Economic Sanctions, Domestic Deprivations, and the Just Compensation Clause: Enforcing the Fifth Amendment in the Foreign Affairs Context

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I. Introduction

When President Teddy Roosevelt summarized his brand of foreign policy with the phrase "speak softly and carry a big stick,"[1] the "big stick" he referred to was likely to be a gunboat or battleship. For U.S. policymakers in more recent times, however, it has been economic sanctions. Reluctance to use military force, combined with the development of a global economic system, have made economic sanctions a preferred policy tool of the United States in the conduct of its foreign relations.[2] Although the concept of economic sanctions conjures up the narrow image of punitive measures taken against another state, this Comment will give the term a broader meaning, encompassing a broad spectrum of state action that employs non-military means to pursue foreign policy objectives. Recent examples of economic sanctions thus defined have ranged from imposing embargoes on hostile states[3] to bartering for the release of American hostages.[4] This policy tool has become even more

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1. Speech by Theodore Roosevelt, Minnesota State Fair (Sept. 2, 1901), *quoted in* J. BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 847 (14th ed. 1968).

2. *See* G. HUFBAUER & J. SCHOTT, ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY (1985) (listing examples of recent U.S. sanctions against South Africa, Nicaragua, and Libya).

In analyzing economic sanctions, we are also concerned with the wide variety of related foreign affairs actions that have economic consequences. *See, e.g., infra* text accompanying notes 109-118 (discussing claims settlements).

3. *See, e.g., Documents Showing the Evolution of Sanctions Against Libya*, 25 I.L.M. 173 (1986).

4. *See, e.g.*, Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979), *reprinted in* 50 U.S.C. § 1701 (1982) (blocking removal and transfer of Iranian government property); Exec. Order No. 12,205, 45 Fed. Reg. 24,099 (1980), *reprinted in* 50 U.S.C. § 1701 (1982) (banning imports from Iran); Exec. Order Nos. 12,277-12,285, 46 Fed. Reg. 7,913-31 (1981), *reprinted in* 50 U.S.C. § 1701 (1982) (implementing the Declarations of the Government of the Democratic and Popular Republic of Algeria (Algiers Accords), Jan. 19, 1981, *reprinted in* 20 I.L.M. 224 (1984)).

critical in today's global economy in which it is increasingly difficult to consider any major event in any country in isolation. Greater interdependence has forced the United States to pursue a more active foreign policy. Since it is impossible for the United States to resort to military force at every foreign policy juncture, economic sanctions have become a critically important means by which the United States can influence world developments.

Unfortunately, economic sanctions undertaken under the banner of foreign policy often have serious domestic repercussions. For example, when the President announces a grain embargo against the Soviet Union, he injures American wheat farmers. When he signs an executive claims settlement, he surrenders legitimate claims that American citizens may have against a foreign state.

The increased use of economic sanctions and the resultant increase in injury to U.S. domestic interests have coincided with two phenomena. First, the federal courts have shown a greater willingness to entertain lawsuits that implicate foreign affairs.[5] Second, there has been increased enthusiasm on the part of private litigants for using courts to challenge foreign policies with which they disagree.[6] When planning economic sanctions, policymakers in the Executive Branch must therefore be prepared for constitutional challenges to be brought and heard.

This Comment argues that the use of sanctions must always be assessed in the context not only of the sanctions' objectives but also of their likely costs. After examining the case law and the policy arguments that surround the President's exercise of the foreign affairs power we assert that the Just Compensation Clause[7] should be applied by the federal courts to force the Executive to compensate persons within the United States who suffer losses because of economic sanctions, and propose a framework for court decision in this field. By outlining the types of sanctions for which compensation should be provided, this prescriptive analy-

5. *See infra* text accompanying notes 48-60 (discussing the political question doctrine).

6. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996 (1979) (challenge to U.S. abrogation of Mutual Defense Treaty with Republic of China); Pietsch v. United States, 788 F.2d 6 (2d Cir.) (challenge to U.S. policy in Nicaragua), *cert. denied*, 107 S. Ct. 101 (1986); Americans United For Separation of Church and State v. Reagan, 786 F.2d 194 (3d Cir. 1986) (challenge to U.S. decision to send an Ambassador to the Vatican), *cert. denied*, 107 S. Ct. 314 (1986); Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983) (*per curiam*) (suit by 29 members of Congress challenging U.S. presence in, and military assistance to, El Salvador), *cert. denied*, 467 U.S. 1251 (1984); Dickson v. Ford, 521 F.2d 234 (5th Cir. 1975) (challenge to U.S. military and economic assistance to Israel), *cert. denied*, 424 U.S. 954 (1976).

7. U.S. CONST. amend. V: "[P]rivate property [shall not] be taken for public use, without just compensation."

sis also serves as a guide for sanctions-planners seeking to obtain policy results at the lowest possible cost.

II. The Constitutional Framework of Economic Sanctions

The President's constitutional and statutory authority includes the power to impose virtually any type of economic sanction.[8] Thus, any challenge to an economic sanctions program on the grounds that the President is acting beyond his authority will fail. To succeed against economic sanctions in federal court, a litigant must rely on the Bill of Rights, demonstrating that some aspect of the program violates a right guaranteed by the Constitution. The following analysis considers how constitutional protections operate in the context of foreign affairs and concludes that the Just Compensation Clause of the Fifth Amendment is uniquely suited to the resolution of claims arising out of the imposition of economic sanctions.

A. *Presidential Authority*

The Constitution does not explicitly grant the President the power to impose economic sanctions. The President must infer such authority from his unenumerated foreign affairs power[9] and from his authority as Commander-in-Chief.[10] Even though the text of the Constitution arguably lodges the power to impose economic sanctions with Congress,[11] the Supreme Court has recently established that the President's imposition of economic sanctions, if accompanied by congressional acquiescence, is virtually immune from attack on separation of powers grounds. In *Dames & Moore v. Regan*,[12] private litigants challenged President Reagan's authority to enforce President Carter's economic sanctions program against Iran. They argued that Treasury Secretary Donald Regan could not constitutionally nullify federal court attachments against Iranian assets, transfer such assets out of the country, or suspend ongoing federal litigation against Iranian entities.[13] The Supreme Court, however, rejected these arguments.

Writing for the majority, Justice Rehnquist analyzed the plaintiffs' claims by invoking the three categories of presidential action first devel-

8. *See infra* text accompanying notes 21-26.
9. *See generally* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-21 (1936) (arguing that the President possesses unenumerated powers in foreign affairs).
10. U.S. CONST. art. II, § 2.
11. *See infra* text accompanying notes 21-26.
12. 453 U.S. 654 (1981).
13. *Id.* at 667.

oped by Justice Jackson in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.[14] In the first category, the President "acts pursuant to an express or implied authorization from Congress."[15] Under these circumstances, the executive action " 'would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.' "[16] In the second category, which Justice Jackson termed a " 'zone of twilight,' " "the President acts in the absence of Congressional authorization."[17] The third category, entitled to the least judicial deference, involves presidential action that is "in contravention of the will of Congress."[18] The *Dames & Moore* Court held that the nullification of attachments was clearly within Jackson's first category,[19] and that "Congress has implicitly approved" of the transfer of assets.[20]

Economic sanctions, as *Dames & Moore* makes plain, also fall into Jackson's first category. Congress has explicitly authorized the President to engage in a broad variety of economic sanctions. The International Emergency Economic Powers Act (IEEPA),[21] for example, which grants power to the President to impose economic sanctions during peacetime, authorizes the President to "investigate, regulate, direct and compel, nullify, void, prevent or prohibit . . . any right, power, or privilege with respect to . . . any property in which any foreign country or national thereof has an interest."[22] In order to wield this wide-ranging authority the President need only "declare a national emergency with respect to" any "extraordinary threat, which has its source in whole or in substantial part outside the United States,"[23] and "in every possible instance . . . consult with the Congress."[24] IEEPA's predecessor, the Trading with the Enemy Act (TWEA), whose application has been limited to

14. *Id.* at 668 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring)).

15. *Id.*

16. *Id.* (quoting *Youngstown*, 343 U.S. at 637).

17. *Id.*

18. *Id.* at 669.

19. *Id.* at 674.

20. *Id.* at 680 (citing the International Claims Settlement Act of 1949, as amended, 22 U.S.C. §§ 1621-45 (1982 & Supp. 1987)); *id.* at 681 (citing the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-06 (1982)). The President relied upon this authorization when he acted. *See, e.g.*, Exec. Order. No. 12,170, *supra* note 4 (blocking Iranian government property and citing IEEPA and the National Emergencies Act, 50 U.S.C. § 1601 (1982), as authority for that action).

21. IEEPA, *supra* note 20.

22. *Id.* § 1702(a)(1)(B).

23. *Id.* § 1701(a).

24. *Id.* § 1703.

wartime, granted the President even more expansive powers.[25] This broad grant of explicit authority[26] leads to the conclusion that when the President imposes economic sanctions, his authority is at its height. The issue is, therefore, not whether the President has the power to impose economic sanctions, but whether and to what degree the Constitution imposes accountability upon the President when he exercises such power.

B. *Due Process Constraints*

Property rights in the United States are usually protected against federal government interference through the Due Process Clause of the Fifth Amendment.[27] Since the Supreme Court's landmark decision in *Goldberg v. Kelly*,[28] the federal courts have extended due process protection to a wide variety of government-created entitlements in the domestic context.[29] As the right-privilege distinction has fallen into disfavor,[30] the courts have become more active in protecting private parties who rely on various forms of property and expect that property to be safe from arbitrary governmental action. Specifically, the courts have read strict procedural requirements into the Fourteenth Amendment when the government seeks to deny or revoke a legal interest that it has created.[31]

In theory, when the President imposes economic sanctions, he remains bound by the Bill of Rights.[32] Consequently, the standard due process

25. *See* Trading With the Enemy Act of 1917 (TWEA), 50 U.S.C. app. §§ 1-44 (1982) (allowing President to vest property in which a foreign country or its national has an interest); *id.* § 10(c) (allowing President to issue licenses to U.S. persons to infringe on foreign-owned patents). *Cf.* H.R. REP. No. 459, 95th Cong., 1st Sess. at 7 (1977) (TWEA had "become essentially an unlimited grant of authority for the President to exercise, at his discretion, broad powers in both the domestic and international arena without congressional review.").

26. The President's power to impose economic sanctions during peacetime is somewhat less broad than his authority to do so during wartime. When Congress enacted IEEPA in 1977, it simultaneously amended TWEA to apply only to time of war. IEEPA, Pub. L. No. 95-223, § 101(a), 91 Stat. 1625 (1977). Thus, during peacetime, the President must rely on IEEPA rather than on TWEA for his statutory authority to wage economic warfare. IEEPA grants narrower authority than does TWEA. For example, under IEEPA, the President can only freeze assets and cannot vest them as he could under TWEA. *Compare* IEEPA, *supra* note 20, § 1702 (a)(1)(B) ("President may . . . investigate, regulate, direct and compel, nullify, void, prevent or prohibit") *with* TWEA, *supra* note 25, § 5(b) ("any property or interest of any foreign country or national thereof shall vest" in an agency designated by the President).

27. The guarantees of the Fifth Amendment have been incorporated, through the Fourteenth Amendment, to protect against state government interference as well. Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897).

28. 397 U.S. 254 (1970).

29. *See* cases cited *infra* note 33.

30. *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

31. *See* cases cited *infra* note 33.

32. The President remains bound by the U.S. Constitution when he acts against U.S. citizens, even if his actions take place in the realm of foreign affairs:

guarantees should extend to all property affected by executive action. In practice, however, the "due process" revolution has failed to affect the foreign affairs power, in spite of its broadened applications to a variety of "liberty and property" interests.[33] Perhaps recognizing the need for swift and decisive presidential action in emergencies, courts have not burdened the Executive with even the fundamental "notice and hearing" requirements, even when its actions in conducting foreign policy affect an individual's property interest.[34] Even the Administrative Procedure Act, which governs the actions of the entire administrative bureaucracy of the United States, explicitly exempts "foreign affairs functions" from its notice and hearing requirements.[35]

When the President acts under delegated authority at the height of his foreign affairs powers, he is given broad freedom from due process constraints otherwise unthinkable in a domestic context.[36] Whether this abandonment of due process in foreign affairs is equitable is a matter for

> The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to live in another land.

Reid v. Covert, 354 U.S. 1, 5-6 (1956) (footnote omitted); *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587-89 (1952) (commander-in-chief power does not authorize President to seize steel mills during wartime labor dispute because such seizure is a usurpation of the Constitution's grant of law-making to Congress); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (President's foreign affairs power, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."); Home Bldg. & Loan Assoc. v. Blaidsell, 290 U.S. 398, 426 (1934) (even the war power does not remove constitutional limitations safeguarding essential liberties); United States v. Cohen Grocery Co., 255 U.S. 81, 88 (1921) ("the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments . . . ."); Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146, 156 (1919) ("The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations . . . .").

33. *See, e.g.*, Vitek v. Jones, 445 U.S. 480, 495-96 (1980) (government must provide hearing before involuntarily transferring convict to mental hospital); Memphis Light, Gas & Water Division v. Kraft, 436 U.S. 1, 11 (1978) (receipt of services from public utility not terminable " 'except for good and sufficient cause . . . .' " (quoting Farmer v. Nashville, 156 S.W. 189, 190 (1913))); Goss v. Lopez, 419 U.S. 565, 573-74 (1975) (right of public education may not be withdrawn because of misconduct "absent fundamentally fair procedures to determine whether the misconduct has occurred."); Goldberg v. Kelly, 397 U.S. 254, 260-61 (1970) (government must provide a hearing before terminating welfare benefits).

34. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 255-56 (1972) (hearing requirements).

35. Administrative Procedure Act of 1946, 5 U.S.C. § 553(a)(1) (1982) (military and foreign affairs exception to notice requirements in agency rule-making); *id.* § 554(a)(4) (military and foreign affairs exception to hearing requirements in agency rule-making).

36. *Cf.* Dames & Moore v. Regan, 453 U.S. 654, 668 (1981).

debate in another place.[37] It is, however, clearly lawful. The foreign affairs power provides special dispensation for the President to "take" anything he deems a particular situation may require. However, while it may not be desirable, or even feasible, for the constitutional process to provide prior restraints on such power, this does not preclude *ex post* constraints on executive action.

C. *Just Compensation Constraints*

The Just Compensation Clause of the Fifth Amendment is the constitutional provision under which relief should be sought in response to deprivations caused by economic sanctions. Courts should be particularly solicitous of these claims for three reasons. First, the Just Compensation Clause is particularly applicable to the economic powers of the President since the exercise of these powers usually results in the sacrifice of individual property interests for some greater national policy objective. The very purpose of the Just Compensation Clause is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[38] Justice Powell noted in his concurrence in *Dames & Moore* that "the government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by a relatively few persons."[39] The Just Compensation Clause thus lays the constitutional basis for the "spreading" of the costs of public policy among its beneficiaries.

37. Academic commentators have attacked this lack of due process. *See* Leigh & Atkeson, *Due Process in the Emerging Foreign Relations Law of the United States* (pts. 1 & 2), 21 BUS. LAW. 853 (1966), 22 BUS. LAW. 3 (1966) (arguing that individuals should have the right to a hearing in the foreign affairs context); Timberg, *Wanted: Administrative Safeguards for the Protection of the Individual in International Economic Regulation*, 17 ADMIN. L. REV. 159, 167 (1965) ("A general re-examination of State Department and cognate Executive Branch procedures in order to provide notice, hearing and the other attributes of administrative due process, wherever necessary and feasible, would do more than rehabilitate the law. It would allay the mistrust of many persons who have sought to put legislative and constitutional restraints on the power of the President and the State Department to carry on the foreign relations of the United States.").

38. Armstrong v. United States, 364 U.S. 40, 49 (1960); *see also* United States v. Caltex (Phillipines), Inc., 344 U.S. 149, 156 (1952) (Douglas, J., dissenting) ("It seems to me that the guiding principle should be this: Whenever the government determines that one person's property—whatever it may be—is essential to the war effort and appropriates it for the common good, the public purse, rather than the individual, should bear the loss."); Gray v. United States, 21 Ct. Cl. 340, 393 (1886) ("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.").

39. 453 U.S. at 690, 691 (Powell, J., concurring).

Second, enforcement of the Just Compensation Clause would simply require the President to pay for property taken by an economic sanctions program and would not involve activist judicial management of foreign policy, a role the courts have properly avoided. The imposition of a compensation requirement on the Executive would not prevent the President from taking necessary action when the situation demanded it, for just compensation claims would be administered *ex post*. Also, the possibility of economic harm to private citizens as a result of sanctions would not bar their timely implementation, since the Executive could be confident that no court would enjoin its actions.

Third, as a matter of policy, enforcing the Just Compensation Clause against the Executive might well lead to a more effective use of economic sanctions. The Just Compensation Clause, by imposing *ex post* accountability, would force the President to take all the costs of an economic sanctions program into account before acting. The inability of sanctions planners to assess the true costs of sanctions programs has resulted in the indiscriminate, and often ineffective, use of many economic sanctions.[40] Sanctions, and the harm they cause, should not be seen as ends in themselves. Rather, sanctions are the means by which the Executive achieves certain analytically independent goals, such as change in the behavior of a target state. As such, both the costs and the benefits of the contemplated action should be assessed before implementation.

Failure to understand the distinction between the after-the-fact nature of just compensation and the prior restraints required by due process has confused the few courts that have considered claims for just compensation arising out of foreign affairs. *United States v. Caltex (Phillipines), Inc.*[41] provides an example of a court's mistaken concern about inhibiting the decision-making process and its consequent reluctance to order compensation. In *Caltex*, the plaintiff sought just compensation for the U.S. Army's destruction of its oil refinery in the Phillipines in 1941. Reversing the Court of Appeal's decision, the Supreme Court held that the destruction of the plaintiff's refinery to prevent its capture by enemy troops was not compensable. The majority opinion referred to an incident where the mayor of London refused to order the destruction of several houses as a firebreak for fear of incurring liability for trespass.[42] As a result of the mayor's inaction, the fire spread destruction to the rest of the city. The *Caltex* Court, however, could just as easily have cited to

40. *See generally* G. HUFBAUER & J. SCHOTT, *supra* note 2.

41. 344 U.S. 149 (1952).

42. *Id.* at 155 n.7 (citing Respublica v. Sparhawk, 1 U.S. (1 Dall.) 357, 363 (1788)).

Mayor of New York v. Lord.[43] In that case, the mayor of New York, who created a firebreak and saved his city in an identical situation, was nevertheless held liable for "taking" the property of the house owners. The *ex post* judgment against New York did not inhibit the mayor's response to the emergency, and it successfully allowed the cost of the mayor's action to be spread among those it benefitted. If courts adopt the essential argument of this Comment—that *ex post* monetary compensation does not inhibit rapid decision-making in foreign affairs—then there should be no bar to the constitutional mandate that takings for a public purpose be compensated.

We argue that protection of the individual's interests in the foreign affairs context should lie in the Just Compensation Clause, not in the Due Process Clause. Requirements like "notice and hearing" throttle the government's ability to act speedily and decisively during an international crisis. Yet, courts should not hesitate—as the *Caltex* court did—to order compensation out of concern for inhibiting the President's power to act. While it is true that compensation forces the Executive to consider the costs to the Treasury of the action it is contemplating, monetary considerations will not prevent quick action in truly critical situations.

III. Prudential Barriers in the U.S. Federal Courts

Courts cannot entertain just compensation claims arising out of economic sanctions programs unless they first determine such claims to be justiciable. Assuming that litigants possess standing, the most important bar to adjudication is prudential abstention. In the past, several abstention doctrines have blocked just compensation claims. They include the political question doctrine and the act of state doctrine. A careful reading of the case law, coupled with our analysis of the Just Compensation Clause, suggests that courts should not abstain from adjudicating just compensation claims in foreign affairs.

A. *Political Question Doctrine*

In an earlier era, the Supreme Court cases occasionally stated that lawsuits involving foreign affairs issues were nonjusticiable.[44] Recently,

43. 18 Wend. 126 (Ct. Corr. Err. N.Y. 1837).

44. *See, e.g.*, Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103 (1948):

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities, nor responsibility and which has

however, the Supreme Court appears to have grown reluctant to apply the political question doctrine in the foreign affairs context.[45] Indeed, *Baker v. Carr*, the modern restatement of the political question doctrine,[46] declared that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[47] Lower federal courts have avoided this "error," at least in some cases, by deciding suits that implicate foreign affairs on their merits.[48] For example, the D.C. Circuit, sitting *en banc*, recently rejected political question challenges and granted an injunction to prevent American soldiers from seizing a ranch in Honduras which belonged to an American citizen.[49] While the injunction was a clear aberration which was quickly vacated by the Supreme Court,[50] even the dissent in the Circuit Court agreed that the plaintiff could seek compensation in Claims Court.[51]

Furthermore, the Supreme Court's recent analysis in *Japanese Whaling Ass'n v. American Cetacean Soc'y*[52] suggests that the political ques-

> [sic] long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Id. at 111; *see also* Johnson v. Eisentrager, 339 U.S. 763, 789 (1950) ("Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region."); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) ("In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.").

45. *See* Japanese Whaling Ass'n v. American Cetacean Soc'y, 106 S. Ct. 2860, 2866 (1986) (no political question bar to adjudication of validity of Executive actions under a statute implementing an international agreement). *But see* Goldwater v. Carter, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring, joined by Burger, C.J., Stewart and Stevens, JJ.) (challenge to the President's ability to terminate a treaty without the advice or consent of the Senate or the House of Representatives presents a political question "because it involves the authority of the President in the conduct of our . . . foreign relations and the extent to which the Senate or Congress is authorized to negate the action of the President.").

46. 369 U.S. 186, 217 (1962) (six-factor test for determining if a case presents a political question).

47. *Id.* at 211; *see also* Henkin, *Is There A "Political Question" Doctrine?*, 85 YALE L.J. 597, 604 (1976) ("The Supreme Court has not recently held any issue to be textually committed by the Constitution to the other branches and therefore not justiciable—a 'political question.' "); Tigar, *Judicial Power, the "Political Question Doctrine," and Foreign Relations*, 17 UCLA L. REV. 1135, 1135 (1970) ("The words 'political question doctrine' are set off by inverted commas to denote my view that there is, properly speaking, no such thing.").

48. *See, e.g.*, Langenegger v. United States, 756 F.2d 1565, 1568 (Fed. Cir. 1985) (no political question bar to adjudication of claim that action of U.S. government in helping to plan, implement, and finance program of land reform in El Salvador resulted in the taking of property for which just compensation was due), *cert. denied*, 474 U.S. 824 (1985).

49. Ramirez v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984) (no political question bar to adjudication of claim that U.S. marines in Honduras may not run military exercises on plaintiff's private pastures when the land has not been expropriated), *judgment vacated on other grounds*, 471 U.S. 1113 (1985).

50. Weinberger v. Ramirez, 471 U.S. 1113 (1985).

51. *Ramirez*, 745 F.2d at 1554 (Scalia, J., dissenting).

52. 106 S. Ct. 2860 (1986).

tion doctrine will not bar a suit asking for just compensation for a taking arising out of an economic sanctions program. The policy behind political question abstention, the *Whaling Ass'n* Court stated, is to "exclude from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the executive branch."[53] In such circumstances, "the judiciary is particularly ill-suited to make such decisions."[54] Where, however, the litigation involved only interpreting legislation, "a recurring and accepted task [of] the federal courts," the Court found no political question bar.[55]

A claim for compensation under the Fifth Amendment has been called "a paradigmatic issue for resolution by the judiciary,"[56] and hearing such claims is certainly a "recurring and accepted task" of the courts.[57] Moreover, the judiciary regularly considers issues that affect foreign nations, such as foreign sovereign immunity in suits against foreign states[58] and the extraterritorial reach of American jurisdiction.[59] A suit for just compensation has an attenuated effect on foreign nations and is largely a

53. *Id.* at 2866.

54. *Id.*

55. *Id.*

56. *Ramirez*, 745 F.2d at 1512.

57. "[F]ederal courts historically have resolved disputes over land." *Id.* (citing Meigs v. McClung's Lessee, 13 U.S. (9 Cranch) 11 (1915)); *see also* Almota Farmers Elevator & Warehouse v. United States, 409 U.S. 470 (1973) (deciding whether property was taken when condemnation of property did not compensate for the expectation that lease would be renewed); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) (property was not taken when grant of landmark status prevented owners from erecting an office building over Grand Central Terminal).

58. As the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 (1982), states:

> The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants. . . . Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

See also Victory Transp. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964) (Spanish General Consul, by agreeing to arbitrate in New York, deemed to have consented to jurisdiction of court in action to compel arbitration), *cert. denied*, 381 U.S. 934 (1965); Republic of Mexico v. Hoffman, 324 U.S. 30 (1945) (merchant vessel owned but not possessed by friendly foreign government not immune from suit *in rem* in admiralty). *But see* Berizzi Bros. Co. v. Steamship Pesaro, 271 U.S. 562 (1926) (admiralty jurisdiction of District Courts does not extend to a libel *in rem* against a ship owned by the Italian government).

59. *See, e.g.*, Laker Airways Ltd. v. Sabena, 731 F.2d 909, 923-24 (D.C. Cir. 1984) (concluding that the United States has prescriptive jurisdiction over alleged anticompetitive acts of foreign airlines directed against another foreign airline, even though "most of the conspiratorial acts took place in other countries," because "the economic consequences of the alleged actions gravely impair significant American interests."); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) (U.S. antitrust law extends to agreements to restrain trade entered into abroad, if these agreements would have been illegal if made in the United States, and if the agreements were intended to affect imports into the United States).

domestic matter between an American citizen and his government. Although such a "controversy may, in a sense, be termed 'political,' "[60] there should be no compelling reason for a federal court to abstain.

B. *Act of State Doctrine*

The act of state doctrine, arising out of principles of comity, has also been raised as a prudential barrier.[61] In *Ramirez v. Weinberger*,[62] the dissent argued that the subsequent recognition of the ranch seizure by the Honduran government was an act of state which the U.S. courts were prevented from questioning.[63] But the act of state doctrine, a creature of the judiciary, is designed to foster comity with other nations, not to shield American government actions that exact benefit from the sacrifice of private American interests. When the United States participates in or authorizes the seizure of American property in conjunction with a foreign state, the doctrine should not be used to avoid holding the Executive accountable in the courts for its actions. Although the invocation of the act of state doctrine in a just compensation claim might be legally permissible, the compelling reasons that justify the doctrine's existence would not apply in the context of an American's claim against his or her government.

In sum, courts invoke abstention doctrines when they believe either that they are not suited to resolve the merits of a primarily "political" claim or that adjudication of the claim would interfere with America's foreign relations. Just compensation claims, on the other hand, are perfectly suited to judicial resolution and do not implicate America's relations with other states. Consequently, this Comment's recommendations neither conflict with the reasons that courts have given for abstaining nor seek to change the current rationale behind prudential barriers.

60. INS v. Chadha, 462 U.S. 919, 942-44 (1983). Admittedly, individuals who have had their property harmed by an exercise of the foreign affairs power have traditionally looked to Congress for relief. But the existence of alternate fora does not suggest that the courts should automatically dismiss a legitimate constitutional claim from being heard. The six-part test of Baker v. Carr, 369 U.S. 186, 217 (1962), for example, does not include the existence of alternate fora as a factor counseling abstention.

61. *See, e.g.*, Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) ("The act of state doctrine . . . expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals . . . .").

62. 745 F.2d 1500 (D.C. Cir. 1984).

63. *Id.* at 1571-74 (Scalia, J., dissenting).

IV. Modern Interpretation of the Just Compensation Clause

The Just Compensation Clause of the Fifth Amendment is deceptively simple. It guarantees that "private property [shall not] be taken for public use, without just compensation."[64] But "the Taking Clause of the Fifth Amendment has not always been read literally,"[65] and the courts have struggled to give content to the terms "property," "taking," "just compensation," and "public use."

Because modern Just Compensation Clause analysis has narrowed the measure of compensation,[66] abandoned the "public use" requirement,[67] and generally been willing to accept an expansive definition of "property,"[68] the central focus of debate has shifted to narrowing the definition of a "taking." This has proved one of the most difficult tasks of judges

64. U.S. CONST. amend. V.

65. Penn Central Transp. Co. v. New York City, 438 U.S. 123, 142 (1978) (Rehnquist, J., dissenting).

66. This narrowing of compensation has taken place despite the lofty rhetoric of just compensation analysis. *See, e.g.*, Olson v. United States, 292 U.S. 246, 255 (1934) (Just Compensation Clause was meant to restore the owner of taken property "in as good a position pecuniarily as if his property had not been taken"; nevertheless, the measure of compensation is only market value at time of taking, and not necessarily highest value to user). For an extreme view of this trend, see R. EPSTEIN, TAKINGS 182-215 (1985).

67. The "public use" limitation is intended to prevent certain takings of property by limiting the ends for which the government may use its power of condemnation. But in the modern regulatory state, where government is involved in nearly every facet of society, the public use limitation has lost almost all of its vigor as it applies to government power. *See, e.g.*, Courtesy Sandwich Shop v. Port of New York Auth., 12 N.Y.2d 379, 190 N.E.2d 402 (1963) (government condemnation of land for construction by government agency of office building held taking for a public purpose), *appeal dismissed*, 375 U.S. 78 (1963). *See generally* Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949). For a critique of this trend, see R. EPSTEIN, *supra* note 66, at 161-81. The most spectacular recent example of the decline of the public use limitation was the Supreme Court's 1984 decision in Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984). The Court in that case permitted the state of Hawaii to enact large-scale land reform by the forced sale of land, at predetermined prices, to tenants and other landless families. *Id.* at 245. The "public use" to be achieved by the Hawaiian land reforms was to cure the perceived ills of oligopolistic land ownership.

68. As the Supreme Court observed in United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945),

> It is conceivable that the [word property] was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the whole group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter. . . . In other words, it deals with what lawyers term the individual's "interest" in the thing in question. That interest may comprise the group of rights for which the shorthand term is "a fee simple" or it may be the interest known as an "estate or tenancy for years". . . . The constitutional provision is addressed to every sort of interest the citizen may possess.

See also Penn Central, 438 U.S. at 108 (airspace over Grand Central Terminal as property).

and legal theorists, and an accurate test remains elusive.[69] The Supreme Court itself has candidly acknowledged its inability "to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government."[70] Instead, the Court has stated that the answer to the question of "whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.' "[71]

Applying the Just Compensation Clause is also difficult because almost any governmental action that affects private rights "takes" an interest that might be regarded as property. The modern regulatory state has permanently altered the antiquated terms by which our society used to define individual rights against the state and other citizens. From taxes or the military draft to the most complex regulatory measures, the legal system infringes upon an individual's right to absolute dominion over her body or labor. Whether such freedom is a natural right or is granted by some original social contract, the ongoing operation of government constantly affects and modifies those rights that we might wish to call "property."

"Takings" analysis is marked by a distinction between physical destruction and regulatory destruction. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government,"[72] in other words, whenever the government " 'regularly use[s], or permanently occup[ies], space or a thing which theretofore was understood to be under private ownership.' "[73] Physical invasion is a relatively easy concept for courts to understand and apply. Where there is actual deprivation of physical property, courts cannot style the intrusion as simply "regulation." There is no reason why this definition of a taking cannot be applied when foreign affairs are implicated.

A more problematic case arises, however, when there is no physical appropriation, yet the property interest has clearly been damaged or de-

69. For scholarly discussion of the takings problem, see generally B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977) (arguing that a court can judge a taking by viewing the case from the vantage point of the ordinary observer); R. EPSTEIN, *supra* note 66 (arguing that the same high standards of protection should be given to private property as to other constitutional rights); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

70. *Penn Central*, 438 U.S. at 124.

71. *Id.* (quoting United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958)).

72. *Id.*

73. Michelman, *supra* note 69, at 1184.

stroyed by governmental action. The mere devaluation of property has been held not to constitute a taking for purposes of the Fifth Amendment.[74] Recognizing that laws and state action may have the incidental effect of limiting the use or potential value of private property, courts have held that a regulation does not "take" property unless it "goes too far."[75] Whether for reasons of equity or efficiency, compensation will be ordered only if a law's deprivatory effects result in the deliberate and complete destruction of "distinct investment-backed expectations."[76]

The difficulty with judging the legitimacy of expectations is that this standard is too malleable. Any claim based on an interest or right created by law would be vulnerable to the argument that such interest or right was in fact held subject to whatever conditions the state wished to impose. For example, if the government were to pass a statute that proclaimed all real property in the United States to be held subject to a revocable license, then any future appropriation of that property would not be a taking because there could be no reasonable expectation of freedom from governmental interference.[77]

The availability of alternative protections has been an important element in cases considering takings claims. For example, despite *dicta* to the contrary,[78] it is now clear that the Just Compensation Clause does not extend to creditors in domestic bankruptcy proceedings.[79] Such creditors are not, however, completely unprotected. Although they may

74. *See Penn Central*, 438 U.S. at 131 ("Appellants concede that the decisions sustaining other land-use regulations, which, like the New York City law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.' ").

75. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

76. *Penn Central*, 438 U.S. at 124.

77. This argument is often raised in the Fourth Amendment context, where courts try to assess whether the search in question violated a "reasonable expectation of privacy." However, if the government were to advertise that all homes were subject to search, no one would be able to maintain a reasonable expectation of privacy. Such difficulties have not prevented the courts from applying the expectations test. *See* Katz v. United States, 389 U.S. 347, 362 (1967); Smith v. Maryland, 442 U.S. 735, 740 (1979).

78. *See, e.g.*, Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589 (1935) ("The bankruptcy power, like the other substantive powers of Congress, is subject to the Fifth Amendment.") (footnote omitted). This oft-quoted phrase of Justice Brandeis laid the foundation for the argument that any impairment of creditors' rights in a bankruptcy reorganization constitutes a "taking" compensable by the Fifth Amendment.

79. For a thorough discussion of the Fifth Amendment and the Bankruptcy Clause, see Rogers, *The Impairment of Secured Creditors' Rights in Reorganization: A Study of the Relationship Between the Fifth Amendment and the Bankruptcy Clause*, 96 HARV. L. REV. 973 (1983). Rogers demonstrates that the various restraints on creditors' rights in a debtor's property are not invalidated by the Fifth Amendment, and that "takings" do not occur in bankruptcy even when the law completely wipes out the value of any property interest held by the

not receive Fifth Amendment compensation for their destroyed expectations, all bankruptcy proceedings are carefully monitored through a number of unique procedural due process safeguards.[80] Thus, the lack of just compensation in the bankruptcy context is balanced by significant protections in the legal process against arbitrary governmental action.

V. Application of the Just Compensation Clause to Economic Sanctions Programs

A more sophisticated understanding of the Just Compensation Clause should lead the judiciary to create different standards for awarding compensation in the foreign affairs context from those that it applies in domestic "takings" cases. The application of these different standards should emphasize two goals: protecting private property interests and holding the Executive accountable for infringing upon those interests.

A. *Physical Invasion*

Deprivations of real property fall most clearly within the purview of the Just Compensation Clause because they usually involve the tell-tale marks of a "taking"—physical trespass or transfer of title. Such deprivations are no less injurious when the property taken is located outside the United States. The case law clearly states that, where just compensation claims for the taking of property located abroad come before a U.S. court, the location of the property should not be a factor in the court's analysis.[81] For example, the Claims Court, in *Seery v. United States*, found that a "taking" occurred when the government seized a claimant's house in Austria for use as an officer's club.[82]

creditor. He suggests instead that the bankruptcy power is limited by its own context, and not by the Fifth Amendment. *Id.* at 1031.

The very nature of the bankruptcy power serves to disrupt even the most settled expectations of secured and unsecured creditors. When a creditor is unable to foreclose on a piece of land during bankruptcy proceedings and suffers a loss, there is no compensation. Whatever the merits of the result, the bankruptcy clause of the Constitution has been read to allow the "taking" of property when such action is necessary to give the debtor a "fresh start." *See generally* Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393 (1985).

80. *See, e.g.*, 11 U.S.C. §§ 361-63 (1982) (discussing "adequate protection" for the creditor).

81. *See* Langenegger v. United States, 756 F.2d 1565 (Fed. Cir. 1985) (allowing adjudication of takings claim where property was located in El Salvador); Ramirez v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984) (holding that takings claim could be adjudicated where property was located in Honduras), *judgment vacated on other grounds*, 471 U.S. 1113 (1985); Porter v. United States, 496 F.2d 583, 591 (Ct. Cl. 1974) (adjudicating plaintiffs' takings claim regarding property located in United States Pacific Trust Territories), *cert. denied*, 420 U.S. 1004 (1975); Seery v. United States, 127 F. Supp. 601 (Ct. Cl. 1955) (allowing adjudication of takings claim where property located in Austria).

82. Seery v. United States, 127 F. Supp. 601 (Ct. Cl. 1955).

The outcome in *Seery* is consistent with the dramatic loosening of territorial constraints on U.S. prescriptive and adjudicative jurisdiction during the last forty years.[83] The protection afforded by the Bill of Rights does not end at the water's edge, but extends to any U.S. government act affecting U.S. citizens anywhere in the world.[84] Property located abroad may be subject to the risks of foreign legal process, but it should not also be subject to the unjustified abstention of U.S. courts. Where the U.S. government and not a foreign state injures American property interests, the doctrine of territoriality, based on notions of comity and the desire to avoid jurisdictional conflicts with other states, does not apply. Under these circumstances, U.S. courts should not be constrained by territoriality from protecting American property interests. Interestingly, the United States vehemently advocates "prompt, adequate, and effective compensation"[85] for foreign government expropriations of American property. There is no reason why compensation should not also be prompt, adequate, and effective when the United States takes the property of its own citizens as a result of its foreign policy decisions.

The analysis above tracks the case law in an attempt to prove that territoriality should not be an issue in just compensation suits. To the extent, however, that prior decisions diverge from this conclusion, we urge that they be rejected and that the principle of just compensation for takings abroad be adopted. For example, some courts have denied claims for takings abroad when the United States is not a direct beneficiary of such takings. Thus, the taking of an American ship by the post-World War II government of Japan—a government that had been functioning under the *de facto* control of the American military—was held not to be compensable because the United States allegedly did not benefit from the Japanese government's use of the ship.[86] Contrary to the court's decision, however, where the United States has either signed a treaty that "takes" title or allows a foreign state to assume title as part of the agreement, or has itself acquired use of the contested property, it should be held liable in the Claims Court for its actions.[87] Even though

83. The United States has, for example, been aggressive in breaking down the territorial constraints on the application of U.S. law. *See, e.g.*, United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). As one scholar put it, "[i]n the past twenty-five years the United States has had three major exports: rock music, blue jeans, and United States law." Grundman, *The New Imperialism: The Extraterritorial Application of United States Law*, 14 INT'L LAW. 257, 257 (1980).

84. Reid v. Covert, 354 U.S. 1, 5-6 (1957).

85. *See* 1978 DIG. U.S. PRAC. INT'L L. 1226 (1980).

86. Anglo Chinese Shipping Co. v. United States, 127 F. Supp. 553, 557 (Ct. Cl. 1955), *cert. denied*, 349 U.S. 938 (1955).

87. We note that, despite the foreign affairs context of the taking, the "treaty exception," 28 U.S.C. § 1502 (1982), to the Claims Court's jurisdictional statute, 28 U.S.C. § 1491 (1982),

there may be no "direct" benefit, the U.S. government should bear the costs of actions taken to further its foreign policy goals.

At the same time, the above analysis may not require compensation when the U.S. government takes physical possession of property interests of foreign states. One common exercise of the foreign affairs power is the freezing of assets in which foreign states have an interest.[88] Courts have denied takings claims for frozen assets,[89] treating the temporary deprivation of the use of property during an assets freeze as a form of regulation.

should not apply. 28 U.S.C. § 1502 (1982) states that "the United States Claims Court shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations." The leading Supreme Court case to interpret the treaty exception, United States v. Weld, 127 U.S. 51 (1888), declared that the predecessor of 28 U.S.C. § 1502 contemplated a "*direct* and *proximate* connection between the treaty and the claim, in order to bring such claim within the class excluded from" jurisdiction. *Id.* at 57 (emphasis in original); *cf.* Dames & Moore v. Regan, 453 U.S. 654, 689 (1981) (claim for just compensation arising out of nullification and transfer of judicial attachments, pursuant to Executive Agreement, would not be barred from Claims Court by "treaty exception."). *But see* Trimble, *Foreign Policy Frustrated*—Dames & Moore, *Claims Court Jurisdiction and a New Raid on the Treasury*, 84 COL. L. REV. 317 (1984) (arguing vigorously, and at length, that Supreme Court erred in *Dames & Moore* when it stated that treaty exception did not bar claims for compensation arising out of the nullification and transfer of the Iranian attachments). Lower courts have followed the analysis in *Weld* when construing 28 U.S.C. § 1502. *See, e.g.*, Hughes Aircraft Co. v. United States, 534 F.2d 889, 905 (Ct. Cl. 1976) ("As in *Societe Anonyme*, the instant case, too 'would never have arisen were it not for the existence of' [the treaty] . . . " (quoting Societe Anonyme des Ateliers Brillie Freres v. United States, 160 Ct. Cl. 192, 197-98 (1963))); S.N.T. Fratelli Gondrand v. United States, 166 Ct. Cl. 473, 478 (1964) (treaty exception does not bar claim where the claim "is founded, rather, on the Constitution" and not on the treaty in question).

88. *See, e.g.*, Exec. Order No. 12,170, *supra* note 4 (freezing Iranian assets); 31 C.F.R. § 515.201 (freezing Cuban assets). Of course, assets freezes raise a host of policy problems, even if such freezes do not rise to the level of constitutional takings. Any seizure of foreign-owned property invites reciprocal action on the part of the target state, and puts comparable American property at risk around the globe. If U.S. foreign policy is predicated on norms of free trade and the protection of international economic interests from national control, the Executive will always be cautious about freezing property in which a foreign state has an interest. The self-enforcement of this norm might better serve to protect American property interests from a freeze than would the imposition of an *ex post* compensation requirement by the courts.

Assets freezes also raise problems when the government attempts to extend them extraterritorially, as in recent actions against the foreign-held assets of Iran. The executive order freezing Iranian assets extended to "all property . . . of the Government of Iran, its instrumentalities and controlled entities . . . which are or become subject to the jurisdiction of the United States or which are in or come within the possession or control of persons subject to the jurisdiction of the United States." Exec. Order No. 12,170, *supra* note 4. By its terms, the executive order thus applied to such assets as dollar-denominated Iranian deposits in the foreign branches of U.S. banks. While such freezes may be possible, they often generate jurisdictional conflicts between the United States and the country where the assets are located. *Cf.* DeSouza, *The Soviet Gas Pipeline Incident: Extension of Collective Security Responsibilities to Peacetime Commercial Trade*, 10 YALE J. INT'L L. 92 (1984) (discussing the reaction of U.S. allies in Western Europe to the extraterritorial reach of the Soviet gas pipeline sanctions).

89. *See* Sardino v. Federal Reserve Bank, 361 F.2d 106 (2d Cir. 1966) (freezing assets is not a taking within the meaning of the Fifth Amendment), *cert. denied*, 385 U.S. 898 (1966); Tole S.A. v. Miller, 530 F. Supp. 999 (S.D.N.Y. 1981) (same).

This result may be thrown into doubt by a new development in just compensation law in which the Supreme Court held that temporary takings may be compensable.[90] Despite that ruling, courts should continue to deny compensation for frozen assets where a foreign state seeks to invoke the Fifth Amendment. The very purpose of an assets freeze would be undermined by a judicial grant of compensation, which would render an important economic weapon useless.

B. *Taking of Expectations*

U.S. courts should also take a more active role in protecting investment-backed expectations in foreign affairs. Such expectations are otherwise left completely vulnerable to the discretion of the Executive Branch. Investment interests of U.S. citizens in foreign countries enjoy few protections other than the Just Compensation Clause, and thus a more lenient standard of compensable expectations should be applied in the foreign affairs context.

Of course, one could argue that there are no legitimate expectations protected by the Just Compensation Clause since individual interests abroad or those connected to foreign states or nationals exist only through the sufferance of the U.S. government.[91] Such an argument, however, fails to recognize that in the foreign affairs context there are fewer alternative protections from arbitrary government takings than in the domestic context.

A better analysis of takings claims would accord more, not less, protection to property expectations in the foreign affairs context, where few procedural constraints limit the government's discretion.[92] While a successful foreign policy is important, the need to allow the President to act in ways that harm domestic parties should not leave those parties without any constitutional redress.

1. *New Property*

In recent decades there has been a profusion of government-created property interests. In 1964, Charles A. Reich declared that among "the most important developments in the United States during the past

90. First English Evangelical Lutheran Church v. City of Los Angeles, 107 S. Ct. 2378 (1987) (Fifth Amendment may require compensation for temporary takings due to regulation).

91. *See, e.g.*, Shanghai Power Co. v. United States, 4 Cl. Ct. 237, 245 (1983) ("The rights of nationals trading or traveling abroad are bound up in another, perhaps more fundamental, aspect of a nation's foreign relations. It is the existence of cordial relations between nations that makes trade possible."), *aff'd*, 765 F.2d 159 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 909 (1985).

92. *See supra* text accompanying notes 32-35.

decade has been the emergence of the government as a major source of wealth. Government is a gigantic siphon. It draws in revenue and power, and pours forth wealth: money, benefits, services, contracts, franchises, and licenses."[93] Reich labelled this government-created wealth "the New Property." Broadly defined, the New Property consists of "government largess—allocated by government on its own terms, and held by recipients subject to conditions which express 'the public interest.' "[94]

Since foreign commerce is so heavily regulated by the federal government, its existence often depends wholly or partially upon a web of licenses, permits, and rights. Many of the interests that a government takes when it cuts off commerce with a target state fit squarely within Reich's conception of New Property. For example, licenses are commonly required to export goods from the United States.[95] As Reich observed in the context of occupational licenses, "such licenses, which are dispensed by government, make it possible for their holders to receive what is ordinarily their chief source of income."[96] When the government bans all exports to a particular country, it simply revokes all the relevant export licenses. The government thus deliberately destroys the property expectations created by the issuance of those licenses.

Courts have generally denied Fifth Amendment protection to New Property in the international context. Thus, the government was not held liable when it denied port rights[97] or placed restrictions on a preexisting fishing permit.[98] The theory behind these decisions seems to be that, where the government creates wealth, it retains the right to take such wealth away as it sees fit. Government takings of New Property, however, often devastate businesses and bankrupt private parties who depend upon particular licenses for their livelihood. As noted earlier, lack of Fifth Amendment protection for such takings in the domestic context is often balanced by other protections.[99] A claimant with international interests, however, is not so fortunate. Under current case law, a claimant must not only bear the heavy burden of proving that her expectations are legitimate, but also realize that no federal court would attempt to enjoin the conduct of foreign policy in order to protect her business deal.

93. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964).

94. *Id.*

95. *See* Export Administration Act of 1979, 50 U.S.C. app. § 2403 (1982) (discussing the types of licenses needed to export from the United States).

96. Reich, *supra* note 93, at 734.

97. Canadian Transp. Co. v. United States, 430 F. Supp. 1168 (D.D.C. 1977), *aff'd in part, rev'd in part*, 663 F.2d 1081 (D.C. Cir. 1980).

98. Organized Fishermen of Florida v. Watt, 590 F. Supp. 805 (S.D.Fla. 1984), *aff'd sub nom.* Organized Fisherman of Florida v. Hodel, 775 F.2d 1544 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 2890 (1986).

99. *See supra* text accompanying notes 79-80.

An example of New Property that should be compensable is export licenses.[100] Export licenses are routinely taken when the President bans all exports to a target state. Such a ban can inflict a variety of injuries on exporters. When an exporter has a contract to ship goods to the target state, he suffers the loss of current and future business. The inability to trade also deprives him of his previously held market share.

Where licenses are taken for foreign policy reasons, exporters should be able to recover the value of contracts that are in the process of being performed at the time the export licenses are revoked, i.e., the value of the unpaid or unperformed balance. Failure to protect at least this interest could create major disincentives to the signing of trade contracts. Further, the argument for compensating outstanding balances is supported by the reliance theory of economic harm. When the government creates wealth by licensing the use of public resources,[101] it encourages U.S. manufacturers and shippers to invest and contract in reliance upon those allocated rights. The government should not subsequently be allowed to revoke such rights without paying just compensation.

In contrast, the loss of potential profit or maximal value is generally not compensable under the Fifth Amendment, no matter how certain an individual may be that her lease would have been renewed or her contract signed.[102] While the long-term economic effect on license holders may be enormous, the Just Compensation Clause cannot provide relief to potential property interests not yet established.

Licenses that allow for pre-judgement attachment against a foreign state also merit compensation. *Dames & Moore*[103] involved such licenses. In that case, the Treasury Department issued revocable licenses to individual claimants, encouraging them to pursue attachments in

100. *See* Export Administration Act of 1979, 50 U.S.C. app. § 2403 (1982).

101. *See* Reich, *supra* note 93, at 736 (arguing that "[u]se of public resources," including "routes of travel and commerce such as the airways," are a form of New Property).

102. *See* Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 482 (1973) (Rehnquist, J., dissenting, joined by Burger, C.J., White and Blackmun, J.J.) ("The holding in *Petty* was consistent with a long line of cases to the effect that the Fifth Amendment does not require, on a taking of a property interest, compensation for mere expectancies of profit."); United States v. Petty Motor Co., 327 U.S. 372 (1946) (tenant whose lease contained "termination on condemnation" clause had no right to compensation in a condemnation proceeding); United States *ex rel* TVA v. Powelson, 319 U.S. 266, 281-82 (1943) ("In absence of a statutory mandate . . . the sovereign must pay only for what it takes, not for opportunities which the owner may lose."); *cf.* United States v. Pink, 315 U.S. 203, 239 (1942) (Frankfurter, J., concurring) ("For we are not dealing here with physical property—whether chattels or realty. We are dealing with intangible rights, with choses in action. The fact that the claims were reduced to money does not change the character of the claims, and certainly is too tenuous a thread on which to determine issues affecting the relation between nations."). One should note, however, that the majority opinion in *Almota* allowed a recovery based on the expectation that the plaintiff's lease would be renewed. 409 U.S. at 478.

103. Dames & Moore v. Regan, 453 U.S. 654 (1981).

court against Iranian property.[104] The intent behind these licenses was to give the United States another "bargaining chip" in negotiations with Iran.[105] The Treasury's bargaining chip, however, also created a recognized property interest which the Algiers Accords subsequently extinguished. When claimants with licenses sued for an injunction against the enforcement of the Algiers Accords, they also asked for just compensation for their lost attachments.[106] The Supreme Court, predictably, refused to enjoin the enforcement of the Algiers Accord. It further held that the nullification of the attachments was not a "taking."[107] In our view, the Court was mistaken: such a nullification should be compensable as a taking.[108]

2. *Judicial Property*

Substantial property expectations can also be created by the judicial process. Judicial property includes both claims filed but not yet adjudicated and final awards. The right of U.S. citizens to go to court and have their claims adjudicated can rarely be destroyed within the domestic context, because the President has extremely limited power to interfere with the judicial process.[109] However, a common feature of foreign affairs ac-

104. 31 C.F.R. § 535.203(e) (1980); *see also* 31 C.F.R. § 535.805 (1980) (licenses granted could be "amended, modified, or revoked at any time.").

105. *See* Brief for Federal Respondents at 28, *Dames & Moore*, 453 U.S. 654 (No. 80-2078) ("In the present case, the initial blocking of the Iranian assets after the hostages had been seized . . . served both as an official response to that hostile action and as a form of economic pressure upon Iran to release the hostages and to resolve the resultant crisis."); *cf. id.* at 29 (freezing orders also designed to "provide[ ] for the settlement of claims of the United States nationals against the country whose assets were frozen.").

106. *See, e.g.*, Marschalk Co. v. Iran Nat'l Airlines, 518 F. Supp. 69, 92-94 (S.D.N.Y. 1981), *rev'd*, 657 F.2d 3 (2d Cir. 1981).

107. *Dames & Moore*, 453 U.S. at 674 n.6; *see also id.* at 690 (Powell, J., concurring in part and dissenting in part).

108. *Cf. id.* at 690 n.1 ("Even though the Executive Orders purported to make attachments conditional, there is a substantial question whether the Orders themselves may have effected a taking by making conditional the attachments that claimants against Iran otherwise could have obtained without condition.") (Powell, J., concurring in part and dissenting in part).

109. Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948) ("[I]f the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render. Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government."); *see also* White v. Mechanic Securities Corp., 269 U.S. 283, 301 (1925) (President may interfere with domestic litigation in U.S. courts only with express consent of Congress); United States v. O'Grady, 89 U.S. (22 Wall.) 641, 648 (1875) ("[I]t is clear that when such a claim as that preferred by the claimants in the original petition passes into judgment in a court of competent jurisdiction it ceases to be open, under any existing act of Congress, to revision by any one of the executive departments or of all such departments combined."); *cf.* McCullough v. Virginia, 172 U.S. 102, 123-24 (1898) (state legislature could not withdraw authorization for a suit after a lower court had rendered judgment, but before state supreme court had acted on appeal); United States v. Peters, 9 U.S. (5 Cranch) 115, 136 (1809) ("If the legislatures of the several states may, at will, annul the

tions is that claims against foreign states or foreign nationals are settled outside of the domestic judicial context. This process usually nullifies individual claims in return for either a lump-sum settlement, the transfer of claims to an alternative tribunal, or merely an intangible diplomatic benefit.[110] By preventing claims from being brought in the U.S. federal courts under these circumstances, the President is taking whatever property interests inhere in the right to bring such actions.[111]

Nevertheless, courts have gone to striking lengths to deny just compensation to private claimants who have been ill-served by settlements,[112] and have consistently denied compensation for claims settled by the Executive.[113] Past practice does not mean, however, that "takings" resulting from executive settlements will not be recognized in the future. *Dames & Moore* explicitly holds that "the question whether the suspension of claims constitutes a taking" is one which may be adjudicated in the Court of Claims.[114]

To resolve the question of whether the suspension of claims results in a taking, we suggest that the Court of Claims and appellate courts apply the analysis developed above. Our reasoning rests on the argument that just compensation is required most where no other protection exists and the property expectations are not unduly attenuated. Claimants against foreign states do receive minimal protection in other fora, and these protections are usually commensurate with the degree to which their claims are legitimate property interests. These claims may also receive some protection during negotiation of settlements in cases where private claimants exert pressure upon the Executive to achieve maximum value for the surrender of their claims. In addition, Congress has the power to reject claims settlements whenever it judges such settlements not to be beneficial to private claimants. Thus, when the President sought in 1973 to settle over $105 million in claims against Czechoslovakia for only $20.5 million, Congress quickly enacted legislation that required the renegoti-

judgments of the courts of the United States, and destroy the rights acquired under these judgments, the constitution itself becomes a solemn mockery . . . .").

110. *See, e.g., Dames & Moore*, 453 U.S. at 679 ("[T]he United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries."); *id.* at 680 n.9 (citing ten claims settlements by the United States since 1952).

111. Settlements seldom cover the actual losses to the injured parties. For a listing of various claims settlements and amounts received by the claimants, see Brief for Intervenor Bank Markazi Iran at app. 1, *Dames & Moore*, 453 U.S. 654.

112. *See, e.g.*, Shanghai Power Co. v. United States, 4 Cl. Ct. 237 (1983) (action brought against President's unilateral settlement of claim does not constitute a valid takings claim when based on grounds that the settlement did not reflect the full monetary value of the claim).

113. *See, e.g., id.* at 245-46; Aris Gloves, Inc. v. United States, 420 F.2d 1386 (Ct. Cl. 1970).

114. *Dames & Moore*, 453 U.S. at 689-90.

ation of the agreement.[115] Finally, the Internal Revenue Code provides relief for injured claimants by allowing a deduction for property expropriated by a foreign state.[116]

Courts hearing just compensation suits should consider the effectiveness of these alternative protections on a case-by-case basis. If the expectations of the claimants are remote, as in a tort claim against a hostile foreign state,[117] then the protections offered by the courts should be weighed against the political process protections afforded the claimants.[118] In these situations, courts must recognize that compensation for lost claims is available through other parts of the legal process which might be more suitable than judicial hearing.

The unique nature of the foreign affairs power presents many other potential ways to affect property interests. It is impossible to draw absolute theoretical lines around the types of action that demand compensation. This analysis merely suggests that when the claim is not remote and other protections are not available, the courts should be more willing to apply just compensation principles to protect private property interests.

Conclusion

The broad economic sanctions power of the Executive should be balanced by a recognition of the economic costs that sanctions can impose within the United States. If courts recognize their ability to impose constitutional constraints on executive action without jeopardizing the making of foreign policy, sanctions planners will be forced to take *all* relevant costs into account. This prescription does not try to shift the decision-making authority in foreign affairs away from the President. Rather, it offers protection to private interests and promotes the spreading of losses. In doing so, it encourages a rational cost/benefit analysis by the Execu-

115. Lillich, *The Gavel Amendment to the Trade Reform Act of 1974*, 69 AM. J. INT'L L. 837, 839-41 (1975).

116. *See* 26 U.S.C. § 172(b)(D) (1986) (allowing taxpayer to take net operating loss carryforward for foreign expropriation losses); *id.* § 172(h) (defining foreign expropriation losses).

117. This is the nature of the claims of the former U.S. hostages in Iran, who assert that, in extinguishing their tort claims against Iran through the signing of the Algiers Accords, the President violated the takings clause. *See, e.g.*, Cooke v. United States, 1 Cl. Ct. 695 (1983) (denying class certification to former hostages and their families); Belk v. United States, 12 Cl. Ct. 732 (1987) (holding that extinguishing former hostages' causes of action against Iran, by signing Algiers Accords, did not constitute a taking).

118. The political process appears to have protected the interests of the Iranian hostages rather well. First, negotiation by the executive branch secured their release, and "this . . . was a very valuable benefit for the compromise of their claim." *Belk*, 12 Cl. Ct. at 734. Second, Congress passed legislation authorizing special pay, educational, medical, and income tax exemption benefits for the hostages and their families. Hostage Relief Act of 1980, P.L. 96-449, 94 Stat. 1967 (Oct. 14, 1980).

tive in the pursuit of its foreign policy, and hopes to ensure that executive decisions will serve both the domestic and the international interests of the United States.