# CONSTITUTIONAL ISSUES IN THE SETTLEMENT OF PROPERTY CLAIMS AGAINST FOREIGN STATES

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## Introduction

The plaintiff in *Aris Gloves, Inc. v. United States*[1] accused the United States of violating the Fifth Amendment prohibition against taking property for public use without just compensation.[2] Under the Potsdam Agreement the United States authorized the Soviet Union to take control of the plaintiff's East German plant, without providing for reimbursement to the corporation for its loss. The Court of Claims denied the Fifth Amendment allegation on the narrow ground that American property in enemy territoy falls subject to the war power and therefore lies outside the scope of Fifth Amendment guarantees.[3]

*Aris Gloves* raises "a whole host of issues" about the Fifth Amendment property rights of American nationals as they are affected by arbitrary exercises of the foreign relations power.[4] The problem arises most frequently in the following contexts: (1) official State Department *refusal to espouse* valid individual property claims against foreign governments, usually leaving no other recourse to the claimant; (2) unilateral *waivers* of such claims resulting from nonreviewable State Department decisions; (3) government settlements with the taking states which are significantly *below the value* of the property in dispute; (4) failure by the government in some cases to *distribute* settlement proceeds to legitimate claimants; and (5) State Department refusal to espouse the eligible claims of *permanent resident aliens*, on the ground that they were not American "nationals" at the time of the alleged foreign taking.

Crucial to the above situations, including the unique *Aris Gloves* situation, is the fact that American property rights are compromised or

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* Member, third year class.

1. 420 F.2d 1386 (Ct. Cl. 1970).
2. *Id.* at 1387.
3. *Id.* at 1391.
4. *Round Table: Toward More Adequate Diplomatic Protection of Private Claims*, 65 AM. SOC. INT'L L. PROC. 333, 334 (1971). *See also* Note, *The Nature and Extent of Executive Power to Espouse the International Claims of United States Nationals*, 7 VAND. J. TRANSNAT'L L. 95, 118-21 (1973).

extinguished by the deliberate action of the United States, principally of the State Department. Although facilitating good foreign relations may be sufficient "public use" for the sacrificed property interests, no duty has yet been assumed by the government to compensate the claimants for their losses.

This note discusses the constitutionality of the government's unilateral role in international property claims in light of the Fifth Amendment property provision and due process clause and in light of the foreign relations power of the executive branch. In addition, it analyzes the informal State Department procedures for the espousal of claims and the quasi-judicial procedures of the Foreign Claims Settlement Commission in adjudicating claims to lump sum settlements. The narrow role of federal courts in the domestic adjudication of international claims, and the limits imposed on that role by the act of state and sovereign immunity doctrines, are also examined.

The three branches of federal government must review the theory and practice of their roles in international property claims settlements in order to accord American nationals adequate protection of their property interests abroad, including, where necessary, compensation for deprivations of those interests when those deprivations are directly attributable to State Department, or other governmental action.

## I. Governmental Theory

Individual property claims against foreign states are handled almost entirely by the State Department. If the department compromises American property interests through its claims policy, officials find legal support for the department actions in principles of constitutional law and international law.

The department argues on constitutional grounds that all facets of diplomatic protection, including foreign claims espousal and settlement, fall within the foreign relations power reserved to the executive branch.[5] Therefore, once the department is involved in a claims matter, it assumes complete jurisdiction over the claim with little or no interference from the other branches of government.[6] Based on its alleged prerogatives in the area of foreign affairs, the State Department rejects the contention that it owes any duties to the aggrieved national to espouse

5. *See* A. ROVINE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 333 (1973) [hereinafter cited as ROVINE]. *See also* 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1216 (1967) [hereinafter cited as WHITEMAN].

6. *See* ROVINE, *supra* note 5, at 332-33. *See also* 8 WHITEMAN, *supra* note 5, at 1216-18. A widely quoted Supreme Court decision generally supporting broad foreign affairs discretion is Justice Sutherland's opinion in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

the claim, settle at full value, or abstain from waiving the claim.[7] Fabian A. Kwiatek, the department's Assistant Legal Advisor for International Claims, argues that diplomatic protection is *not* a legal right:

> Such protection, instead, is in effect an *extra-ordinary* legal remedy which is employed by the Department in its discretion in the conduct of diplomatic relations. The Department is the sole judge of what claims it will enforce, and of the manner, time, means and extent of enforcement. . . . *No constitutional rights are involved.* Furthermore, the Department may, as a matter of pure right, refuse to present legally valid claims and may settle, surrender or compromise claims without consulting the claimant.[8]

Mr. Kwiatek also asserts that the department may espouse a claim "without being requested to do so either formally or informally by the aggrieved national,"[9] and moreover, that such action can be taken notwithstanding "vigorous protest by such national."[10]

From the perspective of international law, the department adopts the traditional theory that nations alone, not individuals, are the subjects of international law.[11] Under this theory, the individual's claim is not his, but his nation's, once it is espoused in the international arena.[12] Because of this theoretical "merging" process, the state maintains its prerogative to handle foreign property claims in its discretion.

Both the constitutional law and the international law underpinnings of governmental theory in the area of foreign claims settlements recently have been under attack. For example, the War Powers Resolution,[13] the legislation requiring that executive agreements be transmitted to Congress[14] and widespread academic skepticism concerning the constitutional basis for executive monopoly in foreign affairs[15] all raise serious questions about the broad power over foreign relations asserted by the executive branch.

Likewise, the theory in international law that only states, and not individuals, are subjects of international law has been challenged by

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7. RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 212-13 (1965); ROVINE, *supra* note 5, at 332-33; 8 WHITEMAN, *supra* note 5, at 1216-18.

8. ROVINE, *supra* note 5, at 333 (emphasis added).

9. *Id.* at 332.

10. *Id.*

11. *See* 1 L. OPPENHEIM, INTERNATIONAL LAW 19-20 (8th ed. 1955); 1 WHITEMAN, *supra* note 5, at 35-37.

12. E. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 356-57 (1927); The Mavrommatis Palestine Concessions Case, (1924) P.C.I.J., ser. A, No. 2, at 6.

13. 50 U.S.C. §§ 1541-48 (Supp. 1973).

14. 1 U.S.C. § 112b (Supp. 1973).

15. *E.g.*, Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972).

many observers. Lauterpacht called this doctine "obsolete"[16] and "unable to stand the test of actual practice."[17] Philip Jessup said that "the right to fair treatment is a right of the individual and not merely the right of a state with which he is connected."[18] The "merging theory" also has been weakened by the impressive worldwide human rights movement,[19] evidenced most strikingly by the direct acceptance of individual petitions for grievances by the Human Rights Commission of the United Nations.[20]

Because the cornerstone of the traditional theory that individuals will not be recognized internationally has been eroded by the evolution of some international legal status for the individual, the associated theory, that a person's claim against a foreign state is not an *individual*, but a *national*, claim also has been eroded. In essence, if the individual is recognized internationally, his claim does not have to be presented to the foreign state as that of the nation alone.

In sum, the theories behind the State Department's role in foreign claims settlements are open to serious questioning. Arguably the foreign relations power is not so broad that it submerges individual rights in the exercise of discretionary authority over claims settlements in which the government assumes a role. Further, it is arguable that, because individuals seem to have some status in international law, their claims are not

16. Lauterpacht, *The Subjects of the Law of Nations*, 63 LAW Q. REV. 438, 439 n.2, 440 (1947) [hereinafter cited as Lauterpacht].

17. *Id.* at 441.

18. Jessup, *Responsibility of States for Injuries to Individuals*, 46 COLUM. L. REV. 903, 909 (1946) [hereinafter cited as Jessup].

19. *See Convention for the Protection of Human Rights and Fundamental Freedoms*, in COUNCIL OF EUROPE, CONVENTION OF HUMAN RIGHTS; COLLECTED TEXTS (6th ed. 1969); International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. (1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 220 A, 21 GAOR Supp. 16, at 49, U.N. Doc. A/6316 (1966); International Covenant on Civil and Political Rights, G.A. Res. 2200 A, 21 U.N. GAOR Supp. 16, at 52, U.N. Doc. A/6316 (1966); Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810 at 71 (1948).

As Lauterpacht points out, other examples of the invalidity of the "object" theory include the imposition of responsibility for war crimes on individuals; universal jurisdiction over pirates and, more recently, the view that hijackers are isolated "subjects" of international law; and the occasional application of international law to individuals in municipal courts. Lauterpacht, *supra* note 16. *See generally* LEECH, OLIVER & SWEENEY, THE INTERNATIONAL LEGAL SYSTEM 572-724 (1973). *See also* F.V. GARCIA-AMADOR, L. SOHN & R. BAXTER, RECENT CODIFICATIONS OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (1974) [hereinafter cited as GARCIA-AMADOR, SOHN & BAXTER]; W.P. GORMLEY, THE PROCEDURAL STATUS OF THE INDIVIDUAL BEFORE INTERNATIONAL TRIBUNALS (1966) [hereinafter cited as GORMLEY]; 1 WHITEMAN, *supra* note 5, at 50-58.

20. ECOSOC Res. 1503 (XLVIII), 48 U.N. ECOSOC, Supp. 1A, at 8 (1970).

by legal necessity *merged* into the government's claims and thereby lost to the individual on the international level.

## II. Governmental Practice

### A. Present Context

In 1973 the private direct investment of American citizens abroad was 107.3 billion dollars, compared with 78.2 billion dollars in 1969 and 31.9 billion dollars in 1960.[21] Accompanying this increase in American foreign investment has been a marked rise in the number of individual and mass nationalizations and expropriations within lesser developed countries. Both the investment and expropriation phenomena have contributed to a high number of group and individual property claims by American nationals against foreign governments.[22]

Two recent developments have complicated the foreign investment picture. First, a split has emerged between western and third world nations on the issue of compensation for expropriations and other takings. Second, the Overseas Private Investment Corporation (OPIC), a government-sponsored insurance corporation, is being phased out to private industry; OPIC has served as a strong guarantor and as a non-political medium for the settlement of investment disputes. Both developments may bring added pressure to the State Department for effective intervention on the investor's behalf.

Western nations sanction expropriations which are (1) *nondiscriminatory,* (2) for *public purposes,* and (3) followed by *"adequate, prompt and effective"* compensation to the owners. The requirement of compensation for the taking has been rejected by several third world nations. The result has been a split in views on the traditional theory and an added source of uncertainty for American investors.[23] As Justice Harlan wrote in *Banco Nacional de Cuba v. Sabbatino*:

> The disagreement as to relevant international law standards reflects an even more basic divergence between the national interests

21. *Economic Report of the President Transmitted to Congress* Feb., 1975, at 357.

22. *See* R. LILLICH & G. CHRISTENSON, INTERNATIONAL CLAIMS: THEIR PREPARATION AND PRESENTATION 2-3 (1962) [hereinafter cited as LILLICH & CHRISTENSON].

23. *See* THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW (R. Lillich ed. & contrib. 1972) and 2 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW (R. Lillich ed. & contrib. 1973). *See also* G.A. Res. 1803, 17 U.N. GAOR Supp. 17, at 15, U.N. Doc. A/5217 (1962) (allowing compensation in accordance with local and international law) as compared with G.A. Res. 3171, 28 U.N. GAOR Supp. 30, at 52, U.N. Doc. A/9030 (1973) (omitting the reference to international law). *See also* 8 M. WHITEMAN, *supra* note 5, at 1143-83.

> of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system.[24]

To combat the uncertainties of overseas investment, including the risk of unreimbursed expropriations, many American businesses have been insured through OPIC, which provides insurance guarantees against certain major risks, including expropriation.[25] "During the 25 year history of this program, investors have paid $39 million for this coverage and $1,722,000 in claims have been paid."[26]

The government stake in this investment insurance program is being "phased out" to the private insurance industry, pursuant to legislation passed in 1974.[27] The effect of this phase out on the settlement of investment disputes may be significant. According to the Congressional Research Service Report to the Senate Foreign Relations Committee, which considered the legislation recently passed:

> . . . OPIC's greatest asset is its ability to assist the developing country and the multinational corporation in the final settlement of investment disputes by translating the investment dispute into a new mutually acceptable business arrangement. A public corporation can maintain a low profile, while State Department management of the problem elevates it to the diplomatic level.[28]

The Subcommittee on Foreign Economic Policy of the House Committee on Foreign Affairs agreed that OPIC helped "to depoliticize the investment dispute through insulating the U.S. Government by keeping the investor out in front."[29]

The effect of the phase out, therefore, may be to remove what has been an effective and non-political medium for settling investment disputes. In an age of eroding international standards on what constitutes a valid expropriation policy, the OPIC buffer has assumed an even more important role than it might have acquired absent such ideological conflicts. It is uncertain whether private industry can approach the scope of the coverage provided by the United States. More importantly, it is

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24. 376 U.S. 398, 430 (1964).

25. 22 U.S.C. §§ 2191-2200(a) (1970).

26. STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 93d Cong., 2d Sess. REPORT ON THE OVERSEAS PRIVATE INVESTMENT CORPORATION AMENDMENTS ACT (Comm. Print 1974).

27. Act of Aug. 27, 1974, PUB. L. No. 93-390, 88 Stat. 763, *amending* 22 U.S.C. §§ 2191-2200a (1975). *See* Wall Street Journal, Feb. 20, 1975, at 19, col. 1.

28. STAFF OF SENATE COMM. ON FOREIGN RELATIONS, REPORT ON THE OVERSEAS PRIVATE INVESTMENT CORPORATIONS AMENDMENTS ACT, S. REP. NO. 93-676, 93d Cong., 2d Sess. 60 (1974).

29. *Id.*

doubtful that private industry will have the settlement clout of the United States OPIC negotiators.

Two problems emerge. Americans with expropriated property overseas may encounter refusals by some expropriating nations to provide compensation for their takings. Moreover, the strong United States overseas investment guarantee program may be weakened in scope and settlement effectiveness with its transfer to private industry. The combined effect may be increased pressure for diplomatic intervention to remedy private wrongs.[30] It is likely that the claimant will be compelled to seek State Department intervention, if redress through the local forum fails.

### B. State Department Procedures

There is no formalized procedure in the State Department for processing international claims.[31] The department does not operate under the Administrative Procedure Act.[32] Therefore, it is essential that the claimant prepare and document his claim as persuasively as possible.[33]

Once the claim is drafted and submitted, the department decides "whether there is a valid ground for a claim," and, if there is, determines "the manner in which the claim is prepared and documented, the international legal grounds upon which the claim is asserted, the amount which is demanded and accepted in settlement and finally what shall be done with any amount received."[34] The department makes it clear that:

> While it frequently happens that during the course of a diplomatic claim the Department consults the claimant in various stages thereof

30. According to LILLICH & CHRISTENSON, "the number of international claims seems destined to increase. Foreign trade and investment is at an all time high. . . . Social and economic changes in some countries and chronic instability in others are bound to impair this investment and generate many claims. Trade and travel also provide situations where property and personal rights of American nationals may be infringed." *Supra* note 22, at 2-3.

31. *See* LILLICH & CHRISTENSON, *supra* note 22, at 88-103.

32. 5 U.S.C. §§ 551-706 (1970). Referring to grants of sovereign immunity, to which the State Department applies the same discretionary control, then Acting Legal Advisor George Aldrich stated: "[T]he Department of State is exercising a discretionary, foreign affairs function to which the requirements of the Administrative Procedure Act do not apply. We do provide an opportunity for the parties directly concerned to express their views to the Department in writing and orally if they so desire, but we do not regard this as an adjudicatory procedure." ROVINE, *supra* note 5, at 224.

33. To provide guidelines for prospective claimants, the State Department publishes "Department of State Suggestions for Preparing Claims," which is available through the department.

34. 8 WHITEMAN, *supra* note 5, at 1217, quoting from a letter written on April 13, 1961 by the then Assistant Legal Advisor for International Claims Spangler.

> and usually endeavors to obtain a settlement satisfactory to the claimant, there is no legal obligation to do so.[35]

In order to qualify for State Department espousal, a property claim must meet three tests: (1) an *invalid taking* attributable to the foreign government,[36] or a *valid* taking for public purposes with *inadequate compensation*,[37] (2) American nationality on the part of the property owner from the time of taking *through* espousal and settlement,[38] and (3) prior exhaustion of foreign local remedies.[39]

A taking is invalid if it is either discriminatory against foreigners or for private purposes.[40] An expropriation meeting the tests of public purpose, nondiscrimination and compensation is recognized by the United States as legal.[41] The requirement of continuous American nationality precludes citizens who were naturalized following the taking and permanent resident aliens from seeking redress through the American government for their claims against foreign powers. The State Department evidences no sign of reconsidering its policy of discrimination against non-citizens.[42] The requirement that foreign remedies be exhausted usually is interpreted according to common sense.[43] Where exhaustion is obviously futile, the applicant will be excused from meeting the requirement. "The trend today seems to be away from the strict enforcement of the traditional local remedies rule."[44]

The State Department receives approximately 120 letters per

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35. 8 WHITEMAN, *supra* note 5, at 1216 (memorandum from the Office of the Assistant Legal Advisor for International Claims, Fabian A. Kwiatek).

36. 8 WHITEMAN, *supra* note 5, at 969-1136. *See also*, GARCIA-AMADOR, SOHN & BAXTER, *supra* note 19, at 129-31, 200-34, 363-67; RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES § 185 (1965).

37. 8 WHITEMAN, *supra* note 5, at 1020-1183; RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 185-90 (1965). In response to the takeover of the American owned Nelson Bunker Hunt Oil Company by Libya in 1973, the American Embassy in Tripoli delivered a note to the Libyan government, which read in part: "Under established principles of international law, measures taken against the rights and property of foreign nationals which are arbitrary, discriminatory, or based on considerations of political reprisal . . . are invalid and not entitled to recognition by other states." ROVINE, *supra* note 5, at 335.

38. 8 WHITEMAN, *supra* note 5, at 1233-68.

39. RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 206-10 (1965); Interhandl Case, (1959) I.C.J. 6.

40. See note 37 *supra.*

41. See note 37 *supra.*

42. According to Fabian A. Kwiatek, Assistant Legal Advisor for International Claims in the State Department, claimants must be "bona fide citizens, by birth or by naturalization" at the time of the alleged taking. Interview (telephone) with Fabian A. Kwiatek, Feb. 27, 1975.

43. RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 206-10 (1965).

44. LILLICH & CHRISTENSON, *supra* note 22, at 98.

month from individual claimants seeking some official redress for their grievances. Of these, five or six per month are accepted for espousal. Many of the others fail because one of the requirements is not met.[45]

### C. The Foreign Claims Settlement Commission (FCSC)

In cases involving a large number of claims the United States traditionally has utilized claims commissions to distribute funds from lump sum agreements negotiated between the United States and the offending nation.[46]

The most recent commission is the Foreign Claims Settlement Commission, which was established by Congress in 1954.[47] The FCSC is a domestic agency, charged with adjudicating claims to lump sum funds and then certifying those claims deemed valid to the secretary of the treasury for payment.[48]

In contrast to the State Department, the procedures established for the FCSC for processing claims are quasi-judicial in nature. Each claim is filed, with supporting documents, and docketed for hearing.[49] Staff attorneys examine the claims to determine if the requisite allegations have been made: (1) American ownership at the time of taking, or within a period prescribed by the relevant settlement statute, (2) continuous American ownership thereafter, (3) the property value, and (4) dates and circumstances of the loss asserted.[50] The claim is then presented to the commission, which is comprised of three members appointed by the president with the advice and consent of the Senate.[51]

Upon full review of the claim, the commission issues a "Proposed Decision," which may be objected to by the claimant in subsequent oral or written hearings. The commission then renders a final decision, which again may be objected to through the filing of a petition to reopen the claim based on newly acquired evidence.[52]

If a new hearing is denied the commission enters its final decision with a full statement of the facts and reasoning supporting the deci-

45. Interview (telephone) with Fabian A. Kwiatek, Jan. 22, 1975.

46. In the past 160 years, "[s]uch commissions have distributed funds under treaties, conventions or agreements with Spain in 1819, Great Britain in 1826, Denmark in 1830, France in 1831, the Two Sicilies in 1832, Spain in 1834, Peru in 1841, Mexico in 1848, Brazil in 1849, China in 1858, Great Britain in 1871, Spain in 1898, China in 1901, Turkey in 1934, and Mexico in 1934 and 1941. R. LILLICH, INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS 8-9 (1962) (citations omitted) [hereinafter cited as LILLICH].

47. *See* 22 U.S.C. §§ 1621-43 (1970).

48. 22 U.S.C. § 1624 (1970).

49. FCSC DEC. & ANN. 4 (1968).

50. *Id.*

51. 1972 FCSC ANN. REP. 3.

52. FCSC DEC. & ANN. 6-7 (1968).

sion.[53] By statute, the decisions so entered are *final and conclusive* on all questions of law and fact, and are *not subject to review* by any other "*official, department, agency, or establishment of the United States or by any court by mandamus or otherwise.*"[54]

The FCSC adjudicated claims against Yugoslavia, Bulgaria, Hungary, Rumania, Italy, the USSR, Czechoslovakia, and Poland, for which funds were available through agreements negotiated between the United States and those countries.[55] In addition, the commission handled claims against Germany and Japan which were funded by the liquidation of German and Japanese assets in the United States under the Trading with the Enemy Act.[56] The commission also was charged with adjudicating claims filed by former POW's and civilian American citizens arising from the Vietnam conflict and the U.S.S. Pueblo incident.[57] Claims against Cuba and the People's Republic of China have also been adjudicated by the commission, *although no claims settlement agreements have been concluded* with these countries.[58] Other programs assigned to the FCSC include the Philippines Claims Program,[59] the Lake Ontario Claims Program,[60] and finally, the Micronesian Claims Program,[61] which provides for a separate commission under the direction of the chairman of the FCSC.

In general, the FCSC plays an important role in claims settlement and distribution. Its existence reduces the need to establish separate distribution mechanisms for each settlement concluded. Moreover, the investigatory role prior to settlement, as in the Cuban and Chinese cases, can aid negotiators in arriving at settlements which better reflect the total sums claimed. However, the FCSC was created to accommodate the lump sum method of settlement. Lump sum settlements invariably relegate claimants to small distributive shares which bear little relation to their actual claims. Moreover, the blanket no-review statute unfairly

53. *Id.* at 7.
54. 22 U.S.C. § 1623(h) (1970) (emphasis added).
55. *See* 22 U.S.C. §§ 1621-43 (1970).
56. 50 U.S.C. App. §§ 1-44 (1970).
57. 50 U.S.C. App. §§ 2001-2017 (1970).
58. It should be noted that, because of the lack of a mechanism for presettlement investigations as to the possible number of claims, the sums available to claimants have had no material relationship to the dollar amount of claims finally pressed, thereby requiring claimants to receive pro rata shares below the value of their claim. This preadjudication of claims against China and Cuba with the resulting reports to Congress and negotiators is an important step in promoting private interests, as the settlements ultimately concluded may better reflect the funds needed to compensate adequately the claimants.
59. Act of Aug. 30, 1962, PUB. L. No. 87-616, 76 Stat. 411.
60. Act of Aug. 15, 1962, PUB. L. No. 87-587, 76 Stat. 387.
61. 50 U.S.C. §§ 2018-20 (Supp. 1973).

restricts claimants who do not receive adequate protection of their claims by the settlement commission. Both problems present questions which are addressed below.

## III. The Role of the Courts: The Act of State Doctrine and Sovereign Immunity

It is beyond the scope of this note to discuss fully the act of state and sovereign immunity doctrines and their effects on foreign claims litigation in United States courts. Both doctrines are undergoing changes in interpretation and application, and their current status is ambiguous Therefore they are analyzed in general terms only, with emphasis on the effects the two doctrines have on the limited role of federal courts in the settlement of foreign claims.

### A. Act of State Doctrine

The act of state doctrine asserts that "*the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.*"[62] Read literally, the act of state doctrine would preclude federal courts from reviewing *any* foreign acts of expropriation. Moreover, in federal court, a claimant to expropriated property *must* prove as an element of his cause of action that the expropriation was *wrongful* under international law. Because of this requirement, the act of state doctrine could be an absolute bar to the claimant in court by preventing him from raising the essential issue of whether or not the expropriation was wrongful.

Notwithstanding the literal reading of the doctrine, the so-called Bernstein exception to the act of state doctrine allows federal courts to review the legality of expropriations if the State Department notifies the courts that such review will not threaten foreign relations.[63] Also, the Hickenlooper Amendments to the Foreign Assistance Act of 1961 state that, under certain narrow facts, courts *shall* review the legality of acts of expropriation unless the State Department specifically instructs them *not* to proceed.[64]

62. Underhill v. Hernandez, 168 U.S. 250, 252 (1897) (emphasis added).

63. *See* Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvart-Maatschappij, 210 F.2d 375 (2d Cir. 1954).

64. 22 U.S.C. § 2370(e)(2) (1970). The amendments state in part: "[N]o court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party . . . based upon (or traced through) a confiscation or other taking . . . by an act of that state in violation of the principles of international law . . . . [This does not apply] in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the

Expropriation cases reach federal court if there is personal jurisdiction over the corporation or persons responsible for the taking. It is more common for the court to obtain jurisdiction by the quasi-in-rem attachment of property which can be *traced* to the original expropriation and which is in transit through the United States. For example, in *Banco Nacional de Cuba v. Sabbatino*, the American claimant purchased several loads of sugar in Cuba. The sugar was nationalized, and while in transit through New York, was attached by the claimant. The claimant thereby established domestic jurisdiction over the claims matter.[65]

The Hickenlooper Amendments specifically cover cases "in which a claim of title or other right to property is asserted by any party . . . based upon (or traced through) a confiscation or other taking . . . by an act of that state in violation of the principles of international law."[66] In 1972, the Supreme Court ruled that the amendments refer to direct title actions and not to cases where the expropriation issue is asserted by way of *counterclaim or setoff*. Nevertheless, the Court decided that counterclaims raising the joint issues of title and of the legality of the foreign expropriation are proper subject matter for federal courts.[67]

Three justices based the decision on the classic Bernstein exception rationale, referring to a *notice* sent to the lower court by the State Department, which permitted that court to decide the counterclaim on its merits. The other justices indicated reservations on the question of whether courts are bound by State Department notices in cases not covered by the Hickenlooper Amendments.[68] In future cases, the Supreme Court may be called upon to clarify its position on the continued viability of the Bernstein exception.

Despite the evident ambiguities surrounding the act of state doctrine, it is clear that the State Department still exerts significant power over claims litigation in federal courts. If the State Department determines that court review of foreign acts of expropriation will harm foreign relations, it is unlikely courts will ignore that determination until the Bernstein exception is conclusively overruled. As has been stated, in cases covered by the Hickenlopoer Amendments, courts must honor a State Department decision barring review.

The repercussions of such State Department control are obvious: a claimant may be denied a hearing on the merits of his case if the department opposes court review. Therefore, it is possible to contend

United States and a suggestion to this effect is filed on his behalf in that case with the court."

65. 376 U.S. 398 (1964).

66. 22 U.S.C. § 2370(e)(2) (1970).

67. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).

68. *Id.* See the concurring opinions of Powell and Douglas and the dissenting opinions of Brennan, Stewart, Marshall and Blackmun.

that a claimant barred by the State Department from redress in court is deprived of his property without due process of law. A Fifth Amendment allegation might be based on a valid claim to property taken in violation of international law and proof of no other possible redress than that provided in federal court. To date, there is no case on point.

**B. Sovereign Immunity**

The due process guarantees of the Fifth Amendment are likewise threatened when the doctrine of sovereign immunity is applied to preclude bringing a sovereign or his agent into court. For example, in *Rich v. Naviera Vacuba, S.A.*,[69] five libels were filed against a Cuban merchant vessel which came to the United States when its crew sought political asylum. Cuba had expressly waived sovereign immunity in relation to one of the claimants, United Fruit Company, who alleged with convincing documentation that part of the vessel's cargo was confiscated corporation property. Ignoring the waiver the court allowed immunity upon receipt of a note from the State Department instructing that immunity be granted. The claimants were thereby deprived of the opportunity to assert or prove their property rights.

At this time, there is pending legislation, approved by the State Department, which promises to alleviate the injustice apparent in *Rich*. The legislation denies sovereign immunity where the basis of the sovereign's action is commercial activity, expropriation, or other private or "wrongful" acts. Sovereign immunity is also denied where the sovereign party waives it, as by suing or asserting a counterclaim in federal court. The legislation also provides a procedure for obtaining personal jurisdiction over foreign states, thereby removing the need for quasi-in-rem attachments.[70]

The keystone of the new legislation is that it transfers from the State Department to the courts the task of determining whether a state is entitled to immunity. As Charles Brower, Acting Legal Advisor of the Department of State observed:

> Transfer of the decision-making process to the courts will ensure that sovereign immunity questions are decided *on legal grounds under procedures guaranteeing due process*. This in turn should better ensure the consistency of decisions and reduce their foreign policy consequences.[71]

Until the proposed bill is passed, and in future cases to which the law does not apply, courts must actively question unjust executive interventions founded on the sovereign immunity doctrine. In the same

69. 295 F.2d 24 (4th Cir. 1961).
70. 119 CONG. REC. 2213-20 (1973).
71. ROVINE, *supra* note 5, at 220-21 (emphasis added).

sense, courts must continue to challenge improvident applications of the act of state doctrine. A claimant who meets jurisdictional requirements should have a right to prove his case free from unilateral State Department interventions which he cannot effectively challenge.

## IV. The Problems Raised by Theory and Practice

### A. Issues

Within the broad context presented above several issues emerge. The central issues are: (1) If the State Department refuses to espouse a valid property claim against a foreign state, and the claimant has exhausted all other available remedies, must the government compensate him on the ground that this was a Fifth Amendment taking? (2) If the government unilaterally releases a foreign property claim by agreement with the taking state, must it then compensate the claimant for the waiver of his property interest? (3) If the government accepts a property settlement from the foreign state significantly *below the value* of the confiscated properties, does a Fifth Amendment duty arise to compensate claimants for the unreimbursed portions of their claims? (4) If the government receives a property settlement from the taking state, is it then under a duty to disperse the funds to legitimate claimants? (5) Is the State Department policy of refusing to espouse the claims of permanent resident aliens violative of equal protection guarantees? (6) Is adequate due process afforded claimants by State Department procedures for processing espousal requests? (7) And finally, is the statute barring judicial review of FCSC decisions unconstitutional on due process grounds?

These seven questions will be discusssed in sequence.

### B. Refusal to Espouse and the Fifth Amendment

There is no legal duty to espouse the claim of an individual injured by a foreign state. Borchard states that the individual injured has "no legally enforceable right" to the protection of his own state.[72] When the failure to espouse a claim results in a deprivation of property for the public purpose of promoting good foreign relations, should a duty arise under the Fifth Amendment to compensate the injured claimant?

The corporation in *Aris Gloves v. United States*[73] asserted that "the failure of the United States to press for compensation for the loss of property belonging to American citizens, in essence, amounted to a licensing of the Russian government to dismantle and carry away plain-

72. E. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 18 (1929).
73. 420 F.2d 1386 (Ct. Cl. 1970).

tiff's property without having to pay compensation."[74] Therefore, the plaintiff claimed, "the United States should be obliged to compensate it for its losses since defendant failed to protect its property interests, and since defendant even went to the point of actually authorizing a third party to take control of plaintiff's property without first requiring just compensation."[75]

The Court of Claims conceded:

> [i]t was not necessary for the defendant to have actually taken physical possession of plaintiff's property in order for there to have been a fifth amendment taking. A taking can occur simply when the Government by its action deprives the owner of all or most of his interest in his property.[76]

However, the court continued, "whether there is a fifth amendment taking cannot turn simply on general principles of law; it must be based on the particular circumstances of each case."[77] The court concluded that the war power excused the Government's action upon "the general rule that property found in enemy territory is enemy property regardless of the status of the owner."[78]

In his concurring opinion, Judge Nichols indicated that the plaintiff might have prevailed on his Fifth Amendment argument had he shown the following elements:

> (a) that the acts of the USSR in seizing United States owned plants in East Germany as "reparations" were contrary to international law, (b) that the USSR's authorities would sooner or later have acknowledged the fact and paid compensation to the United States owners, and (c) that the United Staes representatives at Potsdam knowingly surrendered this possibility of compensation in return for concessions by the USSR in unrelated areas.[79]

Taken as a whole, the *Aris Gloves* case presents persuasive reasoning in support of the theory that the United States has a duty to compensate claimants whose foreign property interests have been terminated by an intentional refusal to espouse valid claims. Conceding that a taking can be indirect and still come within the purview of the Fifth Amendment, the Court of Claims did not directly reject the thrust of the plaintiff's Fifth Amendment argument. Instead, the Court based its decision on the peripheral ground of the war power. Finally, Judge Nichols outlined the three elements of a Fifth Amendment cause of action: a foreign act of taking in violation of international law; proof that the foreign country would have compensated the claimant if pressed to do so, and knowing refusal by the United States to espouse the claim.

74. *Id.* at 1390.
75. *Id.*
76. *Id.* at 1391.
77. *Id.*
78. *Id.*
79. *Id.* at 1396-97.

Courts in the future must be more willing, than the Court of Claims in *Aris Gloves*, to condemn acts under the foreign relations power when they encroach on individual property rights. Courts may sustain the government's refusal to protect a national's property, but they also must decide if the knowing refusal warrants some form of reimbursement. The guidelines suggested by Judge Nichols can be helpful in determining the question. Deference to the foreign affairs power has no place in judicial considerations of valid Fifth Amendment allegations.

**C. Release of a Claim and the Fifth Amendment**

The right to release American claims is stated in the Restatement of the Foreign Relations Law of the United States:

> §213: The President may waive or settle a claim against a foreign state based on the responsibility of the foreign state for an injury to a United States national, without the consent of such national.[80]

The alleged *right* to waive claims with neither consent nor indemnification was challenged in three important cases. These cases set forth the major constitutional issues underlying the release of American claims against foreign states.

The action in *Meade v. United States*[81] was based on the United States' release of all Spanish obligations to pay certain claims of American nationals arising between 1802 and 1819, the date of the treaty releasing the claims. In return for the release, the United States received the Spanish holdings in Florida, plus $5,000,000.00 in claims settlements.

Prior to treaty ratification, a special Spanish tribunal awarded Meade the sums claimed due. However, upon ratification in 1821, this claim was released. There was some evidence that Spain believed at the time of ratification that the United States would assume its adjudicated debt to Meade.[82]

Meade's claim was transferred to a domestic claims commission assigned to adjudicate all American claims to the $5,000,000.00 settlement. The commission refused to receive the Spanish judgment as evidence of Meade's claim, and because of delays on the part of American officials in obtaining other evidence from Spain, the claim was denied and the commission disbanded.[83]

In 1866, because of great public and congressional debate over the *Meade* case, the Court of Claims was given authority to decide the right of Meade's heirs to the sums denied him.[84] In a lengthy opinion,

80. RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES § 213 (1965).

81. 2 Ct. Cl. 224 (1866), *aff'd on other grounds*, 76 U.S. (9 Wall.) 691 (1869).

82. *Id.* at 258-59, 267.

83. *Id.* at 264.

84. S.J. Res. 78, 39th Cong., 1st Sess. (1866).

the court decided that the judgment of the commission, however deplorable, had to be viewed as final and conclusive.

In discussing the constitutional issue in relation to its conclusion, the court stated:

> The claimant's counsel contend that . . . the United States applied Meade's claim, his private property, to public use, which gives him a claim to compensation outside and irrespective of the treaty. That from . . . obligations to make just compensation for property so taken, the law infers . . . a promise to pay its fair value.
>
> Was the release and cancellation of Meade's claim against Spain such an appropriation of private property to public use as comes within the rule of law and the provision of the Constitution? The court think it was. A man's *choses* in action, the debts due him, are as much property and as sacred in the eye of the law as are his houses and lands, his horses and his cattle. And when taken for the public good, or released or cancelled to secure an object of public importance, are to be paid for in the same manner.[85]

Although the Court of Claims upheld the plaintiff's Fifth Amendment argument, it emphasized that it was bound by the remedy provided by the government. Hence, the commission's refusal to accept the Spanish judgment as evidence, and the resulting decision to deny the claim, was held to be conclusive.

On appeal, the Supreme Court affirmed the judgment of the Court of Claims as it related to the finality of the original judgment, but displayed little deference to the Fifth Amendment claims. The Court dismissed the "just compensation" argument on the grounds that Meade had submitted his claims "to the Department of State for that protection which his Government might think proper to grant."[86] Furthermore, the Court upheld the right of the United States to release the claim against Meade's protest, and to determine the method, if any, of compensating him.

*Gray v. United States*[87] was decided in the Court of Claims nineteen years after *Meade*. The *Gray* case arose from the release of claims against France which were based upon "the detention, seizure, condemnation, and confiscation"[88] of American merchant vessels on the high seas following the French Revolution. The court was granted jurisdiction by Congress in 1885 in an advisory capacity only, leaving *Congress* to decide the *remedy, if any*, which would be afforded the claimants' heirs.[89]

In *Gray*, the plaintiffs contended that the United States was under

85. 2 Ct. Cl. at 275.
86. 76 U.S. (9 Wall.) 691, 693 (1869).
87. 21 Ct. Cl. 340 (1886).
88. *Id.* at 343.
89. French Claims Act of 1885, ch. 25, §§ 1-6, 23 Stat. 283.

a duty to compensate American citizens for the claims released in the agreement with France.[90] The Court of Claims sustained the plaintiff's contention, saying:

> It seems to us that this *'bargain'* . . . by which the present peace and quiet of the United States, as well as their future prosperity and greatness were largely secured, and which was *brought about by the sacrifice of the interests of individual citizens, falls within the intent and meaning of the Constitution,* which prohibits the taking of private property for public use without just compensation.[91]

In reaching its conclusion, the court referred to the opinions of persons who were contemporaries of the Spoilation agreement. These views are significant to the extent that they reflect the perspective of those directly involved in the original drafting and interpretation of the Constitution. Quoting Mr. Pickering, Secretary of State to Presidents Washington and Adams, the court wrote that

> we bartered "the just claims of our merchants" to obtain a relinquishment of the French demand, and that—It would seem that the merchants have an equitable claim for indemnity from the United States.[92]

Furthermore, the Court of Claims referred to Chief Justice Marshall's opinion "that there was the strongest obligation on the Government to compensate the sufferers by the French spoliations."[93] The court also quoted Senator Livingston, a congressional expert on the French Claims controversy, who argued in his report to the Senate:

> The committee think it sufficiently shown that the claim for indemnities was surrendered as an equivalent for the discharge of the United States from its heavy national obligations, and for the damages that were due for their preceding non-performance of them. If so, can there be a doubt, independent of the constitutional provision, that the sufferers are entitled to indemnity? Under that provision is not this right converted into one that we are under the most solemn obligations to satisfy? To lessen the public expenditure is a great legislative duty; to lessen it at the expense of justice, public faith, and constitutional right would be a crime. Conceiving that all these require that relief should be granted to the petitioners, they beg leave to bring in a bill for that purpose.[94]

The court in *Gray* thus sustained the plaintiff's Fifth Amendment argument that the release of valid claims in the national interest gives rise to a duty to compensate. The *Gray* opinion stands as an eloquent statement of Fifth Amendment grounds for compensation when valid claims are released by the United States.[95]

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90. 21 Ct. Cl. at 343.
91. *Id.* at 393 (emphasis added).
92. *Id.* at 389.
93. *Id.* at 390.
94. *Id.* at 391.
95. It is significant to note that Judge Nichols in *Aris Gloves*, referring to *Gray*,

The Court of Claims also discussed the Fifth Amendment in relation to the release of claims in *Seery v. United States*[96] decided in 1955. Seery's claim was based upon damage done to her Austrian property during its occupation by the United States Army, which utilized the estate as on officer's club. By executive agreement, liability for this claim was transferred to Austria. Seery challenged the right of the United States to absolve itself of liability.

The decision in Seery's favor was based upon the court's conclusion that a prior statute accorded Seery the right to sue the United States in the Court of Claims on claims such as that assigned, and that the executive agreement could not supersede her statutory right. The case is not direct authority for the proposition that waiver requires compensation, but it does imply at least certain limits, if only statutory, on the executive branch's asserted power to settle claims in its discretion.[97]

The three cases point up the combined interest of the judiciary and Congress in the troublesome questions raised by the asserted right to release valid claims without compensation. To date, such waivers are accepted as a concommitant to executive authority over foreign affairs. This deference to the foreign relations power must be changed by congressional or judicial action aimed at granting claimants adequate protection of their property interests. *Gray v. United States* sets forth persuasive reasoning by which a court might require the government to provide compensation for the release of property claims in the interest of foreign relations. The case also can be a catalyst for congressional action to establish statutory guidelines for granting compensation to eligible individuals whose claims are unilaterally waived. As the opinions in *Gray* reiterate, it is difficult logically *not* to extend the Fifth Amendment to cases where property rights are released by uncontestable decisions within the executive branch. There is a "taking," for public use (foreign relations), and compensation should be provided.

### D. The Fifth Amendment: Settlement Below Value and Pro Rata Settlement

Related to questions surrounding the failure to espouse a claim and the asserted right to waive a claim is the question of whether official

stated: "True, it was an advisory opinion only. Such opinions of course were not 'binding' but I never supposed that lawyers were not to invite attention to them as precedents." 420 F.2d at 1395 (Ct. Cl. 1970).

96. 127 F. Supp. 601 (Ct. Cl. 1955).

97. *But cf.* Ozanic v. United States, 188 F.2d 228 (2d cir. 1951), which held that the British assignee of a Yugoslav claim against the United States was precluded from suing this country under the Public Vessels Act on grounds that an executive agreement with Yugoslavia, by which Yugoslavia released its claims against the United States, served to withdraw the consent of the United States to be sued.

settlements less than the property values asserted, and pro rata settlements which relegate claimants to the funds available, are "takings" within the purview of the Fifth Amendment.

To impose a duty on the government to obtain full compensation from the offending nation appears impractical, if only because success ultimately depends on the willingness or ability of the foreign state to pay. Nonetheless, the government must assume a duty to conscientiously pursue a maximum settlement, or in the case of lump-sum settlements, to ascertain the total amount needed for just compensation prior to negotiating the agreement. The government must operate more as an agent in this regard, than as a benefactor.

The FCSC now has some authority to preadjudicate mass claims prior to final settlement, so as to provide negotiators with a more realistic assessment of the claimants' total need.[98] Nevertheless, pro rata settlements, however convenient or fairly assessed, have almost without exception limited the compensation available to individual claimants.[99] Is this too a (partial) "taking" of property for which compensation is owing? One author hypothesized:

> Let us suppose a case: An American company in 1940 invested a million dollars in a plant in Country X. Eighty other Americans, naturalized after their original investment, but before the taking, used other currencies now greatly depreciated and subject to exchange restrictions, in acquiring property in Country X. All private property in X is nationalized. In order to get dollars now for all the claimants, a lump-sum settlement of $17,000,000 is accepted as against a total reported claims of $50,000,000. A fair ratio of recovery out of this sum for the company is $500,000.

98. *E.g.*, Cuban Claims Act of 1964, 22 U.S.C. 1643-b (1964); Act of Aug. 15, 1962, PUB. L. No. 87-587, 76 Stat. 387 (establishing the Lake Ontario Claims Program).

99. *See* Avramova v. United States, 354 F. Supp. 420 (1973); Z. & F. Assets Realization Corp. v. Hull, 311 U.S. 470 (1940). In *Avramova* the plaintiff asserted that she and others had been deprived of their property without due process of law when Congress enlarged the class eligible to receive payments from the Bulgarian fund assigned for distribution to the FCSC. The original plan had included claimants who had suffered uncompensated confiscations prior to 1955. They received payments from liquidated Bulgarian assets in the United States. Although their claims were adjudicated by the commission in the amount of nearly $7,000,000.00, the fund was exhausted at $2,600,000.00 by 1960. In 1963, an executive agreement with Bulgaria resulted in an additional $400,000.00 for distribution. Congress in 1968 assigned the distribution to the FCSC, but enlarged the eligible class to include those whose property had been confiscated between 1955 and 1963. The court dismissed the contention that plaintiffs' property rights in the new fund had "vested" when their claims had been originally adjudicated but not paid in full because of fund exhaustion. In stating that the plaintiffs failed to state a claim for which relief could be granted, they relied on the power of the President to settle claims and on the congressional power to provide a remedy. Furthermore, the court invoked the no-review provision of the FCSC act to bar review of the commission's decisions. Likewise in *Z. & F. Assets Realization Corp.* the Court held that the assets in the fund would be watered down by admission of more claimants.

> If the United States had done nothing there would clearly have been no taking on the part of the United States, it seems certain. If it does act, we should not expect that due process problems could be avoided by the simple expedient of adverting to the old dogma that the international reclamation is the sovereign's cause of action, not the individual's. Despite this theory, the fact remains that something is being done by executive agreement to diminish or change the citizen's legal relationship to property.[100]

Courts have avoided the imposition of an obligation on the government to provide compensation for pro rata settlements or settlements below value. They have consistently held, that although a property *right* might exist, it is a right limited by the remedy that Congress or the President might afford. As the court in *Gray v. United States* stated: "Whatever the rights of the claimants, they are without remedy other than that which Congress may have seen fit to give them."[101]

In *Comegys v. Vasse*, the Court reiterated this point:

> [I]t may ordinarily be one test of right, that it may be enforced in a Court of Justice. Claims and debts due from a sovereign, are not ordinarily capable of being so enforced. Neither the King of Great Britain, nor the government of the United States, is suable in the ordinary Courts of Justice, for debts due by either. Yet, who will doubt, that such debts are rights? It does not follow, because an unjust sentence is irreversible, that the party has lost all right to justice, or all claim, upon principles of public law, to remuneration. With reference to mere municipal law, he may be without remedy; but with reference to principles of international law, he has a right . . . .[102]

In *Meade v. United States*, the Court of Claims said:

> By this treaty, which has all the force and authority of an act of Congress, the claimant's property is taken for and appropriated to the public use. Spain is released; all her obligation to the claimant is cancelled. By the same instrument it is transferred to, and assumed by, the United States. But the mode and manner of making compensation are prescribed by the same instrument. A special tribunal, with specific powers and special jurisdiction, is created to adjust and award that compensation. Can the person whose property has been taken resort to any other means, or sue in any other tribunal? We think not.[103]

In the *United States v. Weld*, the Supreme Court asserted:

> The claimants had to rely upon the justice of the government, in some of its departments, for compensation in satisfaction of their respective claims . . . .[104]

100. Oliver, *Executive Agreements and Emanations from the Fifth Amendment*, 49 AM. J. INT'L L. 362, 364 (1955).

101. 21 Ct. Cl. at 343 (emphasis added).

102. 26 U.S. (1 Pet.) 193, 216 (1828).

103. 2 Ct. Cl. at 276.

104. 127 U.S. 51, 56 (1888).

Later in *Williams v. Heard*, the Supreme Court stated:

> But the Act of Congress did not create the rights. They had existed at all times since the losses occurred. They were created by reason of losses having been suffered. All that the act of Congress did was to provide a remedy for the enforcement of the right.[105]

Thus, on various occasions, courts have held that the remedy for the violation of an American claimant's rights by a foreign power is precisely that which executive or legislative decisions determine it to be—nothing more, nothing less. However, courts have also held that awards which are made are not mere donations or gratuities to the claimant.[106] As the court in *Williams v. Heard* said:

> [We do not think] that the money appropriated by Congress by the act of 1882 to pay these claims should be considered merely as a gratuity.[107]

In *Phelps v. McDonald*, Justice Swayne stated "[t]here is no element of a donation in the payment ultimately made in such cases. Nations, no more than individuals, make gifts of money. . . ."[108]

Therefore, once a remedy is accorded, and payments are made, the claimant receives his award as a matter of right. Prior to that time, the government may settle the claim at its will, and decide whether to provide a remedy, on conditions which it may insert.[109] In 1957, the United States Court of Appeals, referring to the FCSC, said:

> [The FCSC] has the duty of distributing a governmentally created fund among a class. No claimant . . . has a right to participate in any amount until the Commission has made an award. In short, a benefit is being conferred. . . .[110]

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105. 140 U.S. 529, 541 (1891).

106. However, the Court in *Blagge v. Balch*, 162 U.S. 439 (1896), held that payments made in the French Spoilation Claims cases were "by way of gratuity" and "not of right." *Id.* at 457. In this situation, Congress appropriated money for the heirs of claimants whose claims had been released by the 1801 Treaty with France. The payments, made pursuant to the Act of March 3, 1891, ch. 540, § 4, 26 Stat. 862, were distinguished by the Court from those made in *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193 (1828), and *Williams v. Heard*, 140 U.S. 529 (1891), on the grounds that the latter cases involved funds secured from a foreign government in settlement of claims against it, or funds generated by the United States pursuant to a treaty agreement with the foreign state. In the Spoilation cases, funds were generated solely by legislative decision. However, once the claimant qualified under the Act of 1891 and was awarded compensation, he apparently received it as a matter of statutory right.

107. 140 U.S. at 541.

108. 99 U.S. at 303.

109. In the French Spoilation cases (see note 89 *supra*) Congress limited awards to the next of kin and specifically precluded assignees in bankruptcy from claiming the awards made. See *Blagge v. Balch*, 162 U.S. 439 (1896), for an interpretation of this condition.

110. American and European Agencies v. Gillilland, 247 F.2d 95, 97-98 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 884 (1957).

Notwithstanding the above "right without a remedy" theory developed by the courts, the Restatement of Foreign Relations Law suggests:

> [A] question that has not been definitely settled is whether a settlement by the United States for less than the full value of the claim may constitute a taking of property from the injured party that entitles him to full compensation under the Fifth Amendment of the Constitution.[111]

The Fifth Amendment compensation question has not been settled in part because these interested in the claims field have not accepted the fact that one's property right can be compromised by the government without a secure remedy for the loss. The policy which allows settlements to be compromised with compensation is partly based on the doctrine discussed earlier, that persons have no independent international status, as well as on the alleged foreign relations power. Once the courts interpret the individual's right to be *continuous* and deserving of a remedy as a matter of right, then the government's role must change in relation to the individual claimant. As Jessup writes:

> [T]he old Vattelian fiction of the injury to the state through the injury to its national, should in the ordinary claims case, be abandoned. *It is not inconsistent with such abandonment to agree that the state retains the right to represent its national, to be . . . his agent for collective bargaining.*[112]

Thus far the government reserves its right to compromise claims with no Fifth Amendment ramifications. The property right remains unprotected. Both the executive and judicial branches must review the current policy to insure maximum and secure compensation for property taken abroad. As Jessup suggests a first step might be to impose on the government standards of care and fiduciary responsibility akin to those governing an agent.

### E. "National Funds" and the Fifth Amendment

Related to the "right without a remedy" theory is the prevailing view that funds received by the United States in the settlement of American claims are "national funds" to which claimants have no legal rights. By extrapolation, the United States has no duty to distribute these funds to claimants on whose behalf the funds allegedly were received. As the Court stated in *Williams v. Heard*, referring to a lump sum settlement paid by Britain to the United States:

> It was held in *United States v. Weld*, 127 U.S. 51, that this award was made to the United States as a nation. The fund was, at all events, a national fund to be distributed by Congress as it saw

111. RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES, § 213 (comment) (1965).

112. Jessup, *supra* note 18, at 923.

> fit. . . . But no individual claimant had, as a matter of strict legal or equitable right, any lien upon the fund awarded, nor was Congress under any legal or equitable obligation to pay any claim out of . . . that fund.[113]

This rule applies with equal force to individual claims determined by international commissions. For example, in *La Abra Silver Mining Company v. United States*,[114] an award was made to the plaintiff by the United States-Mexico Commission. Both the United States and Mexico had "agreed to consider the result of the proceedings of the Commission as a *full, perfect and final settlement* of every claim. . . ."[115] But the United States withheld payment of the award because a fraud allegedly had been perpetrated by the company on the commission. In this action to compel payment, the Supreme Court stated:

> As between the United States and Mexico, indeed as between the United States and American claimants, the money received from Mexico under the award of the Commission was in strict law the property of the United States, and no claimant could assert or enforce any interest in it so long as the Government legally withheld it from distribution.[116]

Similarly, in *Bayard v. White*,[117] the Court denied a writ of mandamus compelling payment of an award made under the joint convention between the United States and Mexico. The ground for the refusal to pay was a contest to the award proceeds which had arisen subsequent to the commission grant. The court held that this was an adequate ground for a refusal on the part of the secretary of state to pay the money in question.[118]

In *Great Western Insurance Company v. United States*,[119] the Court dismissed the plaintiff's important contention that the United States became a *trustee* for the claimant when it received money from Great Britain pursuant to the Alabama Claims settlement.[120] However, as Professor Lillich points out, "Although the trust fund doctrine is more theory than reality, references are occasionally made to it in cases, in statute, and in Congress."[121] Supporting Lillich's observation, former President Nixon, in reference to the recent settlement with Peru, stated

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113. 140 U.S. 529, 537-38 (1891). The Court in *Weld* stated: "It is not necessary to discuss whether, in the absence of any action by Congress as to the distribution of this fund, there could have been any legal or equitable right in any person or corporation to any portion of it." 127 U.S. 51, 56. This seems to have been settled by *Heard*.

114. 175 U.S. 423 (1899).

115. *Id.* at 426.

116. *Id.* at 458.

117. 127 U.S. 246 (1887).

118. *Id.* at 249.

119. 112 U.S. 193 (1884).

120. *Id.* at 195.

121. LILLICH, *supra* note 46, at 36-37.

that "[t]he Government of the United States will deposit the [money] in a *trust* account in the U.S. Treasury."[122] Despite such occasional references, the trust fund theory is not in accord with current case law.

The "national fund" theory may operate to deny a claimant both just compensation and basic due process. If settlement proceeds are withheld, the claimant has no basis for compelling payment, even if the claim is held to be valid. As the plaintiff in *Great Western Insurance* asserted, the role of the United States, as the receiver of settlement funds, must be revised to that of a trustee having an enforceable duty to transfer settlement proceeds to the eligible claimants. In practice, the trustee would execute a duty to transfer funds to the FCSC for equitable distribution. The remedy for withholding proceeds would be a mandamus action initiated by the claimant(s) to compel payment. The trustee role, like the agent role, equitably modifies government power in favor of the individual. This is more consistent with the trend in constitutional law affording maximum protection to individual rights and liberties.

### F. Equal Protection and the Nationality Requirement

Recent Supreme Court cases raise the issue of whether resident aliens, who held that status at the time of the alleged foreign taking, should summarily be denied the current "privilege" of diplomatic protection on grounds of their noncitizenship. In *Sugarman v. Dougall,*[123] the appellees were four federally registered resident aliens, who were prohibited by statute from employment with the New York civil service because of their alien status. In holding the statute unconstitutional, the Court pointed to the statute's "indiscriminate" exclusion of aliens from competing for civil service positions.[124] The Court stressed that "an alien is entitled to the shelter of the Equal Protection Clause,"[125] and, citing *Graham v. Richardson,*[126] the Court reasserted its long term position that "classifications based on alienage are 'subject to close judicial scrutiny.' "[127] The standard for such scrutiny is "the substantiality of the State's interest in enforcing" the restrictive law.[128]

Here, the asserted state interests were (1) the interest in limiting government participation to those within the "political community," and

122. DEPT. STATE BULL. 272, 273 (Mar. 18, 1974).
123. 413 U.S. 634 (1973).
124. *Id.* at 639.
125. *Id.* at 641.
126. 403 U.S. 365 (1971).
127. 413 U.S. at 642.
128. *Id.*

(2) the state's "special public interest" in restricting its resources for citizen benefit.[129]

On the first point, the Court held that the statute was "neither narrowly confined nor precise in its application,"[130] and therefore was improperly drawn to meet the asserted interests. On the second contention, the Court stressed that the public interest doctrine was rooted in the notion that privileges, not rights, could be limited to citizens, and that constitutional rights such as equal protection do not "turn upon whether a government benefit is characterized as a 'right' or a 'privilege.' "[131]

In the companion case to *Sugarman, In Re Griffiths*[132] the Court applied the suspect classification doctrine and required the state of Connecticut to demonstrate a substantial state interest in prohibiting admission of aliens to the state bar. The Court concluded that the state's interest in assuring requisite qualifications for those licensed to practice law was adequately protected by the existing safeguards applicable to all lawyers.

Although these two cases deal specifically with state laws relating to employment, the rationale of the cases can be applied to the arbitrary exclusion of aliens from State Department protection. The State Department characterization of its protection as a privilege and not a legal right cannot, on the language of *Sugarman,* provide an adequate basis for arbitrary exclusion of aliens, because of the broader constitutional right to equal protection. In addition, that State Department rules are informal, and not "law," seems inadequate to sustain the department's restrictive policy.

To meet the *Sugarman* and *Griffiths* test, the department logically must bear a burden of proving that it has a substantial and "constitutionally permissible" interest in excluding aliens from protection,[133] and that the policy is narrowly confined "to the accomplishment of its purpose or the safeguarding of its interest."[134]

The constitutional ground for the State Department restriction relating to aliens is the amorphous foreign relations power that is now delegated to the executive branch. Under this power, if the espousal of an alien's claim would injure foreign relations, for example, by involving a claim against the homeland of the alien, then refusal to espouse the claim would seem an appropriate decision in light of possible international conflicts.

129. *Id.* at 642-43.
130. *Id.* at 643.
131. *Id.* at 644.
132. 413 U.S. 717 (1973).
133. *Id.* at 721-22.
134. *Id.*

However, the policy of exclusion is "indiscriminate."[135] According to Assistant Legal Advisor Fabian Kwiatek, eligible claimants must have been "bona fide citizens, by birth or by naturalization" at the time of the taking.[136] Therefore, although there may be occasions where espousal would violate a substantial departmental interest under the foreign relations power, the department policy is neither "narrowly confined nor precise in its application"[137] toward that interest.

At present, aliens are denied equal protection guarantee implicit in the Fifth Amendment in the area of redress through the government on claims against foreign countries. That policy must be reviewed in light of the case law trend affording resident aliens broader equal protection guarantees.

### G. State Department Procedures and Due Process

The State Department procedure is "ad hoc."[138] Review of State Department actions is generally precluded under the political question doctrine and the wide discretion given the executive branch in foreign affairs.[139] There is more room and more need for mechanisms to assure procedural and substantive due process for the private interests affected than those acknowledged in the traditional view of State Department prerogative.[140]

Critics have suggested that greater application of the Administrative Procedure Act to State Department activities might operate to better

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135. *See* 413 U.S. at 639.

136. Interview (telephone) with Fabian A. Kwiatek, Feb. 27, 1975.

137. 413 U.S. at 643.

138. "Since the decision whether or not to present a formal claims . . . is said to be entirely within the discretion of the Department of State, claimants as a matter of right do not have access to an administrative hearing where their request for diplomatic interposition might be weighed. However, in practice any claimant or his attorney may make appointments to meet with officers of the Legal Adviser's Office of the Department in order to present a claim. As no procedural rights are formalized, the validity of a claim must be demonstrated by convincing evidence presented to the Department during such meetings or by mail." LILLICH & CHRISTENSON, *supra* note 22, at 89.

139. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, (1936), which is repeatedly cited by State Department officials. See ROVINE, *supra* note 5, at 174 and 333 for examples of department reliance on *Curtiss-Wright*. For suggestions as to encroachments on this wide discretion, see notes 13, 14, 15 and accompanying text.

140. Leigh & Atkeson, *Due Process in the Emerging Foreign Relations Law of the United States*, 22 BUS. LAW 3, 5 (1966) [hereinafter cited as Leigh & Atkeson]. Lillich and Christenson write: "It is possible that a more formal administrative procedure for presenting claims for espousal would increase the effectiveness of the process by safeguarding against excessive use of subjective standards by the Department in its determination of the validity of a claim for espousal purposes." However, the authors conclude that "the built-in separation of the Legal Adviser's Office from the political and other bureaus of the Department" provides "insurance against arbitrariness." LILLICH & CHRISTENSON, *supra* note 22, at 89-90.

insure private interests.[141] Observers note that judicial intervention in the passport cases is one indicator that the judiciary may intervene when State Department functions serve to encroach on fundamental constitutional guarantees.[142] It has also been suggested that the Court of Claims should be granted jurisdiction to hear claims against the United States arising from treaties.[143] That jurisdiction is now precluded.

These recommendations and observations warrant congressional attention. Private relations between the government and the individual, especially when they affect constitutionally protected property rights, deserve more protection than is now accorded by an arbitrary exercise of governmental power in derogation of basic due process guarantees. One official stated the situation succinctly:

> The protection of individual rights may appear to be microcosmic in relation to the macrocosmic international operations in which the Executive Branch is involved. Nevertheless, it is the obligation of the government to afford private individuals as much procedural protection as the nature of the situation admits. Far too frequently the major obstacle in the way of supplying this protection is not the indifference or the obtuseness of the government officials involved but the lack of appropriate administrative procedures.[144]

Notwithstanding the foreign relations power, the State Department should not be exempt from effective supervisory control, especially where private rights are affected. Procedures must be changed to ensure that private rights are not compromised by arbitrary action.

### H. FCSC and No-Review

The FCSC has been involved in several suits brought by dissatisfied claimants challenging its decisions or methods. The court in each of these cases has invoked the no-review provision of the enabling statute to avoid a decision on the merits.

Because property rights are at issue, more extensive review should be accorded by Congress or the courts, especially when constitutional allegations are pressed. Although the courts have shown some deference to the view that constitutional issues may be passed upon, notwithstanding the no review provision, no court to date has disregarded the provision as a bar to complete review on the merits of the plaintiff's claim.

#### a. *De Vegvar v. Gillilland*

In *de Vegvar v. Gillilland*,[145] decided in 1955, the plaintiff sued

141. Leigh & Atkeson, *supra* note 140, at 10-11.

142. *Id.* at 13-15.

143. *Id.* at 27-28.

144. *Id.* at 27, quoting from Timberg, *Wanted: Administrative Safeguards for the Protection of the Individual in International Economic Regulation*, 17 ADMIN. L. REV. 159, 166 (1965).

145. 228 F.2d 640 (D.C. Cir. 1955), *cert. denied* 350 U.S. 994 (1956).

the FCSC to compel reconsideration of her claim to a portion of the Yugoslav Claims Fund. The commission held that she was not a national at the time her property was taken by Yugoslavia. In reaching its decision, the commission excluded evidence showing that Yugoslavia had not obtained title to the property by local law until 1947, by which time the plaintiff was a naturalized citizen. One commissioner dissented on the grounds that, based on those facts, the plaintiff had met the nationality requirement.

De Vegvar relied on Section 4(a) of the International Claims Settlement Act, which directed the commission to apply both the provision of the claims agreement and "the applicable principles of international law, justice, and equity."[146] She felt that the commission's refusal to analyze the Yugoslavian confiscation statute in relation to her property was both a failure to exercise its jurisdiction and an arbitrary act disconsonant with "the principles of international law."[147]

The District of Columbia Circuit Court of Appeals affirmed the lower court's dismissal of the complaint on the ground that:

> Errors in the result reached, or errors in the admission of evidence or in the making of a legal ruling—assuming such errors to have been made—are not grounds for judicial intervention in the face of the congressional fiat that the Commission's determinations shall be free of judicial review.[148]

However, the court significantly conceded:

> We may assume for purposes of argument that the provisions of Section 4(h) [barring review] would probably not prevent judicial relief in the situation—to illustrate—where a claimant is denied consideration by reason of his race, creed or color. No violation of constitutional right is suggested here: plaintiff-appellant makes no contention, for example, that the United States has taken her property without paying for it.

In addition, the court expressly refused to pass on the government's contention that "settlements of international claims—absent clear congressional intent to the contrary—give rise to no right of judicial review. . . ."[149]

b. *American and European Agencies*

Two years after *De Vegvar*, the District of Columbia Circuit Court was presented with *American and European Agencies v. Gillilland*,[150] in

146. 22 U.S.C. § 1623(a) (1970).
147. 228 F.2d at 642.
148. *Id.*
149. *Id.*
150. 247 F.2d 95 (D.C. Cir.), *cert. denied*, 355 U.S. 884 (1957).

which the plaintiff again sought to compel reconsideration of a FCSC decision.

In this case the plaintiff asserted that she had not been accorded an adequate hearing before the commission, because she "was not furnished a staff memorandum on which the Commission relied in making its determination of value,"[151] and because "the constitutional right to a hearing includes the right to know and meet the claims of the opposing party. . . ."[152] She contended that the no-review provision applied only to "action taken pursuant to prescribed procedures and then only to questions relating to the merits of a claim."[153] She also contended that "Congress may not prevent a court from requiring agency compliance with statutory procedures."[154]

The court rejected the first contention on the ground that the no-review provision was absolute:

> When Congress tells the courts that there shall not be review, we will not assume, in the absence of something more, that Congress could not have meant what it said.[155]

On the second contention, the court stated:

> If the agency's failure to follow prescribed procedures resulted in the denial of a constitutional right, the validity of a blanket non-reviewability clause would indeed pose a grave and difficult constitutional question.[156]

However, the court, assuming arguendo that it had jurisdiction, concluded that due process in a hearing before the FCSC required no more than an opportunity to be heard.[157]

The court also concluded:

> On the showing here we are not required to decide whether Section 4(h) should be narrowly construed to permit review of the validity of a deprivation of a constitutional right.[158]

In an active dissent, Judge Miller interpreted the majority opinion as holding that "the agency here involved may disobey a clear congressional directive to grant a hearing, without being called to the courts; that it cannot be judicially required to act within the framework of its statutory authority." "This," he concluded, "seems to me to be dangerous doctrine . . . ."[159]

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151. *Id.* at 97.
152. *Id.*
153. *Id.* at 96.
154. *Id.* at 97.
155. *Id.*
156. *Id.*
157. *Id.* at 98.
158. *Id.*
159. *Id.*

Judge Miller went on to analyze the statute and concluded that the phrase which bars review of an "action of the Commission *in allowing or denying any claim*" refers to the merits of the claim and not to questions of adequate procedure.[160] He also interpreted the word "action" above to mean action "taken pursuant to prescribed procedures," because:

> [I]t would be perfectly idle for Congress to prescribe a procedure such as the holding of a hearing and then immediately to nullify the requirement by providing that the agency may disregard it with impunity.[161]

The error of the majority, in Judge Miller's opinion, was in viewing plaintiff's claim as one seeking review on the merits, where, in fact, she sought only to compel the commission "to hold the hearing which the statute requires."[162]

c. *Haas v. Humphrey*

In *Haas v. Humphrey*,[163] decided the same year as *American and European Agencies*, the District of Columbia Court of Appeals dismissed plaintiff's claim that her foreign citizenship at the time of confiscation should not bar her from qualifying to receive compensation from the Yugoslav Claims Fund. She based this claim on two allegations: (1) "that the United States Government undertook to release her claim against the Government of Yugoslavia," which requires compensation under the Fifth Amendment,[164] and (2) that State Department officials, prior to signing the treaty with Yugoslavia, had stated that she would be included among those beneficial owners within the treaty provisions. Therefore, she alleged her claim had in fact been released, barring her from any further recourse against Yugoslavia. The FCSC denied both allegations. Despite the dicta in *de Vegvar* and *American and European Agencies* implying the court would hear constitutional issues, the court once more invoked the no-review provision to avoid a decision on the merits. As to the plaintiff's allegation, the court evasively held:

> Appellant urges, contrary to the Commission's conclusion, that her claim against Yugoslavia was in fact released by the United States. But that is something we need not undertake to decide, as our disposition of the case would not in any event turn on the point. The Government [alleges] that inasmuch as Mrs. Haas was not entitled to the treaty's benefits her claim against Yugoslavia was not released and remains alive. If that is so, there has been no

160. *Id.* at 99 (emphasis added).

161. *Id.*

162. *Id.*

163. 246 F.2d 682 (D.C. Cir.), *cert. denied sub nom* Haas v. Anderson, 355 U.S. 854 (1957).

164. *Id.* at 683.

> taking whatever of Mrs. Haas' property. If that is not so, it does not follow that the taking—if any there was—can or should be compensable from the Yugoslav Claims Fund, unless and until there has been an award by the Commission. In any event, it does not follow that this court is empowered to set aside the Commission's adverse determination.[165]

The court also concluded that the commission seemed to have observed procedural due process.[166]

d. *Zutich v. Gillilland*

In *Zutich v. Gillilland*,[167] decided one year after *American and European Agencies* and *Haas*, the Court of Appeals for the Sixth Circuit invoked the no-review provision to deny the appellant a hearing on the question of whether he became a national within the time period established for claimant elgibility in the Yugoslav Claims Fund. By so doing, the court held that the no review provision supersedes a provision in the Immigration and Nationality Act of 1952.[168] Under the latter provision, courts have jurisdiction over cases where a person who claims a right or privilege as an American national is denied such right by a department or official of the United States, on the ground that he is not a national of the United States. It is significant that the court invoked the no-review provision when it had persuasive grounds under the Immigration Act to decide the case on the merits.

e. *First National City Bank*

The same year as *Zutich*, the District of Columbia Court of Appeals again refused to decide the appellant's claim on the ground of the no-review provision. In *First National City Bank v. Gillilland*[169] the issue arose from a FCSC decision denying that appellant came within a statutory provision which allowed American claimants "in whose favor" court attachments had issued against Soviet property in the United States prior to the Litvinov assignments, to be compensated from a Soviet Claims Fund appropriated in 1955. The appellant bank, to meet federal jurisdictional requirements, had assigned its claim to a British citizen who collected upon the attachment of Soviet property prior to the Litvinov Assignment. After deducting attorney's fees and expenses, the assignee passed the balance to appellant.

Appellant contended that on the above facts, the writ of attachment had issued "in its favor" because of an oral trust with the assignee

165. *Id.* at 683-84.
166. *Id.*
167. 254 F.2d 464 (6th Cir 1958).
168. 8 U.S.C. 1503(a) (1970).
169. 257 F.2d 223 (D.C. Cir.), *cert. denied*, 358 U.S. 837 (1958).

and its position as beneficial owner of the claim originally pressed by the assignee. The FCSC denied this contention.

The court acknowledged that the FCSC decision "may have been an error of law, an unjustified elevation of form over substance."[170] However, the court declined to review the decision on grounds of the finality provision.

Appellant also stressed that because the statute expressly included beneficiaries of naked trusts, the commission unconstitutionally redefined its jurisdiction by denying appellant's claim. Appellant cited several Surpeme Court cases to that effect. The court responded inadequately:

> In none of those cases was there an express statutory provision that the actions of the administrative body should be unreviewable. There is no constitutional problem with regard to this point in the appellant's argument. Congress could have expressly disqualified beneficiaries of oral trusts from the benefits of the statute, hence, if its delegate with unreviewable power denies those benefits to such persons, it has not violated the Constitution.[171]

Finally, appellant asserted that his exclusion from the fund was a Fifth Amendment taking for which compensation was owing. The court referred to earlier litigation between the United States and claimants like the appellant, and concluded appellant's failure to intervene in that suit terminated his right to raise the Fifth Amendment argument.

In each of these cases, the no-review provision was invoked to bar a court decision on the merits. Legitimate rights were compromised by the courts' continual deference to what they view to be a congressional mandate. Courts should show less deference to this alleged "mandate" when procedural or substantive due process is at issue, or when other constitutional allegations are pressed. In addition, Congress might reword the finality provision to better define its scope, in order that justice is insured according to each individual case.

## Conclusion

The claims area involves two competing constitutional directives: the Fifth Amendment and the foreign relations power as it has been interpreted by the courts. Should the United States bear the burden of inadequate compensation, when its efforts fail to produce a satisfactory result?

As the court in *Aris Gloves* states, the central problem is where to draw the line.[172] It has been contended here that there should be an

170. *Id.* at 226.
171. *Id.*
172. 420 F.2d 1386 (Ct. Cl. 1970).

affirmative duty to espouse valid claims in a capacity analogous to that of an agent when no other recourse is possible and local remedies have been exhausted. It has also been contended that waiver without consent, because it, too, bars further recourse, should be seen as the breach of an affirmative duty to protect the interests of claimants. This note has sought to encourage the use of presettlement investigation to determine the size of the fund needed and the application of the "trust fund" theory to protect the corpus for the benefit of claimants. Permanent resident aliens who held that status at the time of the alleged taking should be accorded protection for their interests. Finally, greater procedural and substantive due process has been urged in relation to State Department procedures and review of FCSC decisions.

What are the practical implications of these positions?

When espousal is refused on foreign policy grounds, and the claimant can prove that espousal would have resulted in a compensation award, as well as the value of the property interest lost, then compensation in a reasonably estimateable amount should be paid. The burden on the claimant in this respect would be great. The best forum for such dispute settlement would seem to be the Court of Claims, because of its expertise in the claims area.

Likewise, when the United States knowingly waives or releases a claim, a duty to compensate should arise if the requisite degree of proof is established: (1) wrongful taking by the alien government, (2) property value, and (3) the likelihood of payment on the claim waived. When lump sum or below-value settlements are received, the burden falls on the United States to prove reasonable effort in representing the interests of each claimant affected, and usually limited, by these awards.

Granting protection to permanent resident aliens would seem to be more consistent with recent decisions affording them constitutional protections than is current State Department practice.

Easiest to effect would be changes in procedures within the State Department, pursuant to the suggestions already discussed. More active review of FCSC decisions, through court or congressional action, is also necessary to insure maximum justice for individual claimants.

Perhaps the most satisfactory solution, and that most often urged,[173] is to allow claimants to by-pass the espousal morass and have direct access to international tribunals dealing solely in claims settlements. In this way, individuals would assume their rightful and emerging status as full subjects of international law, and states would be free from the complexities of claims espousal, and the necessity of subjecting

173. *See, e.g.*, GORMLEY, *supra* note 19; ROVINE, *supra* note 25, at 463-65, its discussion of Senate proposals to expand the jurisdiction of the International Court of Justice to include private individuals.

these rights to the dictates of foreign policy. To this end, the work being done in codifying international law with respect to state responsibility to aliens[174] is a great step toward providing a legal framework for such international tribunals. If states can be brought to see the advantages of accepting the jurisdiction of such courts, what is now ivory-towerism can become reality. Ultimately, individuals may be able to claim protection as a matter of international right to receive just compensation for a "taking" on public policy grounds.

174. *See, e.g.*, GARCIA-AMADOR, SOHN & BAXTER, *supra* note 19, which is a compilation of major recent codifications.