "unusual and extraordinary threat . . . to the national security, foreign policy, or economy of the United States . . ." *Id.*

41 Exec. Order No. 12170, 44 Fed. Reg. 65729 (1979) (blocking Iranian assets); 31 C.F.R. § 535.203(e) (1979) (prohibiting any judicial process unless licensed); 31 C.F.R. § 535.805 (1979) (making any license granted revocable); 31 C.F.R. § 535.504(a) (1979) (granting a general license for certain judicial proceedings but prohibiting entry of final judgment); 31 C.F.R. § 535.418 (1979) (clarifying that license for prejudgment attachment had been granted).

42 Dames & Moore filed suit in United States District Court for the Central District of California against the Government of Iran, the Atomic Energy Organization of Iran (AEOI) and several Iranian banks. Dames & Moore had contracted to perform a site survey for a proposed nuclear power plant in Iran. The AEOI terminated the contract as provided by the contract. Dames & Moore sued on the contract for the value of services performed before

tachment orders, subject to the Treasury Department's license, against Iranian property located within the United States.[43]

In January 1981, the President negotiated an agreement that private claims would be settled by an Iran-U.S. Claims Tribunal in return for release of the American hostages.[44] The President revoked the previously granted prejudgment licenses, nullified any interests in the Iranian assets and ordered the frozen Iranian assets transferred to a federal reserve bank.[45] Subsequently, the District Court granted summary judgment to Dames & Moore, but dissolved the prejudgment attachment and stayed execution of the judgment pending appeal.[46]

Once the President suspended all private claims before United States federal courts in favor of the Iran-United States Claims Tribunal,[47] Dames & Moore filed a separate suit against the Secretary of the Treasury to prevent implementation of the executive orders. The District Court granted an injunction and the Supreme Court granted a direct appeal on an expedited schedule.[48]

The United States Supreme Court found explicit congressional authorization in the IEEPA which enabled the President to freeze Iranian assets, transfer those assets out of the United States and nullify any judicial attachments taken against the frozen Iranian assets.[49] Although the Court viewed the IEEPA as restricting the President's emergency power over a foreign country's assets during peacetime,[50] it held that the President did possess the powers exercised. The IEEPA's plain language clearly gave the President au-

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termination. Complaint in Dames & Moore v. Atomic Energy Organization of Iran, No. 79-04918 (C.D. Cal. 1979).

43 453 U.S. at 666.

44 Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, United States-Iran. 20 INT'L L. MATERIALS 224 (1981); Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the United States and Iran, Jan. 19, 1981, 20 INT'L L. MATERIALS 230 (1981).

45 Exec. Order No. 12276-12285, 46 Fed. Reg. 7913-1792 (1981).

46 453 U.S. at 666.

47 Exec. Order No. 12294, 46 Fed. Reg. 14111 (1981).

48 453 U.S. at 667.

49 *Id.* at 675. The relevant section of the IEEPA enables the President to:

> investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, transportation, importation or exercising any right, power or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest; by any person, or with respect to any property, subject to the jurisdiction of the United States. IEEPA, 50 U.S.C. § 1702(a)(1)(B) (1976).

50 *See* H.R. Rep. No. 45, 95th Cong., 1st Sess. 7 (1977). *See generally*, Note, *Presidential Emergency Powers related to International Economic Transactions: Congressional Recognition of Customary Authority*, 11 VAND. J. TRANSNAT'L L. 515 (1979).

thority to dispose of frozen foreign assets.[51] Also, the congressional purpose in enacting the IEEPA was to create a "bargaining chip" for negotiation.[52] Permitting private attachments would severely hamper the President's use of this bargaining chip.

Since the executive orders were established pursuant to explicit congressional authority — Justice Jackson's first category — they were supported by the "strongest of presumptions and the widest latitude of judicial interpretation and the burden would rest heavily upon any who might attack it."[53] If the executive orders were unconstitutional, it would mean that "the Federal Government as a whole lacked the power exercised by the President."[54]

The suspension of private claims before United States federal courts presented a more difficult question.[55] The Supreme Court did not find explicit congressional authorization for the suspension of private claims against Iran in the two congressional acts they considered. The IEEPA was rejected because it deals with rights exercised against a foreign country's assets, not personal claims meant to establish liability and fix damages.[56] The 1968 Hostages Act also provided insufficient authority because it was enacted to provide a direct remedy against a foreign country which repatriated Americans travelling abroad.[57]

The failure to find specific congressional authorization for the suspension of private claims required the Court to decide whether the President had such authority either independently or with the implied approval of Congress. Although the Supreme Court has determined that the President has some independent constitutional power over foreign affairs,[58] the extent of that power has not been

51 *See* note 36 *supra*.

52 453 U.S. at 673.

53 *Id.* at 674, (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson J., concurring)).

54 *Id.*

55 Exec. Order No. 12294, 46 Fed. Reg. 14111.

56 453 U.S. at 675.

57 Hostages Act of 1868, 22 U.S.C. § 1732 (1976). "The President shall use such means, not amounting to war, as he may think necessary and proper to effectuate the release" of Americans deprived of liberty by any foreign government.

58 United States v. Belmont, 301 U.S. 304 (1926); United States v. Pink, 315 U.S. 203 (1942). These cases hold the President has independent constitutional power to execute private claims settlements incident to the recognition of a foreign country. See also, Restatement (Second) of the Foreign Affairs Law of the United States § 205 (1975); M. WHITMAN, DIGEST OF INTERNATIONAL LAW 247 (1970).

fixed.[59]

In *Dames & Moore*, the Supreme Court again recognized some independent presidential power over foreign affairs.[60] The Court, however, found implicit congressional approval "crucial" to its decision.[61] The Court did not emphasize the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress."[62] The Court rejected the reasoning that the President has "inherent power, at least in times of international crisis, to settle the claims of United States nationals against a foreign government."[63]

Instead, the Supreme Court chose the more flexible approach indicated by Justice Jackson's tri-partite classification of presidential power.[64] The President's suspension of private claims fell into Justice Jackson's second category where Congress has neither explicitly approved nor disapproved of the presidential action.[65] Writing for the court, Justice Rehnquist explored the history of executive claims settlements and concluded that Congress had acquiesced to these "measures taken on independent presidential responsibility."[66] Congress knew about and facilitated the "long standing practice of settling such claims by executive agreement without the advice and consent of Congress."[67]

Dames & Moore asserted that Congress had not acquiesced to the President's authority to settle private claims by executive agreement. Rather, Congress had enacted the Foreign Sovereign Immunities Act (FSIA) to remove the President's authority to make case by case determinations of sovereign immunity.[68] Dames & Moore argued that the FSIA's grant of exclusive jurisdiction over private claims to federal courts implied that the President could not settle

59 *See* L. HENKIN, FOREIGN AFFAIRS & THE CONSTITUTION 176 (1972); F. WEISBAND, FOREIGN POLICY BY CONGRESS 135 (1979).

60 See *generally*, L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 179 (1972).

61 453 U.S. at 661.

62 *Id.*, quoting United States v. Curtiss-Wright Export Corp. 299 U.S. 304, 319-320 (1926).

63 Chas. T. Main Int'l v. Khuzetan Water & Power Co. 651 F.2d 800 (1st Cir. 1981).

64 453 U.S. at 661.

65 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (Jackson J., concurring).

66 453 U.S. at 678, quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (Jackson J., concurring).

67 *Id.* at 679.

68 453 U.S. at 685.

those claims by executive agreement.[69]

The Court decided that, when the FSIA was enacted, Congress merely intended to remove the sovereign immunity barrier from private claims against a foreign country. The Court required more direct congressional opposition to the presidential action to negate implied congressional approval.

The Supreme Court also found that the statutes in the foreign affairs area evinced a congressional desire to leave broad discretion with the President.[70] Congress considered, but did not enact, legislation which would have greatly reduced the presidential power to make executive agreements or limit the agreements' effect.[71] The legislation enacted only requires the President to send the text of executive agreements to Congress.[72] The Court also noted that Congress had not objected to this executive agreement with Iran, further buttressing its finding of congressional approval.[73]

In *Dames & Moore*, the Supreme Court indicated that it will hold executive claims settlements unconstitutional only when the settlements directly contradict congressional acts. The Court views the foreign affairs power as shared between the President and Congress, except for the small area of exclusive power each derives from specific constitutional grant. In applying Justice Jackson's second category, however, the Court leaves broad discretion with the President for the conduct of foreign affairs.

IV. The Significance of *Agee* and *Dames & Moore*

The underlying issue in both *Agee* and *Dames & Moore* is the scope of the President's executive power to limit the rights of U.S. citizens when exercise of their rights affect foreign affairs. How far may the Executive branch go before it oversteps congressional and

69 See *generally*, Note, *The Foreign Sovereign Immunities Act of 1976: Giving the Plaintiff His Day in Court*, 46 FORDHAM L. REV. 545 (1977).

70 *Id.* at 677. The Supreme Court looked primarily at the IEEPA and the 1868 Hostage Act.

71 *See* Congressional Oversight of Executive Agreements, Hearings on S. 632 and S. 1251 before the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 243-261, 302-311 (1975); Congressional Review of International Agreements: Hearings before the Subcommittee on International Security and Scientific Affairs of the House Committee on International Relations, 94th Cong., 2d Sess., 167, 246 (1976). Congress has been moving generally toward more control over foreign policy. *See generally*, Note, *National Emergency Dilemma: Balancing the Executive's Crisis Powers with the Need for Accountability*, 52 S. CALIF. L. REV. 1453 (1979).

72 1 U.S.C. § 112(b) (1976).

73 453 U.S. at 687.

constitutional limitations?[74] These two cases stand for the proposition that absent clear congressional disapproval, the Supreme Court will uphold executive decisions concerning foreign affairs.

While the Constitution establishes few specific power grants to the President concerning foreign affairs,[75] it does vest him with executive power.[76] Thomas Jefferson and Alexander Hamilton insisted that the grant of executive power expressly vested the President with all authority over foreign affairs except for those specifically withheld.[77] Despite this historical backdrop, a more limited view has emerged.[78] Today, the President's executive authority lies somewhere between a grant in bulk, as Hamilton characterized it, and the few clauses provided by the Constitution. An exact demarcation line still remains to be drawn, even after the *Agee* and *Dames & Moore* decision.[79]

If the congressional role in foreign affairs was more clearly defined, the scope of executive authority in foreign affairs could be ascertained. Congress, however, has no clearcut territory. The Constitution states that the President and the Congress share concurrent power in foreign affairs.[80] The President and Congress interact when making and executing foreign policy. The President makes general foreign policy by acting as the "sole organ of the federal gov-

74 *See* United States v. Curtiss-Wright Export Corp., 399 U.S. 304, 320 (1936) and L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-2 (1978).

75 Article 2, § 2 provides that the President "shall be Commander in Chief of the Army and Navy, . . . shall have the Power, by and with the Advice and Consent of the Senate, to make Treaties," subject such treaties to the Senate and "appoint Ambassadors and other Public Ministers."

76 U.S. Const., Article 2, § 1.

77 *See* 5 T. JEFFERSON, WRITINGS 162 (Ford ed. 1892) and 7 A. HAMILTON, WORKS 81 (Hamilton ed. 1851). Both men reasoned that while the Constitution gave Congress all legislative power "herein granted" in Article 1, Article 2 simply states "the executive power shall be vested in the President." The President therefore, has no limitation other than those specifically stated.

78 *See* Youngstown Sheet and Tubing Co. v. Sawyer, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) "I cannot accept the view that this clause is a grant in bulk of all conceivable executive power, but regard it as an allocation to the presidential office of the generic powers thereafter stated."

79 *See* Dames & Moore, 453 U.S. at 660. "Our decision today will not dramatically alter this situation for the Framers 'did not make the judiciary the overseer of our government'." (quoting Sheet & Tube Co. v. Sawyer, 343 U.S. at 594 (Frankfurter, J., concurring).

80 Article 1 § 8 provides that Congress has power to "lay and collect . . . Duties, Imports and Excise; . . . regulate Commerce with Foreign Nations; . . . define and punish . . . Felonies committed on the high seas and Offenses against the Law of Nations; . . . declare war; . . . raise and support Armies; . . . provide and maintain a Navy." Article 2 § 2 requires congressional advice and consent in treaty making and ambassador appointments. For presidential powers see note 75 *supra*.

ernment in the field of international relations."[81] Congress makes foreign policy as well by regulating commerce, declaring and waging war, authorizing executive agreements, and issuing resolutions on national policy related to its war power.[82]

The President executes foreign policy by entering into executive agreements and negotiating treaties.[83] Congress also executes foreign policy by implementing legislation and appropriating funds.[84]

As *Dames & Moore* points out, the separation and interaction between the two branches in governing our Republic has been the focal point of countless commentaries, with few definitive results.[85] The Court, quoting Justice Jackson, remarked, "[A] judge . . . may be surprised by the poverty of really useful and unambiguous authority applicable to concrete problems of executive authority as they actually present themselves."[86]

While the President predominates in foreign affairs, his power ultimately derives from congressional delegation and constitutional grants.[87] The President cannot invade Congress' legislative power unless Congress delegates its power to him.[88] Once delegated, Congress retains the power to limit the executive authority.[89] In both *Agee* and *Dames & Moore*, the Supreme Court's chief inquiry was whether the President had acted beyond the limits set by Congress.[90]

Dames & Moore posed an easier problem to the Court than *Agee*. In *Dames & Moore*, the Court found that since 1799 the Executive branch had repeatedly exercised authority to settle claims by U.S. nationals against foreign countries.[91] Despite numerous legislative enactments in this area, Congress had not limited this executive authority.[92] To reflect the general tenor of Congress concerning the

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

82 *See* L. HENKEN, FOREIGN AFFAIRS AND THE CONSTITUTION 89 (1972).

83 *See* note 75 *supra*.

84 *See* L. HENKEN, FOREIGN AFFAIRS AND THE CONSTITUTION 89 (1972).

85 453 U.S. at 660.

86 *Id.*

87 *See Youngstown*, at 585.

88 *See* Olegarzo v. United States, 629 F.2d 204 (C.A.N.Y. 1980).

89 *See* L. TRIBE, *supra* note 74, at § 4-2.

90 In *Agee*, "he (Agee) alleged that the regulation invoked by the Secretary, 22 C.F.R. § 51.70(4) (1980) has not been authorized by Congress and is invalid." 453 U.S. at 287. In *Dames & Moore*, The 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. . . ." 453 U.S. at 667. In both cases there were other claims of constitutional infringements which were either never reached (*Dames & Moore*, *Id.* at 688-89) or just briefly touched. (*Agee*, 453 U.S. at 306-10).

91 453 U.S. at 680. (In note 9, the Court lists the ten most recent agreements since 1952).

92 *See* note 53 *supra*.

scope of executive power in foreign affairs, *Dames & Moore* quoted Senator Williams, draftsman of the Hostage Act of 1869: "If you purpose any remedy at all, you must vest the executive with some discretion, so that he may apply the remedy to a case as it may arise."[93] The Court concluded that Congress had implicitly approved private claim settlements by executive agreement.[94] Consequently, *Dames & Moore* fit, if not directly into Justice Jackson's first category, sufficiently close to it to justify upholding the executive action.[95]

Agee, on the other hand, fell more directly into Justice Jackson's "zone of twilight." Having neither express statutory language[96] nor frequent adminstrative practice,[97] the Court was forced to stretch the applicable *Kent-Zemel* test to allow passport revocation for national security reasons.[98] The Court recognized that Congress had delegated broad powers to the President in this important foreign affairs area. Quoting from *Zemel*, the Court emphasized, "Congress, in giving the Executive authority over matters of foreign affairs, must of necessity paint with a brush broader than it customarily weilds in domestic areas."[99]

In *Agee* and *Dames & Moore*, the Court did not define the scope of executive authority in foreign affairs. *Dames & Moore* fit relatively near Justice Jackson's first category. Under those circumstances, the President acted with maximum power, and the Court granted him wide discretion.[100] *Agee* fit more directly into Justice Jackson's second category. But the reasoning in *Agee* implied that the Court will go to some length to give the President control over foreign affairs.[101]

93 453 U.S. at 677, quoting the Cong. Globe 4359, 40th Cong., 2d Sess. (1868).

94 453 U.S. at 680.

95 *See id.* at 680-82. (The Court discussed the fact that executive action falls, not into distinct pigeon-holes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition. *Id.* at 669).

96 453 U.S. at 290.

97 *Id.* at 302.

98 *Id.* at 305-06.

99 *Id.* at 292 quoting from Zemel v. Rusk, 381 U.S. 1, 17 (1965).

100 *See* note 5, *supra*.

101 Two particularly pertinent quotations support this proposition. "This is especially so in areas of foreign policy and national security where congressional silence is not to be equated with congressional disapproval." *Agee*, 453 U.S. at 291. "Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." *Id.* at 292.

Taken together, the message to Congress seems plain: Absent clear congressional disapproval, the Supreme Court will not interfere with executive decisions when they concern foreign affairs.

William P. Hovell
Brian M. Mueller
Kirk S. Schumacher