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The Dangers of Deference: International Claim Settlement by the President

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During the final months of the Clinton administration, the State Department entered into a trio of unprecedented international agreements with France (the "French Agreement"),¹ Germany (the "German Agreement"),² and Austria (the "Austrian Agreement").³ These "sole" executive agreements, designed to resolve litigation pending in the U.S. courts that arose out of World War II and the Holocaust, were made without Senate ratification (as required for a treaty)⁴ or congressional authorization (as in a congressional-executive agreement).⁵ Although executive branch settlement of claims without Senate or congressional approval has a long history,⁶ these executive agreements mark an important departure from prior practice by resolving pending U.S. litigation against private companies rather than claims against foreign sovereigns.⁷ As one senior State Department official noted, the German Agreement was a "move into uncharted areas."⁸

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1. AGREEMENT CONCERNING PAYMENTS FOR CERTAIN LOSSES SUFFERED DURING WORLD WAR II, U.S.-Fr., Jan. 18, 2001, Temp. State Dep't No. 01-36, 2001 WL 416465 [hereinafter FRENCH AGREEMENT].

2. AGREEMENT CONCERNING THE FOUNDATION "REMEMBRANCE, RESPONSIBILITY AND THE FUTURE," U.S.-FR.G., July 17, 2000, Temp. State Dep't No. 00-129, 2000 WL 1863131 [hereinafter GERMAN AGREEMENT].

3. AGREEMENT CONCERNING THE AUSTRIAN FUND "RECONCILIATION, PEACE AND COOPERATION," U.S.-Aus., Oct. 24, 2000, Temp. State Dep't No. 01-13, 2000 WL 33125445 [hereinafter AUSTRIAN AGREEMENT]; AGREEMENT RELATING TO THE AGREEMENT OF OCTOBER 24, 2000 CONCERNING THE AUSTRIAN FUND "RECONCILIATION, PEACE AND COOPERATION" (RECONCILIATION FUND), U.S.-Aus., Jan. 23, 2001, Temp. State Dep't No. 01-73, 2001 WL 935261.

4. U.S. CONST. art. II, § 2, cl. 2.

5. Sole executive agreements are concluded without congressional authorization. Congressional-executive agreements receive approval by Congress, either *ex ante* or *ex post*, but are not ratified by two-thirds of the Senators present, as is required for treaties.

6. See discussion *infra* Part III.B.

7. Ronald Bettauer, Deputy Legal Advisor of the U.S. Department of State, termed the German Agreement "unprecedented." Ronald Bettauer, *Keynote Address: The Role of the United States Government in Recent Holocaust Claims Resolution*, 20 BERKELEY J. INT'L L. 1, 4 (2002).

8. *Id.* at 2. Bettauer describes the German Agreement as an "unconventional and unprecedented arrangement" that "involved an executive agreement between the United States and Germany, but not a

The agreements do not, however, purport to terminate the litigation of their own force, but instead obligate the State Department to file "Statements of Interest" requesting that courts dismiss the cases based on the foreign policy interests of the United States.⁹ Courts have already done so, even over the objections of plaintiffs,¹⁰ without so much as a nod either to the important expansion of executive authority at work or to the Treaty¹¹ and Supremacy¹² Clauses of the U.S. Constitution.¹³

Although the Executive often seeks—and receives—deference from the courts,¹⁴ these Statements of Interest are particularly troubling for three reasons. First, they are made pursuant to executive agreements. Because the Supremacy Clause makes "Treaties," but not other international agreements, the "supreme Law of the Land,"¹⁵ the courts' deference to these executive agreements permits the Executive to achieve through the courts what it could not otherwise do without the agreement of two-thirds of the Senate, as required by a treaty.

Thus, the executive agreement with Germany resulted in the involuntary dismissal of a case brought by a resident of California pursuant to California state law.¹⁶ Although some courts dismissed Holocaust and World War II–

claims settlement agreement." *Id.* at 6. He also points out that the German Agreement "involved dismissals of class action lawsuits, but no class action settlement." *Id.*

9. The Austrian Agreement provides, for example, that the "United States will recommend dismissal on any valid legal ground which, under the United States system of jurisprudence, will be for the United States courts to determine." AUSTRIAN AGREEMENT, *supra* note 3, annex B. The United States "does not suggest that its policy interests concerning the Fund in themselves provide an independent legal basis for dismissal, but will reinforce the point that U.S. policy interests favor dismissal on any valid legal ground." *Id.* The French and German Agreements include similar language. FRENCH AGREEMENT, *supra* note 1, annex C; GERMAN AGREEMENT, *supra* note 2, annex B.

10. See, e.g., *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370, 371 (D.N.J. 2001) [hereinafter *Nazi Era Cases*]. The court had already granted a motion for voluntary dismissal brought by plaintiffs who wanted to pursue claims with the "Remembrance, Responsibility and the Future" Foundation (the "German Foundation") established pursuant to the German Agreement. *In re Nazi Era Cases Against German Defendants Litig.*, 198 F.R.D. 429 (D.N.J. 2000). The Second Circuit has also considered a Statement of Interest in a case involving claims against German and Austrian banks; in that case, too, the plaintiffs moved for voluntary dismissal. The district court eventually granted the motion, the defendants appealed some language in the order, and the Second Circuit granted mandamus relief. *In re Austrian, German Holocaust Litig.*, 250 F.3d 156, 159 (2d Cir. 2001). Two other courts dismissed slave labor claims against private corporations before the United States and Germany formalized their agreement. These decisions were based in part on the negotiations, which were already underway, and on the courts' conclusions that resolution of such claims was a matter for the political branches. *Burger-Fischer v. DeGussa AG*, 65 F. Supp. 2d 248, 281–85 (D.N.J. 1999); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 483–90 (D.N.J. 1999). See discussion *infra* Part V.

11. U.S. CONST. art. II, § 2, cl. 2.

12. U.S. CONST. art. VI, § 1, cl. 2.

13. See cases cited *supra* note 10.

14. Indeed, some of the World War II–related litigation was dismissed even prior to the conclusion of the executive agreements. See *supra* note 10. See generally Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000).

15. U.S. CONST. art. VI, § 1, cl. 2. See *infra* Part II.

16. See *Nazi Era Cases*, 129 F. Supp. 2d at 372. The case was brought in California state court but removed. *Id.* at 372–73.

related litigation before the conclusion of the executive agreements,¹⁷ others did not.¹⁸ After the agreements, however, executive requests for deference come backed—in the German case, for example—by the knowledge that a \$4.3 billion international agreement cannot go forward without a dismissal of the litigation by the courts.¹⁹ Although not formally bound by the agreements, courts have relied in part upon the agreements themselves to dismiss the litigation.²⁰ This use of an executive agreement means that causes of action created by state law and litigated between private parties are effectively preempted by the Executive acting with the acquiescence of the courts through the Statements of Interest, but without the participation of Congress through the formal operation of the Supremacy Clause.

Second, in the area of foreign affairs, prior practice by the executive branch is itself one measure of constitutionality.²¹ In other words, the courts' deference in this area helps to entrench the practice as a matter of constitutional law. Dismissing the litigation pursuant to an executive agreement strengthens the argument that the Executive is entitled to such deference in subsequent cases that involve such agreements. The deference-based doctrines that the courts have used to evaluate the Statements of Interest completely fail, however, to appreciate this significance.

Finally, and related to the second concern, these executive agreements serve as an attractive future model for the State Department to resolve other private litigation with foreign affairs implications. Indeed, a State Department official has already suggested that the German Agreement may serve as a precedent for the resolution of "private litigation in U.S. courts," where

17. See *Burger-Fischer*, 65 F. Supp. 2d at 285; *Iwanowa*, 67 F. Supp. 2d at 491.

18. See, e.g., *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 138 (E.D.N.Y. 2000). This litigation was explicitly included in the FRENCH AGREEMENT, *supra* note 1, annex A.

19. See *Nazi Era Cases*, 129 F. Supp. 2d at 379 n.18, 383.

20. *Id.* at 383. The court reasoned, for example, that

[the] Executive Agreement is a pronouncement by our government that claims against German Industry should not be litigated, but instead should be submitted to the [German] Foundation. That commitment, made in an international agreement, has been relied on by both the German government and German Industry in providing more than \$4 Billion to the [German] Foundation, which they reasonably expect will be the only vehicle for providing compensation to victims. That pronouncement has also been relied on by many victims around the world, who have already consented to dismissal of their actions in this Court and others.

Id. Although the government could have filed a Statement of Interest and the court could have dismissed the litigation even without an executive agreement, the agreement itself is integral to the court's reasoning, as the quote above makes clear. Moreover, the court's analysis rests on the existence of the German Foundation and the Statement of Interest. Politically it appears that an agreement was necessary before the German government would create the Foundation and the U.S. government would file the Statements of Interest. *Id.* at 379; see also *infra* note 67. As the court notes several times, the government could have used a treaty (or an executive order) instead of the Statements of Interest, but relied instead upon judicially created deference doctrines. *Id.* at 382, 386–87.

21. See *Dames & Moore v. Regan*, 453 U.S. 654, 657 (1981). See also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (looking to historical practice to evaluate the constitutionality of the President's seizure of the steel mills); John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 799–800 (2001) (discussing the role of historical practice in foreign affairs powers).

the U.S. government wishes to remove “an irritant from relations with an important ally.”²² This concern is particularly important because of the decoupling of individuals from nation-states that has characterized post-World War II international law, a trend that the events of September 11, 2001 will likely accelerate. The rise of “plaintiff’s diplomacy,” in which lawsuits by individuals have come to play an increasingly important role in foreign policy,²³ is part of this development. Such lawsuits, brought by private individuals in U.S. courts, target as defendants not only foreign governments but also corporations and individuals, for claims related to World War II and the Holocaust,²⁴ international environmental harm,²⁵ international human rights violations,²⁶ war crimes,²⁷ and the September 11 attacks.²⁸ As these cases increase in frequency and importance to U.S. foreign policy, the power of the President to influence or terminate such litigation also increases in importance.²⁹

This Article argues that the courts erred in dismissing the World War II-related cases based on the Statements of Interest made pursuant to the sole executive agreements. Part I provides an introduction to the executive agreements themselves. Part II examines the text of the Constitution and shows that sole executive agreements terminating domestic litigation stand in significant tension with the Treaty and Supremacy Clauses. The text of the Constitution itself does not provide a basis for executive branch lawmaking of this sort. Deference to sole executive agreements that permit the Executive to achieve this result through the courts, without the participation of Congress, thus appears to undermine both the Treaty and Supremacy Clauses.

Nevertheless, the Supreme Court has given some sole executive agreements (and executive orders made pursuant to such agreements) the force of

22. Bettauer, *supra* note 7, at 10.

23. See Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFF., Sept.-Oct. 2000, at 102.

24. See, e.g., *Abrams v. Société Nationale des Chemins de Fer Français*, 175 F. Supp. 2d 423 (E.D.N.Y. 2001); *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1153 (N.D. Cal. 2001); *Bodner*, 114 F. Supp. 2d at 121; *Burger-Fischer*, 65 F. Supp. 2d at 248.

25. See, e.g., *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999); *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998); *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001).

26. See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *In re Estate of Ferdinand Marcos, Human Rights Litig.*, 25 F.3d 1467 (9th Cir. 1994); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001); *Doe v. Unocal Corp.*, 27 F. Supp. 2d 1174 (C.D. Cal. 1998), *aff'd*, 248 F.3d 915 (9th Cir. 2001).

27. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Doe v. Islamic Salvation Front*, 993 F. Supp. 3d (D.D.C. 1998).

28. See, e.g., *Smith v. Islamic Emirate of Afghanistan*, No. 01 Civ. 10132, 2001 WL 1658211 (S.D.N.Y. Dec. 26, 2001). See also 7 *Families Sue bin Laden and Others for Billions*, N.Y. TIMES, Feb. 20, 2002, at A11.

29. As an example, on October 15, 2001, eager to strengthen diplomatic ties with Iran during air strikes against Afghanistan, the Bush administration argued to a federal judge that a case against Iran for damages arising out of the 1979 hostage crisis should be dismissed. See *U.S. Fails in Bid to Block Former Hostages from Testifying Against Iran; Justice Department Says Accord Bars Claims in 20-Year-Old Issue; Ex-Prisoner Assails U.S.*, ST. LOUIS POST-DISPATCH, Oct. 16, 2001, at A7.

domestic law, the Treaty and Supremacy Clauses notwithstanding.³⁰ Part III turns to the Supreme Court, and demonstrates that those cases involved claims against foreign sovereigns and do not provide a basis for executive authority over claims against private individuals. In *Dames & Moore v. Regan*,³¹ for example, the Supreme Court upheld an executive order nullifying claims against Iran. The order was made pursuant to an executive agreement, and the court relied in part on the history of executive agreements that terminated litigation against foreign sovereigns.³² Thus, a historical practice of executive agreements that terminated litigation against private parties would suggest that such agreements may have the force of domestic law, making deference to such agreements far less problematic.³³ As Part III shows, however, there is no such historical practice; sole executive agreements have not been used to terminate litigation against private parties. Also, unlike in *Dames & Moore*, there is little reason to conclude that Congress favors executive resolution of these claims, when it has acted instead to increase the scope of human rights and Holocaust-related litigation in U.S. courts. Therefore, the sources of executive authority that the Supreme Court relied on in *Dames & Moore* do not serve as sources of executive authority to terminate the World War II–related private claims. Without such authority, the Executive’s request for deference creates significant tension with the Supremacy and Treaty Clauses.

Part IV of this Article looks at recent scholarship on sole executive agreements. If scholars provided convincing arguments that sole executive agreements have the power to terminate domestic litigation against private parties, then deference that achieves the same result would present far less significant Treaty and Supremacy Clause issues. Much scholarship focuses on the constitutionality of congressional-executive³⁴ and sole executive³⁵ agree-

30. See, e.g., *Dames & Moore*, 453 U.S. at 654; *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

31. 453 U.S. 654 (1981).

32. *Id.* at 686.

33. Although *Dames & Moore* considered an executive order terminating domestic litigation by its own authority, requests for deference of the sort involved in purely private litigation should be framed by the constitutional authority of the Executive over the issue on which deference is sought. The Executive’s authority—or lack thereof—to resolve these claims through sole executive agreement is integrally related to the question of whether or not the courts should defer to the Executive’s dismissal requests pursuant to that agreement. Indeed, the courts (even through the political question doctrine) rely to some extent on historical practice, but they do so without making the important distinction between claims resolved by treaties and those resolved by the Executive alone. See generally Bradley, *supra* note 14, at 659–61, 711 (Some deference to the Executive is actually “judicially permitted” lawmaking by the Executive through the courts. Deference to the courts on the issue of foreign sovereign immunity might, for example, be justified by the independent law-making authority of the Executive.).

34. See, e.g., Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 801 (1995); Edwin Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664 (1944); Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671 (1998); Peter J. Spiro, *Treaties, Executive Agreements, and Constitutional Method*, 79 TEX. L. REV. 961 (2001); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995); Yoo, *supra* note 21.

35. See, e.g., Paul, *supra* note 34; Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77

ments, but to the extent that scholars do discuss the claims settlement power, they focus solely on its traditional use against foreign sovereigns.³⁶ Scholars have also written extensively about the Holocaust and other World War II–related litigation in the U.S. courts.³⁷ Some have discussed³⁸—and even criticized³⁹—the unusual executive agreements with Germany, Austria, and France, but none have identified or analyzed their constitutional significance.⁴⁰

Part V considers the district court cases that dismissed the World War II–related claims both before and after the formal conclusion of the three executive agreements. The courts dismissed the cases based in part on the political question doctrine and the doctrine of international comity.⁴¹ Neither provides convincing reasons to dismiss the litigation. Both fail to alert courts to changes in executive branch practice and expansion of executive authority, and both overlook how the text of the Constitution allocates authority over foreign affairs. Applying these doctrines, for example, does not force courts to consider how deference pursuant to sole executive agreements undermines the Treaty and Supremacy Clauses. Even aside from the formal conclusion of the executive agreements, failure to distinguish between executive agreements and treaties caused another problem: courts used international comity and the political question doctrine to dismiss litigation based in part on the historical use of treaties to resolve war-related reparations issues, without distinguishing between treaties and executive agreements (and the authority each provides for deference).⁴² As a result, claims were dismissed on the

N.C. L. REV. 134, 234–40 (1998).

36. See Evan Todd Bloom, Note, *The Executive Claims Settlement Power: Constitutional Authority and Foreign Affairs Applications*, 85 COLUM. L. REV. 155 (1985). See also Ramsey, *supra* note 35, at 173–83 (providing a historical analysis of sole executive agreements that includes many claims settlement agreements).

37. See, e.g., The Stefan A. Riesenfeld Symposium 2001, *Fifty Years in the Making: World War II Reparation and Restitution Claims*, 20 BERKELEY J. INT'L L. 1 (2002); Symposium, *Holocaust Restitution: Reconciling Moral Imperatives with Legal Initiatives and Diplomacy*, 25 FORDHAM INT'L L.J. 1 (2001).

38. See, e.g., Michael J. Bazylar, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT'L L. 11, 24–25 (2002); Eric Rosand, *Confronting the Nazi Past at the End of the 20th Century: The Austrian Model*, 20 BERKELEY J. INT'L L. 202 (2002).

39. See, e.g., Libby Adler & Peer Zumbansen, *The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich*, 39 HARV. J. ON LEGIS. 1 (2002); Morris A. Ratner, *The Settlement of Nazi-Era Litigation Through the Executive and Judicial Branches*, 20 BERKELEY J. INT'L L. 212 (2002).

40. Some authors have also criticized court decisions to dismiss the litigation, but not for the reasons discussed in this Article. See, e.g., Michael J. Bazylar, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1 (2000) (arguing that the political question doctrine did not apply in *Iwanowa* because the test was not met and because the executive branch did not intervene); K. Lee Boyd, *Are Human Rights Political Questions?*, 53 RUTGERS L. REV. 277 (2001) (arguing that application of the political question doctrine in these cases is part of a general trend to limit human rights litigation and that courts should be more receptive to customary human rights norms).

41. See *Nazi Era Cases*, 129 F. Supp. 2d at 371; *Burger-Fischer*, 65 F. Supp. 2d at 285 (applying political question doctrine to dismiss slave labor claims before the executive agreements); *Iwanowa*, 67 F. Supp. 2d at 489 (same). I argue that application of the political question doctrine by these courts was in error, both before and after the executive agreements. See discussion *infra* Part V.A.

42. The court in *Nazi Era Cases* reasoned that while "the policy interests articulated in the Statement

grounds that the executive branch sought “government-to-government” resolution of the litigation, when the historical practice supported resolution by treaty.⁴³

Part VI concludes by setting out an alternative approach that has as its point of departure a careful separation of powers framework beginning with the textual allocation of authority in the Constitution (including the Supremacy Clause), before considering prior executive branch and congressional practice. Even if these sources provide no definitive answer as to the scope of executive authority in this area, application of the international comity and political question doctrines should nonetheless operate within the framework that these sources create. Finally, most iterations of the political question doctrine speak of the “political branches” as a monolith; in fact, as the World War II–related litigation illustrates, both state and federal legislatures are often in conflict with the executive branch.⁴⁴ Courts should seek to identify such conflict; where it exists they should hesitate to defer.

I. EXECUTIVE AGREEMENTS WITH FRANCE, GERMANY, AND AUSTRIA

The United States has increasingly become the forum for lawsuits alleging human rights violations, environmental harms, war crimes, and other international harms that take place in foreign countries.⁴⁵ Much of this litigation has been brought under the Alien Tort Statute.⁴⁶ Litigation during the 1990s against a variety of corporate defendants for World War II–related

of Interest do not in and of themselves provide an independent legal basis for dismissal, the long-standing foreign policy commitment to resolving claims arising out of World War II and the Holocaust at a governmental level does provide such a basis.” 129 F. Supp. 2d at 382 (emphasis added). The court went on to say that rejecting the Statement of Interest and permitting the case to go forward

would unacceptably intrude into the foreign policy determinations of our government. Such a decision would in effect say that the [German] Foundation and all of the treaties that have gone before are inadequate, and that this Court could somehow do a better job of fashioning relief for victims of the Nazi era.

Id. at 383 (emphasis added). The court, in other words, used the history of mostly treaties that resolve World War II–related claims to support deference to the Executive alone. This is particularly problematic where the bid for deference has the effect of implementing an international agreement as domestic law without the participation of the Senate, but this reasoning is also used erroneously to support deference even in cases not involving formal executive agreements. In *Iwanowa*, for example, the court dismissed the case in part on political question grounds, relying heavily on the “executive branch’s commitment to resolving individual claims arising out of World War II through government-to-government negotiations.” 67 F. Supp. 2d at 487. The problem with this reasoning is that a history of resolving an issue by treaty does *not* support the dismissal of otherwise valid claims in favor of negotiations or informal statements by the executive branch.

43. See, e.g., *Nazi Era Cases*, 129 F. Supp. 2d at 371–72; *Iwanowa*, 67 F. Supp. 2d at 486–87.

44. See, e.g., *Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F. 3d 739 (9th Cir. 2001) (considering the constitutionality of a California statute called the Holocaust Victim Insurance Relief Act of 1999). The court noted letters in which executive branch officials argued the law interfered with the government’s policy on Holocaust-related claims, but it concluded that Congress was aware of, and encouraged, state initiatives like those of California. *Id.* at 749. See also Carolyn Skorneck, *Bill to Allow U.S. POWs to Sue Japan*, AP ONLINE, Mar. 22, 2001, 2001 WL 16546640 (quoting a member of the House of Representatives who stated that “[o]ur own State Department is the biggest obstacle to justice”).

45. *Slaughter & Bosco*, *supra* note 23, at 102–03.

46. 28 U.S.C. § 1350 (2002).

atrocities is one part of this general development. Perhaps most prominently, class action litigation against Swiss banks ended in a \$1.25 billion settlement, negotiated in part by then Under Secretary of State Stuart Eizenstat.⁴⁷ Other World War II–related litigation targeted (among other defendants)⁴⁸ Japanese corporations;⁴⁹ European insurance companies and their affiliates;⁵⁰ French railroads;⁵¹ French, Austrian, and German banks;⁵² and other German and Austrian corporations.⁵³ Pressure from Germany, France, and Austria on the United States led to the three executive agreements that attempted to resolve some of these cases. As the agreements make clear, they are specifically designed to end the U.S. litigation.⁵⁴

The three agreements are similar in structure. Each requires the establishment of a foundation with contributions from the foreign government and from private companies.⁵⁵ Individual claimants may apply to the foundation for compensation for their injuries.⁵⁶ The agreements specifically set out the claims and claimants covered by the foundations, and provide many details of the oversight and administration of the funds.⁵⁷

The agreements do differ somewhat in scope and in detail. The German Agreement is the broadest, covering all claims against German companies arising from the National Socialist era and World War II.⁵⁸ The Austrian Agreement also applies to all Austrian companies but includes only claims related to slave or forced labor, as defined by the agreement.⁵⁹ The French Agreement applies only to claims against French banks arising out of World War II.⁶⁰

47. See Bettauer, *supra* note 7, at 5; Madeline Doms, Comment, *Compensation for Survivors of Slave and Forced Labor: The Swiss Bank Settlement and the German Foundation Provide Options for Recovery for Holocaust Survivors*, 14 TRANSNAT'L LAW. 171, 174, 193–94 (2001).

48. See Bazylar, *supra* note 40.

49. See, e.g., *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160 (N.D. Cal. 2001). See generally Sean D. Murphy, *World War II Era Claims Against Japanese Companies*, 95 AM. J. INT'L L. 139 (2001) (describing litigation against Japanese corporations).

50. See, e.g., *Gerling Global Reinsurance Corp. of Am. v. Low*, 240 F.3d 739 (9th Cir. 2001).

51. See, e.g., *Abrams v. Société Nationale des Chemins de Fer Français*, 175 F. Supp. 2d 423 (E.D.N.Y. 2001).

52. See, e.g., *D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001) (German and Austrian banks); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000) (French bank).

53. See, e.g., *Burger-Fischer v. DeGussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999).

54. See, e.g., FRENCH AGREEMENT, *supra* note 1, pmbl., art. 1(1); GERMAN AGREEMENT, *supra* note 2, pmbl., art. 1(1); AUSTRIAN AGREEMENT, *supra* note 3, pmbl., art. 1(1).

55. FRENCH AGREEMENT, *supra* note 1, pmbl., art. 1(1); GERMAN AGREEMENT, *supra* note 2, pmbl.; AUSTRIAN AGREEMENT, *supra* note 3, pmbl.

56. FRENCH AGREEMENT, *supra* note 1, annex B; GERMAN AGREEMENT, *supra* note 2, annex A; AUSTRIAN AGREEMENT, *supra* note 3, annex A.

57. For instance, the agreements supply the standard of proof to apply to claims, as well as the composition of the foundations' boards of directors. FRENCH AGREEMENT, *supra* note 1, annex B.I.B; GERMAN AGREEMENT, *supra* note 2, annex A.9; AUSTRIAN AGREEMENT, *supra* note 3, annex A.7.

58. GERMAN AGREEMENT, *supra* note 2, art. 1(1).

59. AUSTRIAN AGREEMENT, *supra* note 3, art. 1(1).

60. FRENCH AGREEMENT, *supra* note 1, art. 1(1).

All three agreements note that the companies and banks are seeking “all-embracing and enduring legal peace” for claims arising out of the National Socialist Era and World War II.⁶¹ To this end, they all obligate the United States to file “Statements of Interest” in any litigation that raises claims covered by the agreements,⁶² and carefully set forth the statements’ content. The statements must explain that the United States, in its foreign policy interests, would like to see the claims resolved outside of litigation, that the funds established by the agreements provide quicker and easier ways of resolving the claims than litigation, and that the claims face significant legal hurdles in U.S. courts.⁶³

61. FRENCH AGREEMENT, *supra* note 1, pmb. (referring just to “World War II” not “National Socialist Era”); GERMAN AGREEMENT, *supra* note 2, pmb.; AUSTRIAN AGREEMENT, *supra* note 3, pmb.

62. FRENCH AGREEMENT, *supra* note 1, art. 2; GERMAN AGREEMENT, *supra* note 2, art. 2(1); AUSTRIAN AGREEMENT, *supra* note 3, art. 2(1).

63. FRENCH AGREEMENT, *supra* note 1, annex C; GERMAN AGREEMENT, *supra* note 2, annex B; AUSTRIAN AGREEMENT, *supra* note 3, annex B. The German Agreement, for example, provides

Pursuant to Article 2, Paragraph 1, the United States will timely file a Statement of Interest and accompanying formal foreign policy statement of the Secretary of State and Declaration of Deputy Treasury Secretary Stuart E. Eizenstat in all pending and future cases, regardless of whether the plaintiff(s) consent(s) to dismissal, in which the United States is notified that a claim has been asserted against German companies arising from the National Socialist era and World War II. The Statement of Interest will make the following points:

1. As indicated by his letter of December 13, 1999, the President of the United States has concluded that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II, including without limitation those relating to slave and forced labor, aryanization, medical experimentation, children’s homes/Kinderheim, other cases of personal injury, and damage to or loss of property, including banking assets and insurance policies.

2. Accordingly, the United States believes that all asserted claims should be pursued (or in the event Foundation funds have been exhausted, should timely have been pursued) through the Foundation instead of the courts.

3. As the President said in his letter of December 13, 1999, dismissal of the lawsuit, which touches on the foreign policy interests of the United States, would be in the foreign policy interests of the United States. The United States will recommend dismissal on any valid legal ground (which, under the U.S. system of jurisprudence, will be for the U.S. courts to determine). The United States will explain that, in the context of the Foundation, it is in the enduring and high interest of the United States to support efforts to achieve dismissal of all National Socialist and World War II era cases against German companies. The United States will explain fully its foreign policy interests in achieving dismissal, as set forth below.

4. The United States’ interests include the interest in a fair and prompt resolution of the issues involved in these lawsuits to bring some measure of justice to the victims of the National Socialist era and World War II in their lifetimes; the interest in the furtherance of the close cooperation this country has with our important European ally and economic partner, Germany; the interest in maintaining good relations with Israel and other Western, Central, and Eastern European nations, from which many of those who suffered during the National Socialist era and World War II come; and the interest in achieving legal peace for asserted claims against German companies arising from their involvement in the National Socialist era and World War II.

5. The Foundation is a fulfillment of a half-century effort to complete the task of bringing justice to victims of the Holocaust and victims of National Socialist persecution. It complements significant prior German compensation, restitution, and pension programs for acts arising out of the National Socialist era and World War II. For the last 55 years, the United States has sought to work with Germany to address the consequences of the National Socialist era and World War II through political and governmental acts between the United States and Germany.

Unlike the Swiss Bank cases, these executive agreements did not *settle* the cases, nor did the agreements themselves extinguish the legal claims.⁶⁴ As a result, none of the protections afforded to class action settlements applied in these cases.⁶⁵ Instead, the governments banked on the deference that the U.S. courts would give to the executive branch's Statements of Interest requesting the dismissal of the cases. For Germany, the concern that courts would not dismiss the cases when so requested posed a threat to the negotiations that nearly prevented an agreement.⁶⁶ Ultimately, however, the State Department convinced Germany and then the other foreign governments that the Statements of Interest constituted "enduring legal peace" in the U.S. courts.⁶⁷ By the time the Statements of Interest were filed in court, they were backed by considerable momentum: a \$4.3 billion resolution (in the German case alone) was premised upon dismissal of the U.S. litigation at the insistence of the executive branch.⁶⁸

6. The participation in the Foundation not only by the German Government and German companies that existed during the National Socialist era, but also by German companies that did not exist during the National Socialist era, allows comprehensive coverage of slave and forced laborers and other victims.

7. Plaintiffs in these cases face numerous legal hurdles, including, without limitation, justiciability, international comity, statutes of limitation, jurisdictional issues, forum non conveniens, difficulties of proof, and certification of a class of heirs. The United States takes no position here on the merits of the legal claims or arguments advanced by plaintiffs or defendants. The United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal, but will reinforce the point that U.S. policy interests favor dismissal on any valid legal ground.

8. The Foundation is fair and equitable, based on: (a) the advancing age of the plaintiffs, their need for a speedy, non-bureaucratic resolution, and the desirability of expending available funds on victims rather than litigation; (b) the Foundation's level of funding, allocation of its funds, payment system, and eligibility criteria; (c) the difficult legal hurdles faced by plaintiffs and the uncertainty of their litigation prospects; and (d) in light of the particular difficulties presented by the asserted claims of heirs, the programs to benefit heirs and others in the Future Fund.

9. The structure and operation of the Foundation will assure (or has assured) swift, impartial, dignified, and enforceable payments; appropriately extensive publicity has been given concerning its existence, its objectives, and the availability of funds, and the Foundation's operation is open and accountable.

GERMAN AGREEMENT, *supra* note 2, annex B.

64. Bettauer, *supra* note 7, at 6–8.

65. See Ratner, *supra* note 39, at 224–32.

66. See Edmund L. Andrews, *Talks with Germany on Fund for Victims of Nazi Slave Labor Are Snagged by a Legal Issue*, N.Y. TIMES, June 3, 2000, at A6.

67. See John Burgess, U.S., *Germany Act to Clear Way for Slave-Labor Compensation*, WASH. POST, June 13, 2000, at A15. Burgess noted that

after 10 hours of talks in Washington, the teams reached a deal under which the Clinton administration would throw its full authority behind efforts to dismiss 55 lawsuits that are pending against German companies for their use of the labor Under the accord, the Clinton administration would formally state in court that it believes it is in the foreign policy interests of the United States to dismiss pending and future lawsuits Since the judicial system is independent in this country, the White House cannot guarantee it can end the lawsuits. Nonetheless, German government negotiator Otto Graf Lambsdorff said that 'we have come as close as possible under the given circumstances.'

68. Adler & Zumbansen, *supra* note 39, at 3–4. The German law establishing the German Foundation requires that the Bundestag (lower house of German parliament) wait until lawsuits pending in the United States are dismissed before certifying that final legal peace has been achieved; only after such

Not surprisingly, as courts have begun to consider these Statements of Interest they have honored the request of the State Department and dismissed litigation against private corporate defendants.⁶⁹ In so doing, courts have used the political question and international comity doctrines to sanction a sole executive agreement (not a treaty or congressional-executive agreement) that hinged upon successful executive branch termination of litigation against private parties. As discussed at length in Part V below, these doctrines provide no convincing basis for dismissal, and in applying them the courts failed to see the shift in executive branch practice, failed to understand that practice itself creates an important constitutional basis for future executive branch action, and failed to understand the extent to which such deference circumvents the Treaty and Supremacy Clauses. In other words, these decisions themselves create important precedent for the executive branch. The next such agreement, after all, will be negotiated based on the success of these agreements—an issue to which the courts, and the doctrines they employed, have been entirely blind.

II. CONSTITUTIONAL TEXT

Termination of domestic litigation by the courts in deference to a sole executive agreement stands in significant tension with the Supremacy and Treaty Clauses of the Constitution. Article II gives the President the power, “by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”⁷⁰ Generations of scholars have struggled to clarify what power the President has to enter into international agreements other than treaties.⁷¹ For its part, Article I, Section 10 distinguishes between “any Treaty, Alliance, or Confederation” on the one hand, and an “Agreement or Compact” on the other.⁷² The former are absolutely forbidden to states, while the latter are forbidden to states “without the Consent of Congress.”⁷³ This distinction suggests that the framers contemplated international agreements other than “Treaties,” but provides no guidance as to how the federal government may conclude non-treaty agreements. Similar distinctions made in the Articles of Confederation⁷⁴ and by

certification, which was made on May 30, 2001, could payments begin. *Id.* at 4.

69. *Nazi Era Cases*, 129 F. Supp. 2d 370, 372 (D.N.J. 2001). *See also* *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 432 (D.N.J. 1999) (dismissing slave labor claims against private corporations based in part on negotiations between the United States and Germany under comity and political question doctrines); *Burger-Fischer*, 65 F. Supp. 2d at 285 (dismissing slave labor claims against private corporations based in part on negotiations between the United States and Germany under the political question doctrine).

70. U.S. CONST. art. II, § 2, cl. 2.

71. *See, e.g.*, SAMUEL B. CRANDALL, TREATIES, THEIR MAKING AND ENFORCEMENT 102–33 (2d ed. 1916); Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972); Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181 (1945).

72. U.S. CONST. art. I, § 10, cls. 1, 3.

73. *Id.* art. I, § 10, cl. 3.

74. *See* CRANDALL, *supra* note 71, at 24–25.

eighteenth-century international law scholars support the conclusion that use of the word “Treaty” in Article II was deliberate, and not intended by the Framers to include all international agreements.⁷⁵

Scholars, even those who take a dim view of the President’s power to enter into non-treaty international agreements, have almost unanimously concluded that the President has at least some power to enter into some executive agreements without a two-thirds vote of the Senate.⁷⁶ This conclusion is supported by use of the word “Treaty” in Article II as distinguished from the other, broader terms used in Article I, Section 10; the unbroken history of sole executive agreements;⁷⁷ the functional argument that it would be difficult to run the executive branch without some power to enter into agreements without the approval of the Senate;⁷⁸ and the vesting of the “executive Power” with the President.⁷⁹ There is little agreement, however, on the scope of such power.⁸⁰

Explicit textual grants of authority to the President provide one way of defining the President’s power to enter into sole executive agreements.⁸¹ In particular, such authority may come from the “Commander in Chief” power,⁸² the power to make treaties (with the advice and consent of the Senate),⁸³ the power to “receive Ambassadors and other public Ministers,”⁸⁴ and the “take Care” Clause.⁸⁵ For example, some view military agreements—such as those that negotiate an armistice ending hostilities,⁸⁶ that arrange for an exchange of prisoners,⁸⁷ that provide for foreign troops to pass through the

75. See Ramsey, *supra* note 35, at 160–73.

76. See, e.g., Borchard, *supra* note 34, at 673–74 (arguing against the interchangeability of executive agreements and treaties but acknowledging the President’s power to enter into some sole executive agreements); Tribe, *supra* note 34. See also RESTATEMENT OF THE LAW (THIRD), FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(4) (1987) [hereinafter RESTATEMENT]. Those who have not include David Gray Alder, *Court, Constitution, and Foreign Affairs, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 19 (David Gray Adler & Larry N. George eds., 1996), and Berger, *supra* note 71, at 55.

77. See John Bassett, *International Agreements Without the Advice and Consent of the Senate*, 15 YALE L.J. 63 (1905).

78. Borchard, *supra* note 34, at 673. See also Ackerman & Golove, *supra* note 34, at 815.

79. U.S. CONST. art. II, § 1, cl. 1. See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 264 (2001) (arguing that the executive power vests the President with the authority to enter into non-treaty agreements).

80. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 219–24 (2d ed. 1996).

81. The Restatement of the Law on Foreign Relations provides that “the President, on his own authority, may make an international agreement dealing with any matter that falls within his independent powers under the Constitution.” RESTATEMENT, *supra* note 76, § 303(4).

82. U.S. CONST. art. II, § 2, cl. 1.

83. *Id.* art. II, § 2, cl. 2.

84. *Id.* art. II, § 3.

85. *Id.* McDougal and Lans argue that this clause gives the President the power to negotiate executive agreements in furtherance of treaty and other international agreement obligations, and provides authority for the Boxer Protocol of 1900. McDougal & Lans, *supra* note 71, at 248 n.150.

86. See QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 241 (1922); Borchard, *supra* note 34, at 673–74 (noting the August 12, 1898 agreement with France setting the basic conditions for peace with Spain, an agreement that was confirmed by a treaty several months later).

87. Borchard, *supra* note 34, at 673–74.

United States⁸⁸ or, in some circumstances that establish mutual defense agreements⁸⁹—as coming within the Commander-in-Chief power. The power to negotiate treaties and/or the executive power itself, many agree, confers on the President the power to enter into temporary agreements pending a treaty (often called *modi vivendi*),⁹⁰ such as agreements related to fishing rights,⁹¹ international boundaries,⁹² and agreements to attempt treaty negotiations.⁹³ Some have reasoned that the President's authority to receive ambassadors under Article II includes the power to recognize (or not recognize) foreign governments and the power to conclude agreements related to such recognition.⁹⁴

Whatever the appropriate line between sole executive agreements and treaties, the text of the Constitution seems clear that only treaties have the force of domestic law. The text of the Constitution makes "Treaties" the "supreme Law of the Land." Because the Supremacy Clause applies to treaties and *not* to non-treaty agreements (like "Compacts," "Agreements," and "Alliances") mentioned elsewhere in the Constitution, such other agreements do not come within the plain language of the Supremacy Clause. The Supreme Court held in *United States v. Belmont*, however, that *some* sole executive agreements do trump inconsistent state law, because of the broad powers of the executive branch over foreign affairs.⁹⁵ *Belmont* is discussed further in the following Part.

Constitutional text leaves us, therefore, with a strong argument in favor of presidential power to enter into some kinds of non-treaty executive agreements. The Supremacy Clause, however, provides a strong textual reason for concluding that non-treaty agreements lack the force of domestic law. Deference by the courts to sole executive agreements, particularly where such deference has the effect of terminating litigation pursuant to such agreements, thus stands in considerable tension with the limits the text of the Constitution places on executive authority. As discussed in the next Part, however, the Supreme Court has held that at least *some* sole executive agreements *can* terminate domestic litigation, the Supremacy and Treaty clauses notwithstanding. If the World War II-related executive agreements have the same

88. See WRIGHT, *supra* note 86, at 242 (noting that between 1882 and 1896, U.S. Presidents made a series of agreements with Mexico permitting the pursuit of Indians into U.S. territory).

89. See, e.g., MUTUAL DEFENSE ASSISTANCE: DISPOSITION OF EQUIPMENT AND MATERIALS, U.S.-Vietnam, Mar. 1, 1955, 7 U.S.T. 837. See also McDougal & Lans, *supra* note 71, at 247 n.139 (citing the bases-for-destroyers deal of 1940 and the 1940 Canadian-American defense agreement). Others argue that "[e]very arms control agreement since 1972 has been approved as a treaty" and that treaties have been consistently used for mutual security pacts, including NATO, several bilateral security agreements, and the Southeast Asian Treaty Organization. Spiro, *supra* note 34, at 996-99.

90. See WRIGHT, *supra* note 86, at 239-40.

91. CRANDALL, *supra* note 71, at 112-13 (discussing several examples).

92. See *Watts v. United States*, 1 Wash. Terr. 288 (Wash. 1870).

93. WRIGHT, *supra* note 86, at 243.

94. *Id.* at 268-69. See Bloom, *supra* note 36, at 163. But see Berger, *supra* note 71, at 5, 17-19 (citing *The Federalist* No. 69 (Alexander Hamilton)).

95. 301 U.S. 324, 331-32 (1937). See discussion *infra* Part III.A.

power, then dismissing litigation in deference to the executive branch is in significantly less tension with the Supremacy Clause.

III. CASE LAW AND HISTORICAL PRACTICE

The Supreme Court has upheld the termination of domestic litigation through sole executive agreement in three cases: *United States v. Belmont*,⁹⁶ *United States v. Pink*,⁹⁷ and *Dames & Moore v. Regan*.⁹⁸ This Part discusses these cases and concludes that although they might provide a basis for executive lawmaking that would support deference to the Statements of Interest filed pursuant to the German, French, and Austrian agreements, in fact they do not. Historical practice, upon which *Dames & Moore* relies in part, might also have provided a basis for executive authority that justifies deference to these sole executive agreements (the Supremacy and Treaty Clauses notwithstanding), but it does not. Even the recent actions by Congress,⁹⁹ from which one might infer congressional approval of executive resolution of the World War II-related cases, suggest instead that Congress supports the resolution of such issues by the courts. By this measure, too, the executive branch lacks law-making authority to resolve these claims by sole executive agreement. The deference of the courts thus permits the Executive to achieve what it otherwise lacks the constitutional authority to do.

A. Supreme Court Cases

The Supreme Court considered in both *Belmont* and *Pink* an agreement by the United States to assume certain claims that the government of the Soviet Union had against U.S. nationals (the "Litvinov Assignment").¹⁰⁰ In *Belmont*, the U.S. government claimed that the assignment included funds held by August Belmont, a New York banker, for the Petrograd Metalworks, a company whose assets were nationalized by the Soviet government.¹⁰¹ The

96. 301 U.S. 324 (1937).

97. 315 U.S. 203 (1942).

98. 453 U.S. 654 (1981).

99. See *infra* notes 251–260 and accompanying text.

100. The Litvinov Assignment was part of a 1933 exchange of correspondence between President Roosevelt and Maxim Litvinov, the People's Commissar for Foreign Affairs, Union of Soviet Socialist Republics. Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics, Oct. 20–Nov. 23, 1933, reprinted in 78 CONG. REC. 463–68 (1934). The agreement provided, in part, that

[t]he Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations [sic] for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

Id. at 466.

101. *Belmont*, 301 U.S. at 325–27. Petrograd had deposited the funds prior to the nationalization of

United States sued to recover the deposits, relying on the Litvinov Assignment. Belmont argued in response that the Soviet nationalization of Petrograd Metalworks' assets in New York violated New York public policy and that the Soviet Union accordingly never owned the claim and could not have transferred it to the United States.¹⁰² The lower courts held for Belmont, reasoning that the bank deposit was located in New York, that the Soviet nationalization decree conflicted with New York public policy against enforcing foreign confiscatory decrees, and that questions of title to property in New York were questions of New York law.¹⁰³

The Supreme Court reversed, reasoning that courts are bound by decisions of the "political departments of the government" about the recognition of foreign governments.¹⁰⁴ Recognition, in turn, legitimates the acts (i.e., nationalization decrees) of the recognized government within its own territory.¹⁰⁵ In this case, the President negotiated the Litvinov Assignment as part of a deal that led to U.S. recognition of the Soviet government, putting the assignment within the "competence of the President."¹⁰⁶ As to the issue of what domestic effect the Litvinov Assignment had, the Court reasoned that although it lacked the advice and consent of the Senate, was not a treaty, and did not come within the "express language" of the Supremacy Clause, it nonetheless had the same effect, based on the "complete power" of the national government over "international affairs."¹⁰⁷

In *Pink*, decided several years after *Belmont*, the United States brought suit against the Superintendent of Insurance of the State of New York to recover funds deposited by Russian insurance companies subsequently nationalized by the Soviet Union.¹⁰⁸ The lower courts denied the claim, distinguishing *Belmont* on the grounds that it had decided only that the United States had a cause of action and that the New York courts had not refused to give effect to the Soviet decrees. In *Pink*, on the other hand, the New York courts had held that the Litvinov Assignment did not intend to contravene state law or policy governing the distribution of assets of Russian insurance companies that were located outside the Soviet Union.¹⁰⁹

Again, the Supreme Court reversed,¹¹⁰ relying, like *Belmont*, in part on broad language from *United States v. Curtiss-Wright Export Co.*¹¹¹ that identified the President as the "sole organ of the federal government in the field of

its assets in 1918. *Id.* at 326.

102. *See id.* at 327.

103. *See id.*

104. *Id.* at 327-28.

105. *Id.*

106. *Id.* at 330.

107. *See id.* at 331.

108. *Pink*, 315 U.S. at 210-11.

109. *United States v. Pink*, 32 N.E.2d 552 (N.Y. 1940), *rev'd*, 315 U.S. 203 (1942). *See also* *Moscow Fire Ins. Co. v. Bank of N.Y. & Trust Co.*, 20 N.E.2d 758 (N.Y. 1939).

110. *Pink*, 315 U.S. at 203.

111. 299 U.S. 304 (1936).

international relations.”¹¹² In *Curtiss-Wright*, the Court upheld an executive order prohibiting the sale of arms to certain parties in South America against a claim that the order violated the non-delegation doctrine.¹¹³ The Court’s famous opinion by Justice Sutherland articulated a sweeping, extra-constitutional theory of federal and executive branch supremacy in the area of foreign affairs—a theory that has come under extensive attack by scholars.¹¹⁴ The *Pink* decision also cited to *Belmont* in concluding that in respect to “all international compacts and foreign relations generally,” state lines disappear and the “state of New York does not exist.”¹¹⁵

Despite the sweeping language in *Belmont* and *Pink*, neither authorizes executive branch settlement of claims against private parties. As an initial matter, subsequent Supreme Court opinions have backed away from the broad language in these cases and from the reasoning in *Curtiss-Wright*.¹¹⁶ Moreover, both *Belmont* and *Pink* involved the assignment of claims by the Soviet government to the United States. The claims so assigned were claims against U.S. nationals or the U.S. government, but they were claims at least arguably held by the Soviet Union. Some nominally private litigation was resolved by the Litvinov Assignment, but it was litigation against private parties that had been nationalized by the Soviet Union.¹¹⁷

112. *Pink*, 315 U.S. at 229 (quoting *Curtiss-Wright*, 299 U.S. at 318).

113. *Curtiss-Wright*, 299 U.S. at 320–29.

114. See HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 94 (1990) (describing attacks on *Curtiss-Wright*).

115. *Pink*, 315 U.S. at 234 (quoting *Belmont*, 301 U.S. at 331).

116. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (holding that the President’s foreign affairs power must be grounded either in the Constitution or in an act of Congress); *Dames & Moore*, 453 U.S. at 661–62 (citing *Youngstown Sheet & Tube*, 343 U.S. at 641 (Jackson, J., concurring)).

117. See HENKIN, *supra* note 80, at 221 (describing *Belmont* as involving “an agreement to settle claims by the United States and by U.S. citizens against the Soviet Union”). For example, in 1931 the Ohio Attorney General sued the Northern Insurance Company of Moscow, which had deposited \$100,000 with the Ohio Superintendent of Insurance in 1911. *Bettman v. N. Ins. Co. of Moscow*, 27 Ohio Law Abs. 112 (Ohio Ct. App. 1938), *aff’d*, 16 N.E.2d 472 (Ohio 1938). The suit alleged that the company was defunct and the total on deposit should be distributed among its creditors. *Id.* The company answered on behalf of its former director, alleging that the company had been unlawfully nationalized by the Soviets and claiming the Ohio deposit for the director. Various interested parties intervened, including lawyers in Columbus, Ohio, seeking compensation for \$20,000 worth of legal services for the company, and the U.S. government, which claimed that the total on deposit had been nationalized by the Soviet government along with the rest of the company’s assets, and transferred to the U.S. government via the Litvinov Assignment. *Id.* The trial court ordered that the lawyers be paid, refusing to recognize the confiscatory decree. *Id.* The Court of Appeals reversed, holding that the attorneys were not entitled to the fees, at least not until the ownership of the fund was determined. *Id.* Ultimately, the attorneys did not get paid. STEPHEN M. MILLETT, THE CONSTITUTIONALITY OF EXECUTIVE AGREEMENTS: AN ANALYSIS OF *UNITED STATES v. BELMONT* 223–24 (1990). Ignoring the participation of the Ohio and New York Attorneys General, who did not appear to have their own claims to the fund, the conflict in the case started as one between private parties—the former board members, the Ohio attorneys, and other claimants—but the Litvinov Assignment (the United States argued) made the United States the new owner of the funds. The Litvinov Assignment only applied, however, because the Soviet Union claimed (or could have claimed) that the deposit belonged to it, by virtue of the nationalization decree. It was the Soviet action, not the executive agreement, which turned the conflict into one between a private party and the foreign sovereign. The effect of the Litvinov Assignment on the ultimate disposition of the fund is unclear from the Ohio Supreme Court’s opinion, which merely affirmed the decision of the Court

Almost a half-century later the Supreme Court returned to the question of executive settlement of claims against foreign sovereigns and distanced itself substantially from the reasoning of *Belmont* and *Pink*. In *Dames & Moore* the Court considered (among other issues) the President's authority to suspend claims against Iran and its state-owned corporations that were then pending in U.S. courts.¹¹⁸ An executive order, made pursuant to an executive agreement negotiated in Algiers between Iran and the United States, "suspended" all "claims which may be presented to the U.S.-Iran Claims Tribunal," and provided that such claims "shall have no legal effect in any action now pending in any court of the United States."¹¹⁹

The Court concluded that no statute specifically authorized this part of the Executive Order.¹²⁰ Rather than relying on the President's own authority over foreign affairs, however, as the *Belmont* opinion had, the Court relied instead upon Justice Jackson's concurring opinion in *Youngstown Sheet & Tube*,¹²¹ and backed away from the broad statement of executive power in *Curtiss-Wright*.¹²² Applying Justice Jackson's famous concurrence, Justice Rehnquist reasoned that although the order was not specifically authorized by statute, Congress had delegated broad general authority to the President to act in times of national emergency,¹²³ had long acquiesced in the settlement by the President of claims against foreign sovereigns,¹²⁴ and had "implicitly approved the practice of claim settlement by executive agreement"¹²⁵ by enacting the International Claims Settlement Act.¹²⁶

The *Dames & Moore* case itself involved only claims against the government of Iran (including agencies and state-owned corporations)—not Iranian nationals. The Executive Order in *Dames & Moore* suspended all claims that could be presented to the U.S.-Iran Claims Tribunal.¹²⁷ The claims tribunal, according to the Algiers Accords, had jurisdiction over "claims of nationals of the United States against Iran and claims of nationals of Iran against the United States," and limited counterclaims.¹²⁸ On the face of the agreement, therefore, the claims tribunal had no jurisdiction over claims between U.S.

of Appeals; the case was sent back to trial court to resolve ownership of the fund, with the observation that *Belmont* would be "pertinent" when the court below determines who owns the fund. *Bettman*, 27 Ohio Law Abs. at 112.

118. *Dames & Moore*, 453 U.S. at 675–88.

119. Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (Feb. 24, 1981).

120. *Dames & Moore*, 453 U.S. at 675–77.

121. 343 U.S. at 634.

122. See *Dames & Moore*, 453 U.S. at 661–62.

123. See *id.* at 677 (citing the International Emergency Economic Powers Act and the Hostage Act).

124. See *id.* at 678–82.

125. *Id.* at 680–81.

126. 22 U.S.C. § 1621 (2002).

127. *Dames & Moore*, 453 U.S. at 666 (citing Exec. Order 12,294, 46 Fed. Reg. at 14,111).

128. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, DEP'T ST. BULL., Feb. 1981, at 1, reprinted in 1 Iran-U.S. Cl. Trib. Rep. 9 (Jan. 19, 1981).

and Iranian nationals. Not surprisingly, given this language, the claims tribunal subsequently interpreted its own jurisdiction to exclude cases brought by U.S. nationals against private Iranian companies.¹²⁹

Moreover, the *Dames & Moore* opinion carefully avoided the issue of executive settlement of claims against private defendants, by emphasizing that “[w]e do not decide that the President possesses plenary power to settle claims, even as against foreign governmental entities.”¹³⁰ The Court’s care in referring to foreign governmental entities here was no accident. This phrase was taken directly from a First Circuit case, *Chas. T. Main International, Inc. v. Khuzestan Water & Power Authority*,¹³¹ in which there was considerable disagreement about potential executive authority over private litigation between the concurring and majority opinions. Judge (now Justice) Breyer’s concurrence concluded that the President had specific congressional authorization to nullify the claims in question, and criticized the majority for concluding that the President had inherent authority to do so.¹³² Inherent authority, Breyer reasoned, presented more problems than the majority acknowledged because the defendant was not the government of Iran itself, but instead a state-owned company that resembled, in some senses, a “foreign individual.”¹³³

Once this potential impact of the majority’s opinion on claims against foreign individuals is clear, Breyer went on, “one becomes uncertain about the validity of [the Court’s] broad assertion of inherent Presidential power.”¹³⁴ Noting that the President lacks the power to seize a domestic steel mill without congressional approval,¹³⁵ Breyer asked:

Does he nonetheless have the power to seize an American’s claim against, say, a foreign steel mill, even in the face of Congressional silence or opposition? The answer to this question is not given in the precedents the court cites for they are cases decided prior to evolution of the restrictive view [of foreign sovereign immunity¹³⁶] or involve claims against a foreign government rather than a private citizen or both. One suspects the answer to this question depends upon the nature of the emergency facing the President, whether Congress is actively opposed and whether compensation is granted.¹³⁷

129. See, e.g., *Hollyfield v. Iran*, 23 Iran-U.S. Cl. Trib. Rep. 276 (1989).

130. *Dames v. Moore*, 453 U.S. at 688 (emphasis added).

131. *Chas. T. Main Int’l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800 (1st Cir. 1981). The full sentence in the First Circuit opinion reads: “We need not and do not hold that the executive possesses plenary power to settle claims, even as against foreign governmental entities.” *Id.* at 814.

132. *Chas. T. Main*, 651 F.2d at 816 (Breyer, J., concurring).

133. *Id.* at 817.

134. *Id.*

135. *Id.* (citing *Youngstown Sheet & Tube*, 343 U.S. at 579).

136. See *infra* note 260.

137. *Chas. T. Main*, 651 F.2d at 817 (Breyer, J., concurring).

Breyer's concurrence, in other words, raised the very question to which this Article is directed.¹³⁸ The two other Judges on the First Circuit panel rejected Breyer's argument that the majority opinion had any implications outside the context of litigation against foreign entities, but accepted the broader point that suits against foreign sovereigns stand on different footing from those against private parties, and that the power to settle the former ought not be conflated with the power to settle the latter.¹³⁹

Like *Belmont* and *Pink*, the *Dames & Moore* litigation left unresolved the question of plenary or sole executive branch authority over litigation against private parties, and also highlighted the fluidity between governments and nationals, at least in the context of government-owned corporations. *Dames & Moore* also, however, provided a framework for analyzing executive authority that looks both at congressional intent and the history of the practice in question. The next Part applies this analysis and considers whether the historical practice of claims settlement by the Executive provides authority over claims like those at issue in the World War II-related cases. However, the claims settlement history to which *Dames & Moore* cites is, as Justice Breyer commented, a history of claims settlement against foreign sovereigns, and so too are the other indicia of congressional acquiescence to which Justice Rehnquist referred.

B. Historical Practice

As Part I detailed, the text of the Constitution provides no clear authority for the executive branch to nullify private claims through a sole executive agreement; in fact, the Supremacy Clause suggests that only treaties, and not executive agreements, have this power. Current Supreme Court case law holds that the Executive does have (at least in some situations) the power to nullify claims against foreign sovereigns, but the Court has declined to address whether such power extends to claims against private parties. *Dames & Moore*, however, directs the courts to consider the history of the practice in question, and Congress's possible acquiescence in any such practice, as partial measures of executive authority over domestic litigation through sole executive agreements.¹⁴⁰ This Part considers this history, and concludes that there is neither a long-standing history of executive branch settlement of claims against private parties, nor any other indicia of Congressional ap-

138. This Article does not discuss the Takings Clause, a topic beyond its scope. See David J. Bederman & John W. Borchert, *International Decisions, Abraham-Youri v. United States*, 139 F.3d 1462, 92 AM. J. INT'L L. 533 (1998) (analyzing a recent Takings Clause challenge to the U.S. government's espousal of private claims of less than \$250,000 before the Iran-U.S. Claims Tribunal, pursuant to the claims settlement agreement with Iran).

139. The majority reasoned that suits against government corporations are "closely akin" to suits against governments themselves, and that it viewed "neither [its] holding nor [its] analysis as having any necessary implications for the broad class of suits against foreign individuals and private commercial entities discussed by the concurring opinion." *Chas. T. Main*, 651 F.2d at 814.

140. See *supra* text accompanying notes 123-126.

proval of such practice. In fact, recent actions by Congress suggest that it supports resolution of claims such as those at issue here by the courts, rather than through executive agreement.¹⁴¹ The executive branch lacks any general authority to terminate ongoing private litigation in the foreign policy interests of the United States, based either on constitutional text or historical practice.

1. *Espousal and State Responsibility*

Historically, claims settlement by the executive branch has been closely tied to the doctrines of espousal and state responsibility. An individual harmed by a foreign government in violation of international law generally has no capacity to bring a claim, for individuals are not considered the “subjects” of international law.¹⁴² Instead, the injury to the individual is considered injury to his or her government, which would then have a claim under international law against the injuring state.¹⁴³ In so doing, the “injured” state espouses the claim of its national—in other words, it adopts the claim and presses diplomatically for compensation for the injury.¹⁴⁴ States have claims based only on the injuries of *their* nationals.¹⁴⁵ In the United States, the executive branch decides whether, and under what conditions, to press claims of injury to its nationals with other nations. It also decides whether to compromise or abandon such claims, even over the objection of the injured national.¹⁴⁶ Injury to an alien violates international law only if a foreign *state* is responsible for that injury.¹⁴⁷ International law has developed complicated rules of “state responsibility” for injury to aliens, some of which provide that states may be responsible for injuries inflicted by private parties if they did not adequately protect aliens,¹⁴⁸ or failed to provide aliens access to courts or judicial remedies.¹⁴⁹ A corresponding prerequisite for bringing a

141. This Part may miss some such agreements; many were likely preserved, if at all, only in foreign diplomatic offices. Some agreements, even in U.S. State Department archives, may not have made their way into electronic databases and/or collections of treaties and executive agreements. For example, a 1990 claims settlement agreement between the United States and Iran is documented in the Iran-U.S. Claims Tribunal Reporter but not on Westlaw or Lexis. See 25 Iran-U.S. Cl. Trib. Rep. 327 (1990).

142. See EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD; OR THE LAW OF INTERNATIONAL CLAIMS* 16–18 (1915); 1 RICHARD B. LILICH & BURNS H. WESTON, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS* 1 (1975). See also Panevezys-Saldutiskis Railway Case (Est. v. Lith.), 1939 P.C.I.J. (ser. A/B) No. 76 (Feb. 28) (describing diplomatic protection in terms of a state asserting its own right to ensure in the person of its nationals respect for the rule of international law).

143. RESTATEMENT, *supra* note 76, § 713 cmt. a. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 482–96 (5th ed. 1998).

144. See RESTATEMENT, *supra* note 76, § 713 cmt. a; 8 MARJORIE M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 1216–33 (1967).

145. See BROWNLIE, *supra* note 143, at 482.

146. See RESTATEMENT, *supra* note 76, § 713 cmt. a; 8 WHITEMAN, *supra* note 144, at 1216–33.

147. See RESTATEMENT, *supra* note 76, §§ 207, 711 cmt. a; MALCOLM SHAW, *INTERNATIONAL LAW* 542–45 (4th ed. 1997).

148. See BORCHARD, *supra* note 142, at 217–26.

149. See *id.* at 283–84.

claim of state responsibility for injury to an alien is the exhaustion of local remedies.¹⁵⁰

Diplomatic claims presented by the United States to foreign governments are, accordingly, claims against the foreign governments themselves, consistent with the international law upon which such claims are based.¹⁵¹ Thus historically, diplomatic settlement of such claims was unlikely to affect any private claims because international law required that the private claims be exhausted before the diplomatic claims were lodged, and because domestic claims against foreign sovereigns for injuries that occurred abroad in any event were likely barred for jurisdictional reasons, as well as by the doctrine of foreign sovereign immunity.¹⁵²

2. *The Wilmington Packet*

Settlement of claims concerning *The Wilmington Packet* illustrates the traditional doctrines of espousal and state responsibility. In 1799, William Vans Murray, the U.S. diplomatic representative to the Netherlands (then called the Batavian Republic), negotiated an agreement that settled the claim of an American citizen against the Netherlands.¹⁵³ This was the nation's first sole executive agreement.¹⁵⁴

The claim involved an American schooner, *The Wilmington Packet*, that had been seized by a Dutch privateer in 1793 and taken to the island of St. Martin.¹⁵⁵ Once there, a Dutch prize tribunal condemned the cargo as a lawful prize; the *Packet* then sailed home to Charleston.¹⁵⁶ An American firm with an interest in the freight pressured the State Department to seek compensation from the Dutch government on the grounds that the cargo was improperly condemned in violation of a treaty between the Netherlands and the United States.¹⁵⁷ In the 1799 agreement, the Dutch government agreed to pay 20,000 florins in exchange for an "acquittance" from the United States "in full of all claims."¹⁵⁸ The Dutch blamed the delay in settlement on the

150. *Id.* at 332. See BROWNLIE, *supra* note 143, at 496–506.

151. 8 WHITEMAN, *supra* note 144, at 1217.

152. See generally SHAW, *supra* note 147, at 453–540 (discussing jurisdictional limitations and immunities).

153. AGREEMENT WITH NETHERLANDS (BATAVIAN REPUBLIC), U.S.-Neth., Dec. 7–12, 1799, reprinted in 5 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 1075–78 (Hunter Miller ed., 1931–1948) [hereinafter MILLER].

154. An earlier postal agreement was the first congressional-executive agreement.

155. See Letter from W.V. Murray to Batavian Minister of Foreign Relations, Dec. 26, 1798, reprinted in 5 MILLER, *supra* note 153, at 1085.

156. See *id.*

157. See *id.* at 1081.

158. Letter from W.V. Murray to U.S. Secretary of State, Dec. 23, 1799, reprinted in 5 MILLER, *supra* note 153, at 1099. The release signed by Murray declared, in part, that

for this sum in the name of and for the captured or those qualify'd to desist from all claim right or demand of all actions and pretensions on account of suffered damages & loss of gain of whatever nature which the captured might pretend under pretence of the capture. All which rights and claims

refusal of the interested Americans to pursue an appeal in the Dutch courts from the decision of the St. Martin prize court.¹⁵⁹ Thus, any rights to an appeal, or any claim against the privateer itself, were relinquished through this sole executive agreement.

Even this first use of sole executive power to settle claims illustrates the interplay between private and government actors. The Americans with an interest in the freight complained that the actions of a privateer¹⁶⁰—a private ship commissioned by the Dutch government to take prizes—together with the condemnation of the cargo by the St. Martin prize court, violated Dutch treaty obligations. Nothing in the correspondence suggests, however, that the agreement nullified a claim cognizable in a U.S. court (although it may well have cut off rights against the privateer cognizable in Dutch courts); indeed, it is difficult to imagine how a U.S. court would have either personal jurisdiction over the privateer or subject matter jurisdiction over the lawfulness of the prize.¹⁶¹

3. *Executive Claims Settlement in the Nineteenth Century*

In the first part of the nineteenth century, executive claims settlement was relatively rare, and the claims settled were similar to those involved in the *Wilmington Packet*. Indeed, the next executive claims settlement agreement came over a quarter-century later, in 1825, and settled claims for vessels, cargo, loss of profit, damages, and injuries to the crew arising out of the capture of four American ships by Venezuelan brigs of war between 1817 and 1821.¹⁶²

Executive claims settlements became more frequent after 1825; 24 were concluded between 1825 and 1850.¹⁶³ All resolved relatively discrete mari-

by these, for the said sum, is renounced to the above mentioned Committee without reserve, with the promise to validate this renunciation in all times.

Letter from W.V. Murray to the Committee of Affairs on the Colonies of the Batavian Republic in America and the Coast of Guinea, Jan. 19, 1800, *reprinted in* 5 MILLER, *supra* note 153, at 1078.

159. Letter from M. Van der Goes to W.V. Murray, Nov. 18, 1799, *reprinted in* 5 MILLER, *supra* note 153, at 1097.

160. Privateers were licensed by a country at war "to capture vessels of an enemy country" and "would obtain title to the seized property, ship, and cargo, through judicial condemnation carried out by an admiralty court near the locale of the capture." William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL HIST. 117, 124 (1993) (discussing the national security implications of this licensing system).

161. Prize courts have jurisdiction only over prizes taken by their own privateers; thus, only a Dutch prize court would have had jurisdiction to decide whether the prize was lawful. *See* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1333–36 (1996).

162. CONVENTION FOR ADJUSTING CERTAIN CLAIMS, U.S.-Colom., Mar. 16, 1825, *reprinted in* 3 MILLER, *supra* note 153, at 195–99.

163. *See* CONVENTION FOR THE SETTLEMENT OF THE CASE OF THE BRIG "MORRIS," U.S.-Ecuador, Feb. 9, 1850, *reprinted in* 5 MILLER, *supra* note 153, at 665–69; CONVENTION FOR THE SETTLEMENT OF THE CLAIM ARISING OUT OF THE SEIZURE AND DETENTION OF THE BRIG "MOUNT VERNON," U.S.-Venez., July 7, 1849, *reprinted in* 5 MILLER, *supra* note 153, at 587–90; CONVENTION FOR THE FINAL SETTLEMENT OF THE CASES OF THE BRIG "JOSEPHINE" AND THE SCHOONER "RANGER," U.S.-Ecuador, June 15, 1849, *reprinted in* 5 MILLER, *supra* note 153, at 581–85; CONVENTION FOR THE SETTLEMENT

time disputes,¹⁶⁴ none appear to have terminated claims cognizable in U.S. courts, and in all cases the conduct complained of was conduct of either the government itself or parties closely linked to the government (particularly privateers).¹⁶⁵ Of the 31 executive claims settlement agreements concluded

OF THE CASE OF THE BRIG "NATIVE," U.S.-New Gran., Apr. 25, 1848, *reprinted in* 5 MILLER, *supra* note 153, at 437-43; CONVENTION FOR THE SETTLEMENT OF THE CASE OF THE BRIG "SARAH WILSON," U.S.-Venez., Apr. 12, 1848, *reprinted in* 5 MILLER, *supra* note 153, at 429-35; CONVENTION FOR THE FINAL SETTLEMENT OF THE CASE OF THE BRIG "JOSEPHINE," U.S.-Venez., Nov. 16, 1846, *reprinted in* 5 MILLER, *supra* note 153, at 109-13; CONVENTION FOR THE SETTLEMENT OF THE CASE OF THE BRIG "NATIVE," U.S.-Venez., Nov. 16, 1846, *reprinted in* 5 MILLER, *supra* note 153, at 103-08; CONVENTION FOR THE FINAL SETTLEMENT OF THE CASE OF THE BRIG "JOSEPHINE," U.S.-New Gran., May 16, 1846, *in* 4 MILLER, *supra* note 153, at 813-15 (Hunter Miller ed., 1934); SETTLEMENT OF CLAIMS, U.S.-Gr. Brit., Nov. 10-26, 1845, *reprinted in* 4 MILLER, *supra* note 153, at 779-90; CONVENTION FOR THE SETTLEMENT OF CLAIMS ARISING OUT OF THE SEIZURE OF THE SCHOONER "YANKEE," U.S.-New Gran., Mar. 29, 1845, *reprinted in* 4 MILLER, *supra* note 153, at 741-49; CONVENTION FOR THE SETTLEMENT OF THE CASE OF THE BRIG "MORRIS," U.S.-New Gran., Nov. 5, 1844, *reprinted in* 4 MILLER, *supra* note 153, at 663-69; CONVENTION FOR THE SETTLEMENT OF THE CLAIM ARISING OUT OF THE LOSS OF PART OF THE CARGO OF THE SCHOONER "HENRIETTA," U.S.-New Gran., Apr. 22, 1844, *reprinted in* 4 MILLER, *supra* note 153, at 555-58; ARRANGEMENT FOR THE SETTLEMENT OF THE CASE OF THE BRIG "MORRIS," U.S.-Venez., Feb. 26-Mar. 1, 1844, *reprinted in* 4 MILLER, *supra* note 153, at 523-28; CONVENTION FOR THE ADJUSTMENT OF THE CLAIM FOR THE DETENTION AND SEIZURE OF THE SCHOONER "JOHN S. BRYAN," U.S.-Braz., June 12, 1843, *reprinted in* 4 MILLER, *supra* note 153, at 507-14; CONVENTION FOR THE SETTLEMENT OF CLAIMS ARISING OUT OF THE CONFISCATION OF PART OF THE CARGO OF THE SCHOONER "BY CHANCE," U.S.-New Gran., Feb. 9, 1843, *reprinted in* 4 MILLER, *supra* note 153, at 499-506; ORAL AGREEMENT FOR THE SETTLEMENT OF THE CASE OF THE BRIG "WARRIOR," U.S.-Chile, Dec. 10, 1840, *reprinted in* 4 MILLER, *supra* note 153, at 325-28; ORAL AGREEMENT FOR THE SETTLEMENT OF THE FIRST CASE OF THE BRIG "MACEDONIAN," U.S.-Chile, July 7, 1840, *reprinted in* 4 MILLER, *supra* note 153, at 287-93; SETTLEMENT OF THE CLAIM FOR THE SHIP "MARY" AND HER CARGO, U.S.-Neth., Mar. 25, 1839, *reprinted in* 4 MILLER, *supra* note 153, at 179-87; AGREEMENT FOR THE SETTLEMENT OF CLAIMS, U.S.-Port., Jan. 19, 1832, *reprinted in* 3 MILLER, *supra* note 153, at 653-69; CONVENTION FOR ADJUSTING CERTAIN CLAIMS, U.S.-Colom., Nov. 25, 1829, *reprinted in* 3 MILLER, *supra* note 153, at 523-30; CONFIRMATION OF THIRTEEN CLAIMS AGREEMENTS AND OF AN AGREEMENT REGARDING THE RATE OF EXCHANGE, U.S.-Braz., June 15, 1829, *reprinted in* 3 MILLER, *supra* note 153, at 485-505; SETTLEMENT OF THE CLAIMS FOR THE BRIG "HECTOR" AND THE SHIP "COMMERCE," U.S.-Russ., Mar. 17, 1828, *reprinted in* 3 MILLER, *supra* note 153, at 421-25; EXCHANGE OF NOTES FOR THE SETTLEMENT OF THE CLAIM IN THE CASE OF THE BRIG "PEARL," U.S.-Russ., Apr. 19-22, 1825, *reprinted in* 3 MILLER, *supra* note 153, at 201-07. Although 24 separate agreements were negotiated, they do not represent claims arising out of 24 separate incidents. For example, five of the agreements deal with claims related to the Brig *Josephine*, four deal with claims related to the Brig *Morris*, and two deal with claims related to the Brig *Native*.

164. There are some arguable exceptions to this. See SETTLEMENT OF CLAIMS, U.S.-Gr. Brit., Nov. 10-26, 1845, *reprinted in* 4 MILLER, *supra* note 153, at 779-90 (settling a long-standing tariff dispute under a treaty between the two countries); CONFIRMATION OF THIRTEEN CLAIMS AGREEMENTS AND OF AN AGREEMENT REGARDING THE RATE OF EXCHANGE, U.S.-Braz., June 15, 1829, *reprinted in* 3 MILLER, *supra* note 153, at 485-505 (settling a number of disputes).

165. Some claims during this period were resolved by treaties. See, e.g., CONVENTION FOR THE SETTLEMENT OF CLAIMS, U.S.-Ecuador, Nov. 25, 1862, *reprinted in* 8 MILLER, *supra* note 153, at 869-82 (resolving claims of American citizens against the government of Ecuador); CONVENTION FOR THE SETTLEMENT OF CLAIMS, U.S.-New Gran., Sept. 10, 1857, *reprinted in* 7 MILLER, *supra* note 153, at 661-705 (resolving claims of American citizens for property damage arising out of riots in Panama); GADSDEN TREATY, U.S.-Mex., Dec. 30, 1853, *reprinted in* 6 MILLER, *supra* note 153, at 293-437 (resolving claims arising out of war); TREATY BETWEEN THE UNITED STATES AND GREAT BRITAIN, U.S.-Gr. Brit., Feb. 8, 1853, *reprinted in* 6 MILLER, *supra* note 153, at 111-67 (resolving claims against the governments of both nations); CONVENTION FOR THE SETTLEMENT OF CLAIMS, U.S.-Braz., Jan. 27, 1849, *reprinted in* 5 MILLER, *supra* note 153, at 125-31; TREATY BETWEEN THE UNITED STATES AND PERU, U.S.-Peru, Mar. 17, 1841, *reprinted in* 4 MILLER, *supra* note 153, at 329-48 (resolving confiscation of United States ships and

between 1851 and 1863,¹⁶⁶ eight involved the resolution of claims by foreign governments against the United States for international maritime inci-

their cargo); TREATY BETWEEN THE UNITED STATES AND THE REPUBLIC OF TEXAS, U.S.-Rep. of Tex., Apr. 11, 1838, *reprinted in* 4 MILLER, *supra* note 153, at 125-31 (resolving claims arising from the Texan seizure of the Brigs *Pocket* and *Durango*); TREATY BETWEEN THE UNITED STATES AND DENMARK, U.S.-Den, Mar. 28, 1830, *reprinted in* 3 MILLER, *supra* note 153, at 531-40 (resolving claims against the governments of both nations); TREATY OF AMITY, COMMERCE, AND NAVIGATION, U.S.-Gr. Brit., Nov. 19, 1794, *reprinted in* 2 MILLER, *supra* note 153, at 245-74 (resolving claims arising out of war).

166. SETTLEMENT OF THE CASE OF THE BRITISH BARK "SYMMETRY," U.S.-Gr. Brit., Apr. 3-July 10, 1863, *reprinted in* 8 MILLER, *supra* note 153, at 933-38; SETTLEMENT OF THE CASE OF THE FRENCH STEAMER "TAGE," U.S.-Fr., Dec. 30, 1862-Feb. 18, 1863, *reprinted in* 8 MILLER, *supra* note 153, at 907-13; SETTLEMENT OF THE CASE OF THE BRITISH SCHOONER "ELLEN," U.S.-Gr. Brit., Dec. 1, 1862-June 20, 1863, *reprinted in* 8 MILLER, *supra* note 153, at 883-88; SETTLEMENT OF THE CASE OF THE NORWEGIAN BARK "ADMIRAL PETER TORDENSKJOLD," U.S.-Nor., June 11-12, 1862, *reprinted in* 8 MILLER, *supra* note 153, at 821-32; AGREEMENT FOR THE SUBMISSION TO ARBITRATION OF THE QUESTION OF THE AMOUNT OF INDEMNITY IN THE CASE OF THE DANISH BARK "JURGEN LORENTZEN," U.S.-Den., Feb. 19, 1862, *reprinted in* 8 MILLER, *supra* note 153, at 707-16; AGREEMENT FOR THE SUBMISSION TO ARBITRATION OF THE QUESTION OF LIABILITY IN THE CASE OF THE FRENCH BRIG "JULES ET MARIE," U.S.-Fr., Jan. 17-24, 1862, *reprinted in* 8 MILLER, *supra* note 153, at 691-705; AGREEMENT FOR THE SUBMISSION TO ARBITRATION OF THE QUESTION OF THE AMOUNT OF INDEMNITY IN THE CASE OF THE SPANISH BARK "PROVIDENCIA," U.S.-Spain, Dec. 19-20, 1861, *reprinted in* 8 MILLER, *supra* note 153, at 681-89; SETTLEMENT OF THE CASE OF HENRY C.J. HEUSKEN, U.S.-Japan, Nov. 26, 1861, *reprinted in* 8 MILLER, *supra* note 153, at 635-45; SETTLEMENT OF THE CASE OF THE BRITISH SHIP "PERTSHIRE," U.S.-Gr. Brit., Oct. 11 and 24, 1861, *reprinted in* 8 MILLER, *supra* note 153, at 607-14; SETTLEMENT OF THE CLAIM OF JOHN N. COBB, U.S.-Chile, Mar. 9-14, 1861, *reprinted in* 8 MILLER, *supra* note 153, at 585-89; CONVENTION FOR THE SETTLEMENT OF THE CASE OF GEORGE W. JOHNSTON, U.S.-Venez., Oct. 18, 1860, *reprinted in* 8 MILLER, *supra* note 153, at 577-83; SETTLEMENT OF THE CASE OF WALTER DICKSON, U.S.-Turk., July 18, 1860, *reprinted in* 8 MILLER, *supra* note 153, at 519-32; SETTLEMENT OF THE CLAIMS OF HEMENWAY & CO. AND ALSOP & CO., U.S.-Chile, Jan. 16-28, 1860, *reprinted in* 8 MILLER, *supra* note 153, at 449-57; SETTLEMENT OF THE CASE OF EDWARD NEWTON PERKINS, U.S.-Papal States, June 24-Aug. 2, 1859, *reprinted in* 8 MILLER, *supra* note 153, at 267-80; SETTLEMENT OF THE CASE OF THE AMERICAN BARK "MERMAID," U.S.-China, Oct. 26-Nov. 1, 1858, *reprinted in* 8 MILLER, *supra* note 153, at 13-20; CONVENTION FOR THE SETTLEMENT OF THE CASE OF THE AMERICAN WHALING SHIP "FRANKLIN," U.S.-Chile, Sept. 10, 1858, *reprinted in* 8 MILLER, *supra* note 153, at 3-11; CONVENTION FOR THE SETTLEMENT OF THE CASE OF THE BRIG "HORATIO," U.S.-Venez., Feb. 27, 1858, *reprinted in* 7 MILLER, *supra* note 153, at 727-32; AGREEMENT FOR A MIXED COMMISSION IN THE CASE OF THE WHALING SHIP "GEORGE HOWLAND," U.S.-Ecuador, Nov. 13, 1857, *reprinted in* 7 MILLER, *supra* note 153, at 707-12; SETTLEMENT OF THE CASE OF THE BRIG "ESMERALDA," U.S.-Fr., June 10-Dec. 26, 1857, *reprinted in* 7 MILLER, *supra* note 153, at 591-94; AGREEMENT FOR THE SETTLEMENT OF THE CASE OF JOHN ADAMS, U.S.-Peru, June 4, 1857, *reprinted in* 7 MILLER, *supra* note 153, at 587-90; SETTLEMENT OF THE CASE OF AMERICAN SHIPMASTERS AT THE CHINCHA ISLANDS, U.S.-Peru, Apr. 8-9, 1857, *reprinted in* 7 MILLER, *supra* note 153, at 503-18; SETTLEMENT OF THE CLAIM OF STEPHEN H. WEEMS, U.S.-Guat., Oct. 26-29, 1855, *reprinted in* 7 MILLER, *supra* note 153, at 325-28; ENGAGEMENT TO PAY AMERICAN CLAIMS, U.S.-Fiji, Oct. 23, 1855, *reprinted in* 7 MILLER, *supra* note 153, at 283-324; ADJUSTMENT OF THE DILLON CASE, U.S.-Fr., Aug. 3-7, 1855, *id.* at 147-222; SETTLEMENT OF THE CLAIM OF JOHN B. PHILLIPS AND GEORGE M. EICHELBERGER, U.S.-Switz., Mar. 9-Apr. 12, 1855, *reprinted in* 7 MILLER, *supra* note 153, at 113-20; SETTLEMENT OF THE CASE OF THE STEAMER "BLACK WARRIOR," U.S.-Spain, Feb. 21-June 28, 1855, *reprinted in* 7 MILLER, *supra* note 153, at 31-111; CONVENTION FOR THE PAYMENT OF CLAIMS FROM THE VENEZUELAN "LEY DE ESPERA," U.S.-Venez., June 1, 1853, *reprinted in* 6 MILLER, *supra* note 153, at 197-209; CONVENTION FOR THE SETTLEMENT OF THE CASE OF THE BRIG "NATIVE," U.S.-Ecuador, Feb. 5, 1853, *reprinted in* 6 MILLER, *supra* note 153, at 105-09; AGREEMENT FOR THE SETTLEMENT OF THE CLAIM OF SAMUEL FRANKLIN TRACY, U.S.-Peru, Aug. 6, 1852, *reprinted in* 6 MILLER, *supra* note 153, at 59-73; SETTLEMENT OF THE CLAIM OF ZIMMERMANN, FRAZIER & CO., U.S.-Uru., June 23-24, 1852, *reprinted in* 6 MILLER, *supra* note 153, at 45-58; CONVENTION FOR THE SETTLEMENT OF THE CASES OF THE SCHOONER "ECONOMY," THE SCHOONER "BEN ALAM," AND THE VESSELS "SAN JOSE," "CARLOTA," AND "GERTRUDIS," U.S.-Venez., May 1, 1852, *reprinted in* 5 MILLER, *supra* note 153, at 1063-73.

dents related to the civil war.¹⁶⁷ In the first five of these cases, Congress appropriated the funds to pay the claims;¹⁶⁸ but in the last three cases the money came directly out of the budget of the Navy Department.¹⁶⁹ Seventeen of the remaining claims dealt with the damage to or seizure of property abroad or the false imprisonment of U.S. citizens.¹⁷⁰ Others include settlement of a diplomatic spat resulting from a U.S. subpoena served on a French

167. SETTLEMENT OF THE CASE OF THE BRITISH BARK "SYMMETRY," *supra* note 166; SETTLEMENT OF THE CASE OF THE FRENCH STEAMER "TAGE," *supra* note 166; SETTLEMENT OF THE CASE OF THE BRITISH SCHOONER "ELLEN," *supra* note 166; SETTLEMENT OF THE CASE OF THE NORWEGIAN BARK "ADMIRAL PETER TORDENSKJOLD," *supra* note 166; AGREEMENT FOR THE SUBMISSION TO ARBITRATION OF THE QUESTION OF LIABILITY IN THE CASE OF THE FRENCH BRIG "JULES ET MARIE," *supra* note 166; AGREEMENT FOR THE SUBMISSION TO ARBITRATION OF THE QUESTION OF THE AMOUNT OF INDEMNITY IN THE CASE OF THE SPANISH BARK "PROVIDENCIA," *supra* note 166; SETTLEMENT OF THE CASE OF THE BRITISH SHIP "PERTSHIRE," *supra* note 166.

168. With congressional approval, these agreements could be classified as congressional-executive, rather than sole executive agreements. *See, e.g.,* SETTLEMENT OF THE CASE OF THE NORWEGIAN BARK "ADMIRAL PETER TORDENSKJOLD," *supra* note 166; AGREEMENT FOR THE SUBMISSION TO ARBITRATION OF THE QUESTION OF THE AMOUNT OF INDEMNITY IN THE CASE OF THE DANISH BARK "JURGEN LORENTZEN," *supra* note 166; AGREEMENT FOR THE SUBMISSION TO ARBITRATION OF THE QUESTION OF LIABILITY IN THE CASE OF THE FRENCH BRIG "JULES ET MARIE," *supra* note 166; AGREEMENT FOR THE SUBMISSION TO ARBITRATION OF THE QUESTION OF THE AMOUNT OF INDEMNITY IN THE CASE OF THE SPANISH BARK "PROVIDENCIA," *supra* note 166; SETTLEMENT OF THE CASE OF THE BRITISH SHIP "PERTSHIRE," *supra* note 166.

169. SETTLEMENT OF THE CASE OF THE BRITISH BARK "SYMMETRY," *supra* note 166; SETTLEMENT OF THE CASE OF THE FRENCH STEAMER "TAGE," *supra* note 166; SETTLEMENT OF THE CASE OF THE BRITISH SCHOONER "ELLEN," *supra* note 166. It is unclear why, in these cases, money was not sought directly from Congress. Neither the amount of money involved, nor the other country involved can fully explain the difference. In the case of the *Pertshire*, for example, Congress appropriated the \$1,000, *see* SETTLEMENT OF THE CASE OF THE BRITISH SHIP "PERTSHIRE," *supra* note 166, at 614, but in the case of the British Schooner *Ellen*, the Navy Department paid the \$4,123.50 directly, *see* SETTLEMENT OF THE CASE OF THE BRITISH SCHOONER "ELLEN," *supra* note 166, at 888. With reference to the *Providencia* claim the Secretary of the Navy wrote that the Navy had no funds under its control from which the award could be made. AGREEMENT FOR THE SUBMISSION TO ARBITRATION OF THE QUESTION OF THE AMOUNT OF INDEMNITY IN THE CASE OF THE SPANISH BARK "PROVIDENCIA," *supra* note 166, at 688. Perhaps such a fund was established because the early agreements (until the *Ellen* in December 1862) were paid by funds sought from Congress and the later agreements were paid directly out of the Navy budget.

170. CONVENTION FOR THE SETTLEMENT OF THE CASE OF GEORGE W. JOHNSTON, *supra* note 166; SETTLEMENT OF THE CASE OF WALTER DICKSON, *supra* note 166; SETTLEMENT OF THE CASE OF EDWARD NEWTON PERKINS, *supra* note 166; CONVENTION FOR THE SETTLEMENT OF THE CASE OF THE AMERICAN WHALING SHIP "FRANKLIN," *supra* note 166; CONVENTION OF THE SETTLEMENT OF THE BRIG "HORATIO," *supra* note 166; AGREEMENT FOR A MIXED COMMISSION IN THE CASE OF THE WHALING SHIP "GEORGE HOWLAND," *supra* note 166; AGREEMENT FOR THE SETTLEMENT OF THE CASE OF JOHN ADAMS, *supra* note 166; SETTLEMENT OF THE CASE OF AMERICAN SHIPMASTERS AT THE CHINCHA ISLANDS, *supra* note 166; SETTLEMENT OF THE CLAIMS OF STEPHEN H. WEEMS, *supra* note 166; AGREEMENT TO PAY AMERICAN CLAIMS, WITH OTHER PROMISES, *supra* note 166; SETTLEMENT OF THE CLAIM OF JOHN B. PHILLIPS AND GEORGE M. EICHELBERGER, *supra* note 166; SETTLEMENT OF THE CASE OF THE STEAMER "BLACK WARRIOR," *supra* note 166; CONVENTION FOR THE PAYMENT OF CLAIMS ARISING FROM THE VENEZUELAN "LEY DE ESPERA," *supra* note 166; CONVENTION FOR THE SETTLEMENT OF THE CASE OF THE BRIG "NATIVE," *supra* note 166; AGREEMENT FOR THE SETTLEMENT OF THE CLAIM OF SAMUEL FRANKLIN TRACY, *supra* note 166; SETTLEMENT OF THE CLAIM OF ZIMMERMANN, FRAZIER & CO., *supra* note 166; CONVENTION FOR THE SETTLEMENT OF THE CASES OF THE SCHOONER "ECONOMY" AND THE SCHOONER "BEN ALAM" AND THE VESSELS "SAN JOSE," "CARLOTA," AND "GERTRUDIS," *supra* note 166.

consul in the United States,¹⁷¹ compensation to the family of an American diplomat assassinated in Japan,¹⁷² restitution for excess customs duties charged to American merchants in Chile,¹⁷³ and payments for damages to ships caused by accidental collisions at sea.¹⁷⁴

Between 1863 and 1918 at least five claims were directly resolved by executive agreement. Each claim involved a U.S. merchant or merchant vessel claiming damage or loss of property against a foreign government.¹⁷⁵ During this same time, however, the President entered into more than twenty sole executive agreements that referred claims to arbitration commissions.¹⁷⁶

171. ADJUSTMENT OF THE DILLON CASE, *supra* note 166.

172. SETTLEMENT OF THE CASE OF HENRY C.J. HEUSKEN, *supra* note 166.

173. SETTLEMENT OF THE CLAIM OF JOHN N. COBB, *supra* note 166; SETTLEMENT OF THE CLAIMS OF HEMENWAY AND CO., AND ALSOP AND CO., *supra* note 166.

174. SETTLEMENT OF THE CASE OF THE AMERICAN BARK "MERMAID," *supra* note 166; SETTLEMENT OF THE CASE OF THE BRIG "ESMERALDA," *supra* note 166.

175. CLAIMS: THE CASE OF A.F. JAURETT, U.S.-Venez., Feb. 13, 1909, 12 Bevans 1104; CLAIMS: THE CASES OF CHARLES W. RENTON AND JACOB BAIZ, U.S.-Hond., Nov. 25, 1904, 8 Bevans 888-89; CLAIMS: PAYMENTS OF DUTIES TO REBEL CHIEFS, U.S.-Nicar., Apr. 29, 1899, 10 Bevans 351-52; ADJUSTMENT OF THE CLAIM OF PATRICK SHIELDS, U.S.-Chile, May 24, 1897, *reprinted in* 1 TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS, 1776-1909, at 190 (William H. Malloy ed., 1910) [hereinafter MALLOY]; AGREEMENT TO RESOLVE CLAIMS IN THE CASE OF THE STEAMER "VIRGINIUS," U.S.-Spain, Feb. 27, 1875, *reprinted in* 2 MALLOY, *supra*, at 1664-65.

176. AGREEMENT FOR SETTLEMENT OF CERTAIN CLAIMS OF CITIZENS OF THE UNITED STATES ON ACCOUNT OF WRONGS AND INJURIES COMMITTED BY AUTHORITIES OF SPAIN IN THE ISLAND OF CUBA, U.S.-Spain, Feb. 11-12, 1871, *reprinted in* 2 MALLOY, *supra* note 175, at 1661-64; PROTOCOL OF AN AGREEMENT FOR SUBMISSION TO AN ARBITRATOR OF THE CLAIMS OF ANTONIO PELLETIER AND A.H. LAZARE AGAINST HAYTI, U.S.-Haiti, May 28, 1884, *reprinted in* 1 MALLOY, *supra* note 175, at 932-34; PROTOCOL OF AN AGREEMENT FOR SUBMISSION TO AND ARBITRATOR OF THE CLAIM OF CHARLES ADRIEN VAN BOKKELEN, U.S.-Haiti, May 24, 1888, *reprinted in* 1 MALLOY, *supra* note 175, at 935-36; PROTOCOL BETWEEN THE UNITED STATES, GREAT BRITAIN, AND PORTUGAL IN REFERENCE TO ARBITRATION CLAIMS AGAINST PORTUGAL, June 13, 1891, *reprinted in* 2 MALLOY, *supra* note 175, at 1460-62; PROTOCOL CONCERNING THE CLAIMS OF OBERLANDER AND MESSENGER, U.S.-Mex., Mar. 2, 1897, *reprinted in* 1 MALLOY, *supra* note 175, at 1180-81; ARBITRATION OF "OZAMA BRIDGE" CLAIM, U.S.-Dom. Rep., Mar. 5-8, 1898, 7 Bevans 183; PROTOCOL OF AN AGREEMENT FOR THE ARBITRATION OF THE AMOUNT OF DAMAGES TO BE AWARDED IN FAVOR OF VICTOR H. MACCORD, U.S.-Peru, May 17, 1898, *reprinted in* 2 MALLOY, *supra* note 175, at 1443-44; SUPPLEMENTAL PROTOCOL: CLAIM OF VICTOR H. MACCORD, U.S.-Peru, June 6, 1898, *reprinted in* 2 MALLOY, *supra* note 175, 1444-45; PROTOCOL OF AN AGREEMENT FOR THE ARBITRATION OF THE QUESTION OF THE LIABILITY AND AMOUNT OF DAMAGES TO BE AWARDED JOHN D. METZGER AND CO., U.S.-Haiti, Oct. 18, 1899, *reprinted in* 1 MALLOY, *supra* note 175, at 936-38; PROTOCOL OF AN AGREEMENT FOR THE ARBITRATION OF THE AMOUNT OF THE CLAIM OF ROBERT H. MAY AGAINST GUATEMALA AND THE CLAIM OF GUATEMALA AGAINST SAID MAY, U.S.-Guat., Feb. 23, 1900, *reprinted in* 1 MALLOY, *supra* note 175, at 871-73; PROTOCOL OF AN AGREEMENT FOR THE ARBITRATION OF THE AMOUNT OF DAMAGES TO BE AWARDED ORR AND LAUBENHEIMER AND THE POST-GLOVER ELECTRIC CO., U.S.-Nicar., Mar. 22, 1900, *reprinted in* 2 MALLOY, *supra* note 175, at 1290-92; CLAIMS PROTOCOL SUBMITTING TO ARBITRATION THE CLAIMS OF THE SCHOONERS "JAMES HAMILTON LEWIS," "C. H. WHITE," AND "KATE AND ANNA," AND THE WHALING BARK "CAPE HORN PIGEON," U.S.-Russ., Aug. 26, 1900, *reprinted in* 2 MALLOY, *supra* note 175, at 1532-34; PROTOCOL FOR THE ARBITRATION OF CERTAIN CLAIMS AGAINST SALVADOR, U.S.-El Sal., Dec. 19, 1901, *reprinted in* 2 MALLOY, *supra* note 175, at 1568-70; ARBITRATION OF SALA CLAIM, U.S.-Dom. Rep., Apr. 28, 1902, 7 Bevans 184-88; PROTOCOL SUBMITTING TO ARBITRATION THE CLAIM OF GEORGE C. BENNER ET AL., U.S.-Braz., Sept. 6, 1902, *reprinted in* 1 MALLOY, *supra* note 175, at 152-54; ARBITRATION PROTOCOL—CLAIM OF SAN DOMINGO IMPROVEMENT CO., U.S.-Dom. Rep., Jan. 31, 1903, *reprinted in* 1 MALLOY, *supra* note 175, at 414-18; PROTOCOL WITH VENEZUELA SUBMITTING TO ARBITRATION CLAIMS AGAINST VENEZUELA, U.S.-Venez., Feb. 17, 1903, *reprinted in* 2 MALLOY, *supra*

These agreements resolved, through arbitration, claims against states. Sometimes the parties complained of private conduct, but the key to recovery was proving state responsibility for such conduct. None of the arbitration agreements contemplate the settlement of claims against private parties, much less the settlement of any such claims actually cognizable in U.S. courts.

This first century of practice shows that the claims settlement power was used infrequently by the executive branch until 1825, and that even until 1850 all such agreements dealt with maritime disputes with foreign sovereigns, often over the conduct of the privateers they licensed. The second half of the nineteenth century saw an increase in the use of arbitration commissions set up through sole executive agreement. The claims funneled through these commissions, however, remained claims against foreign sovereigns and/or their agents. To the extent that claims against even nominally private parties (like the privateers) were resolved, there is no evidence that such claims were cognizable—much less pending—in U.S. courts.

4. *Reparations and Other War-Related Claims Settlement Agreements*

The best support for sole executive authority to nullify the World War II-related claims probably comes from post-World War II reparations agreements. These agreements, however, address conduct committed in conjunction with, or at the behest of, foreign governments. Executive branch settlements of reparations issues have never explicitly precluded private claims against private parties. Treaties, on the other hand, have done so.

War has provided the context for a number of significant sole executive agreements, including two particularly well-known agreements from World War II: the bases-for-destroyers agreement of 1940,¹⁷⁷ and the agreement between allied governments at Yalta at the close of World War II.¹⁷⁸ In the claims settlement context, executive agreements have been used to settle war-related debts owed by foreign governments to the U.S. government,

note 175, at 1870–72; CLAIMS PROTOCOL SUBMITTING TO ARBITRATION THE CLAIMS OF THE ORINOCO STEAMSHIP COMPANY AND THE U.S. AND VENEZUELA Co., U.S.-Venez., Feb. 13, 1909, *reprinted in* 2 MALLOY, *supra* note 175, at 1881–87; PROTOCOL CONCERNING THE SETTLEMENT OF THE CLAIM OF THE UNITED STATES AND VENEZUELA Co., U.S.-Venez., Aug. 21, 1909, *reprinted in* 2 MALLOY, *supra* note 175, at 1887–89; PROTOCOL AND EXCHANGE OF NOTES CONCERNING THE SETTLEMENT OF THE CLAIM OF THE ORINOCO Co., U.S.-Venez., Sept. 9, 1909, *reprinted in* 2 MALLOY, *supra* note 175, at 1889–92; CLAIMS: THE CASE OF GEORGE D. EMERY Co., U.S.-Nicar., May 25, 1909, 10 Bevens 365–73; ARBITRATION THE ALSOP CLAIM, U.S.-Chile, Dec. 1, 1909, 6 Bevens 548–49; CLAIMS: DAMAGES CAUSED BY RIOT, U.S.-Pan., Nov. 27, 1915, 10 Bevens 712–13. For more examples, see CRANDALL, *supra* note 71, at 108–11. This is a marked change from the pre-1870 period when agreements that referred claims to arbitration commissions were submitted to the Senate for approval. See Bassett, *supra* note 77, at 77.

177. AGREEMENT BETWEEN THE UNITED STATES AND GREAT BRITAIN RESPECTING NAVAL AND AIR BASES, U.S.-Gr. Brit., Sept. 2, 1940, 54 Stat. 2405.

178. REPORT SIGNED AT CRIMEA (YALTA) CONFERENCE, Feb. 11, 1945, 59 Stat. 1823.

frequently with the blessing of Congress.¹⁷⁹ In a more limited capacity, sole executive agreements have also dealt with reparations for private parties.

The fate of claims of U.S. nationals against foreign governments for war-related injuries and damages has frequently been determined by treaty.¹⁸⁰ In an 1801 treaty with France, for example, the U.S. government renounced claims on behalf of its nationals for attacks on commerce, in exchange for French renunciation of its claims against the United States for treaty violations.¹⁸¹ Following the War of 1812, U.S. officials pushed for compensation to its nationals for capture by the British of their ships and goods, but the British successfully resisted the effort and the Treaty of Ghent did not include such reparations.¹⁸² Instead, Congress provided some relief to the injured Americans.¹⁸³ The Treaty of Guadalupe Hidalgo ending the Mexican-American war gave New Mexico and California to the United States in return for \$15 million and the assumption of payment of certain claims by U.S. nationals against Mexico.¹⁸⁴ Again, Congress enacted a law providing for the payments. The treaty ending the Spanish-American War renounced all claims by citizens of either country against the government of the other, and once more Congress undertook to compensate U.S. nationals with legitimate claims against Spain that had been bargained away.¹⁸⁵

World War I reparations claims by the United States against Germany were resolved by a 1921 bilateral treaty signed in Berlin ("Treaty of Berlin").¹⁸⁶ It included by incorporation reparations-related provisions from the Treaty of Versailles, which was not ratified by the United States Senate.¹⁸⁷ An executive agreement between Germany and the United States in 1922

179. Following World War I, President Wilson negotiated agreements for the resolution of debts owed both by Germany and the Allies to the United States. Congress criticized President Wilson's decision to permit postponement of scheduled payments by the Allies and subsequently passed a statute creating a commission to renegotiate the Allied debt. A debt-restructuring agreement negotiated with Great Britain exceeded the commission's authority, so the commission requested congressional approval. Congress then amended the statute to permit *ex post* approval to future debt agreements. See Ackerman & Golove, *supra* note 34, at 838–40. Both the lend-lease and the war debt agreements resolved claims of the United States government with the ultimate approval of Congress.

180. See generally SUPPLEMENTARY REPORT OF THE WAR CLAIMS COMMISSION WITH RESPECT TO WAR CLAIMS ARISING OUT OF WORLD WAR II, H.R. DOC. NO. 83-67, at 64–91 (Jan. 16, 1953) [hereinafter SUPPLEMENTARY REPORT OF THE WAR CLAIMS COMMISSION]. The Jay Treaty from 1794 resolved a variety of claims, including debts owed by Americans to British citizens, which U.S. courts refused to honor, and the claims of U.S. citizens that British privateers involved in the war against France had improperly captured American vessels and other property. THE JAY TREATY, arts. 6, 7, U.S.-Gr. Brit., Nov. 19, 1794, reprinted in 2 MILLER, *supra* note 153, at 245.

181. SUPPLEMENTARY REPORT OF THE WAR CLAIMS COMMISSION, *supra* note 180, at 66–67. In an agreement with Spain in 1819, both Spain and the United States relinquished claims for damages their citizens had suffered; Congress provided some compensation to the injured U.S. nationals. *Id.* at 73.

182. *Id.* at 69–70.

183. *Id.*

184. *Id.* at 74–75.

185. *Id.* at 79–81.

186. TREATY OF PEACE BETWEEN THE UNITED STATES AND GERMANY, U.S.-Germany, Aug. 25, 1921, 42 Stat. 1939.

187. *Id.* arts. I, II.

established the Mixed Claims Commission to resolve, among other issues, claims by American citizens for damage to their properties and rights within German territory, other claims suffered by the United States or its nationals as a result of the war, and debts owed to American citizens by the German government or German nationals.¹⁸⁸ These categories of claims had been secured to the United States through the Treaty of Berlin; the Mixed Claims Commission was established to make the actual awards. The commission made detailed decisions about the types of claims covered by the agreement, which included American civilian forced labor claims and the mistreatment of prisoners of war.¹⁸⁹

An argument for sole executive power to resolve private claims in reparations agreements might rest on the Potsdam Agreement, signed August 2, 1945,¹⁹⁰ and the follow-up agreement concluded in Paris in January 1946.¹⁹¹ As an initial matter, both agreements were concluded within months of the end of the war, and neither was contemplated as a comprehensive Peace Treaty, perhaps giving the President some claim to authority under the Commander-in-Chief power which would not extend to later agreements. The Potsdam Agreement provides that “[t]he reparation claims of the United States, the United Kingdom and other countries entitled to reparations shall be met from the Western Zones and from appropriate German external assets.”¹⁹² On the one hand, this language makes no mention of individual claims. On the other hand, the term “reparations” may be read broadly enough to cover war-related harm to individuals inflicted by either the foreign government or private parties working in concert with such governments. As used in the Treaty of Versailles, the term “reparations” included claims of injury to individuals and their property, but did not explicitly include injury inflicted by private parties.¹⁹³

The Potsdam Agreement also provided for the dismantling of German industry, including the “complete disarmament and demilitarization of Germany and the elimination or control of all German industry that could

188. AGREEMENT FOR A MIXED CLAIMS COMMISSION TO DETERMINE THE AMOUNT TO BE PAID BY GERMANY IN SATISFACTION OF GERMANY'S FINANCIAL OBLIGATIONS UNDER THE TREATY CONCLUDED BETWEEN THE TWO GOVERNMENTS ON AUGUST 25, 1921, art. I, U.S.-Germany, Aug. 10, 1922, 42 Stat. 2200.

189. SUPPLEMENTARY REPORT OF THE WAR CLAIMS COMMISSION, *supra* note 180, at 169.

190. PROTOCOL OF PROCEEDINGS APPROVED AT BERLIN (POTSDAM), Aug. 2, 1945, 3 Bevans 1207 [hereinafter POTSDAM AGREEMENT].

191. AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND OTHER GOVERNMENTS RESPECTING THE DISTRIBUTION OF GERMAN REPARATION, Jan. 14, 1946, 61 Stat. 3157 [hereinafter PARIS REPARATIONS AGREEMENT].

192. POTSDAM AGREEMENT, *supra* note 190, § III.3.

193. The Treaty of Versailles provided that Germany would “make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency of each as an Allied or Associated Power against Germany by such aggression by land, by sea and from the air.” TREATY OF PEACE WITH GERMANY (TREATY OF VERSAILLES), art. 232, June 28, 1919–Jan. 10, 1920, 2 Bevans 43.

be used for military production."¹⁹⁴ In other words, whatever the precise meaning of the term "reparations," as a practical matter potential German corporate defendants would likely be under allied control, lack the assets to satisfy any potential judgment, or no longer exist. Plaintiffs bringing slave and forced labor claims in U.S. courts against German corporate defendants have conceded that the Potsdam Agreement resolved claims against private entities as well as the German state, since it provided for the seizure of private industrial assets.¹⁹⁵

The Allies negotiated another multinational agreement governing reparations in Paris in 1946,¹⁹⁶ also concluded by the United States as a sole executive agreement. It divided up Germany's industrial property among the allies, and established that each signatory's shares of reparations under the agreement covered "all claims and those of its nationals against the former German Government and its *Agencies*, of a governmental or private nature, arising out of the war."¹⁹⁷ As with the Potsdam Agreement, it seems difficult as a practical matter to reconcile this division of industrial property with private litigation against the companies whose property was being divided by the Allies.¹⁹⁸

The Paris Reparations Agreement nonetheless rather carefully excludes from its scope at least some claims against German *nationals*. It does not oblige the German government to secure the discharge of claims "against Germany and German *nationals* arising out of contracts and other obligations entered into . . . before the existence of a state of war between Germany and Signatory Government concerned."¹⁹⁹ Thus, the agreement explicitly distinguishes between claims directed against German *agencies* and those directed against German *nationals*; it purports to settle the former, but excludes some of the latter. The Paris Reparations Agreement also refers to claims between persons entitled to protection by a signatory government against *nationals* of any other signatory government with respect to property received by that government as reparations.²⁰⁰ The agreement does not purport to waive or extinguish such claims, but instead pledges that each signatory government will neither assert such claims in international tribunals, nor give diplomatic support to such claims.²⁰¹ Finally, the Paris Reparations Agreement does not purport to finally resolve the "total amount of all reparation to be made by Germany."²⁰²

194. POTSDAM AGREEMENT, *supra* note 190, § II.A.3(i).

195. *Burger-Fischer v. DeGussa AG*, 65 F. Supp. 2d 248, 277 (D.N.J. 1999).

196. PARIS REPARATIONS AGREEMENT, *supra* note 191.

197. *Id.* art. 2.A (emphasis added).

198. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 449 (D.N.J. 1999).

199. PARIS REPARATIONS AGREEMENT, *supra* note 191, art. 2.C(i) (emphasis added).

200. *Id.* art. 3 (emphasis added).

201. *Id.*

202. PARIS REPARATIONS AGREEMENT, *supra* note 191, art. 2.B(i).

Other agreements from the same period also distinguish between claims against governments and claims against nationals, further suggesting that the resolution of claims against German governmental "Agencies" was not synonymous with the resolution of claims against German "nationals." The Treaty of Peace with Japan, for example, purports to waive claims by U.S. nationals against Japanese nationals of its own force,²⁰³ just as treaties with Romania, Bulgaria, and Hungary explicitly purport to waive claims by nationals of those countries against German nationals.²⁰⁴ All of these agreements were concluded by the United States as treaties.

Tensions with the Soviet Union during the early 1950s resulted in renegotiated reparations agreements in 1952 (the "Transition Agreement")²⁰⁵ and 1953 (the "London Debt Agreement").²⁰⁶ Both were concluded as treaties. The western allied powers, meeting in Bonn in 1952, agreed to defer Germany's payment of reparations in hopes of promoting the growth of the German economy. The agreement provides, in part, that "[t]he problem of reparation shall be settled by the peace treaty between Germany and its former enemies or by earlier agreements concerning this matter."²⁰⁷ The Transition Agreement obligated Germany to pass legislation to compensate persons who were persecuted by the Nazis and suffered injury or damages.²⁰⁸ Pursuant to this agreement, Germany implemented extensive domestic programs to compensate victims of the Nazis, but the programs excluded many claimants and certain types of claims—including claims for forced and slave labor.²⁰⁹ The parties to the Transition Agreement resolved "that they will at no time assert any claim for reparation against the current production of the

203. TREATY OF PEACE WITH JAPAN, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45. Article 14 provides the terms of Japanese payment "for the damage and suffering caused by it during the war." *Id.* art. 14(a). Article 14 further provides that

[e]xcept as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their *nationals* arising out of any actions taken by Japan and its *nationals* in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

Id. art. 14(b) (emphasis added).

204. For example, the Treaty of Peace with Romania provides that

[w]ithout prejudice to these and to any other dispositions in favour of Roumania and Roumanian nationals by the Powers occupying Germany, Roumania waives on its own behalf and on behalf of Roumanian *nationals* all claims against Germany and German *nationals* outstanding on May 8, 1945, except those arising out of contracts and other obligations entered into, and rights acquired, before September 1, 1939. This waiver shall be deemed to include debts, all inter-governmental claims in respect of arrangements entered into in the course of the war and all claims for loss or damage arising during the war.

TREATY OF PEACE WITH ROUMANIA, art. 28.4, Feb. 10, 1947, 61 Stat. 1757, 42 U.N.T.S. 3 (emphasis added). See also TREATY OF PEACE WITH BULGARIA, art. 26.4, Feb. 10, 1947, 61 Stat. 1915, 41 U.N.T.S. 21; TREATY OF PEACE WITH HUNGARY, art. 30.4, Feb. 10, 1947, 61 Stat. 2065, 41 U.N.T.S. 135.

205. CONVENTION ON THE SETTLEMENT OF MATTERS ARISING OUT OF THE WAR AND THE OCCUPATION, May 26, 1952, 6 U.S.T. 4411, 332 U.N.T.S. 219 [hereinafter TRANSITION AGREEMENT].

206. AGREEMENT ON GERMAN EXTERNAL DEBTS, Feb. 27, 1953, 4 U.S.T. 443, 333 U.N.T.S. 3 [hereinafter LONDON DEBT AGREEMENT].

207. TRANSITION AGREEMENT, *supra* note 205, ch. 6, art. 1.1.

208. *Id.* ch. 4.

209. *Burger-Fischer*, 65 F. Supp. 2d at 270.

Federal Republic.”²¹⁰ The London Debt Agreement was designed to “remove obstacles to normal economic relations between the Federal Republic of Germany and other countries.”²¹¹ It used language taken directly from the Paris Reparations Agreement to exclude from the treaty “consideration of claims arising out of the second World War by countries which were at war or occupied by Germany during that war, and by nationals of such countries, against the Reich and agencies of the Reich,” which were “deferred until the final settlement of the problem of reparation.”²¹²

This series of agreements provides only weak and limited support for sole executive authority to settle claims against private parties, even in the context of reparations.²¹³ The London Debt Agreement and the Transition Agreement were *treaties*, ratified by the Senate. Courts holding that slave labor claims were subsumed by post-War agreements have relied largely upon these two treaties.²¹⁴ The Potsdam and Paris Reparations Agreements were concluded as sole executive agreements, and their *effect*, as discussed above, was to appropriate for the Allies the German industrial assets, leaving private industry nothing from which to pay reparations. This effect, though, is not the same thing as nullifying claims cognizable in U.S. courts; instead, it simply leaves no potential defendants for such suits.²¹⁵

Significantly, the language of neither agreement explicitly resolves claims against private parties. The Potsdam Agreement uses the term “reparations,” while the Paris Reparations Agreement terminates claims against German “Agencies,” not nationals. Several treaties, on the other hand, do explicitly resolve claims against “nationals.” Finally, both the Potsdam and Paris Reparations Agreements were signed shortly after the end of hostilities, providing, perhaps, some authority for the President to conclude them under the Commander-in-Chief power.

210. TRANSITION AGREEMENT, *supra* note 205, ch. 6., art. 1.

211. LONDON DEBT AGREEMENT, *supra* note 206, pmb1.

212. *Id.* art. 5(2).

213. See generally Boyd, *supra* note 40, at 298–303 (arguing that “negotiated war reparations” differ from judicial remedies “in motive and purpose, in nature and type, and in the source of law defining each”).

214. *Burger-Fischer*, 65 F. Supp. 2d at 278; *Iwanowa*, 67 F. Supp. 2d at 483. These opinions, however, are not entirely consistent. The *Iwanowa* court concluded that article 2.A of the Paris Reparations Agreement bars claims against German agencies (including slave and forced labor claims against private parties), but that article 5(2) of the London Debt Agreement deferred such claims. The court resolved this “irreconcilable conflict” by concluding that the London Debt Agreement superseded the earlier Paris Reparations Agreement. *Iwanowa*, 67 F. Supp. 2d at 460. It held that plaintiffs’ claims were barred based on the London Debt Agreement because that agreement contemplated only government-to-government claim resolution. *Id.* at 483. The *Burger-Fischer* court, on the other hand, concluded that the Transition Agreement was “finalized” after the London Debt Agreement and therefore did not modify its terms, and that the plaintiffs were limited to the remedies provided by the Transition Agreement, which subsumed private claims. *Burger-Fischer*, 65 F. Supp. 2d at 278–79. The conclusion that the Transition and/or the London Debt Agreements—both treaties—nullified private claims has little bearing on the argument that the President cannot nullify such claims through a sole executive agreement, except to highlight that many treaties do so, while virtually no sole executive agreements do.

215. *Cf.* Prakash & Ramsey, *supra* note 79, at 264 n.125.

As a general assertion of sole executive authority over private claims—even ones related to the second World War—this series of agreements fails, particularly in light of the explicit language resolving national-national litigation found in some treaties. The executive agreements related to German reparations do provide, however, some limited precedent for the settlement through sole executive agreement of claims against “Agencies” of the German government (the language used in the Paris Reparations Agreement). As courts have noted, German courts have relied on the negotiating history of the London Debt Agreement to conclude that this language includes claims against private companies for forced or slave labor during the war.²¹⁶

Accepting this reading,²¹⁷ one might argue that the Potsdam and Paris Reparations Agreements establish that the executive branch has the power, at least in the context of immediate post-war reparations agreements, to conclude agreements that define certain conduct by nominally private actors as government conduct, and to resolve claims against those entities through a sole executive agreement.²¹⁸ This argument has particular force with respect to slave and forced labor claims, in part because there is German precedent for the proposition that the Transition Agreement included such claims with the “Agencies,” and in part because the distinction between public and private conduct is particularly muddled when the forced laborers involved were captured and transported by the German government, and then used by German industry to produce armaments and other war-related goods for the German government.²¹⁹

However, this argument proves too much.²²⁰ The recent executive agreements with Germany and France, in fact, include a broad spectrum of claims

216. *Iwanowa*, 67 F. Supp. 2d at 454.

217. On the one hand, this reading is entirely plausible given the purpose of the London Debt Agreement to permit the economic recovery of German industry; on the other hand, Germany has a strong incentive to read the agreement this way.

218. One might buttress this argument with the observation that reparations issues have historically been resolved through government-to-government negotiations, and that claims related to slave/forced labor and other wartime atrocities fall within the traditional definition of reparations or “war damage.” See generally Armin Steinkamm, *War Damages*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1354 (Rudolf Bernhardt et al. eds., 2000). But such issues have traditionally been resolved through peace treaties, ratified by the Senate.

219. See, e.g., *Nazi Era Cases*, 129 F. Supp. 2d 370, 375–76 (D.N.J. 2001) (reasoning that although the “[p]laintiff almost certainly was enslaved by a private company, as opposed to the Nazi government or German military, one need only look to the labor [plaintiff] Frumkin was forced to perform (construction of a military airbase) to see that Holzmann’s abuse of Frumkin was fundamentally interrelated with the Nazi war effort”); *Iwanowa*, 67 F. Supp. 2d at 445–46 (concluding that the complaint pled facts to support the conclusion that private corporate defendants were de facto state actors).

220. There is significant disagreement about the relationship between slave/forced labor and the war effort, as well as disagreement as to the relationship between the private companies and the Reich. Forced labor programs were not simply a by-product of the war effort; instead, they were thoroughly structured by racial hierarchy, including the goal of “annihilation by labor” for Jews. Adler and Zumbansen, *supra* note 39, at 47 (quoting BENJAMIN B. FERENCZ, *LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION* 17–18 (1979)). Although private companies argue that they were “agencies of the Reich” and were forced to use slave labor, this is disputed, *id.* at 43–44, 52, as is the extent to which such companies actually initiated the use of slave and forced labor. *Id.* at 44 n.280.

for conduct unrelated to slave or forced labor. The French Agreement, for example, covers “any and all claims that have been or may be asserted against the Banks . . . arising from World War II.”²²¹ The definition of “the Banks” refers explicitly to defendants in three U.S. lawsuits.²²² These lawsuits include a number of factual allegations that relate not to reparations, but to post-war conduct, including the claim that “failing to return plaintiffs’ funds and repeated denials of information to plaintiffs constitute a deliberate, continuous, and ongoing violation of international law for the past fifty years,”²²³ and the claim that the “defendants unjustly refused to return the looted assets, enriched themselves with the derivative profits, and concealed information, value, and derivative profits of the looted assets from the plaintiffs.”²²⁴ The German Agreement is even broader; it purports to resolve all claims against all German companies arising out of or relating to World War II.²²⁵

The limited post-war reparations agreements provide little support for unilateral nullification of such claims by the executive branch. Whatever authority the Commander-in-Chief power may give the President over reparations issues is substantially diminished by the passage of fifty years since the war’s conclusion. Moreover, none of the earlier agreements, including the reparations agreements with potential implications for private claims, explicitly contemplates extinguishing claims cognizable in U.S. courts. Thus these recent agreements squarely present Supremacy Clause issues not raised by the earlier agreements. Finally, unlike the claims against foreign sovereigns that the Court considered in *Dames & Moore*, there is no long-standing history of sole executive control over these claims against private parties, even in the reparations context, and no statutory stamp of approval for such control (as with the Foreign Claims Settlement Act).

5. Expropriation Claims Settlements

Expropriation provides another key category of executive claims settlement agreements. Historically, these agreements, too, have settled claims against foreign governments. Before the end of World War II, diplomatic pressure from the State Department resolved expropriation claims against Nicaragua (1909 and 1911), Cuba (1925), Guatemala (1930), the Soviet Union (1933), Bolivia (1942), and several with Mexico.²²⁶ Most were resolved through the exchange of diplomatic notes providing for arbitration of

221. FRENCH AGREEMENT, *supra* note 1, art. 1(1).

222. *Id.* annex A.

223. *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 134 (E.D.N.Y. 2000).

224. *Id.* at 122.

225. GERMAN AGREEMENT, *supra* note 2, art. 1(1).

226. See generally STAFF OF HOUSE COMM. ON FOREIGN AFFAIRS, 88TH CONG., REPORT ON EXPROPRIATION OF AMERICAN-OWNED PROPERTY BY FOREIGN GOVERNMENTS IN THE TWENTIETH CENTURY (Comm. Print 1963) [hereinafter EXPROPRIATION REPORT].

individual claims.²²⁷ After World War II, most expropriation claims were resolved through lump sum agreements pursuant to which the foreign government made a lump sum payment to the United States and the United States divided it among claimants.²²⁸ The first post-war agreement of this type was reached with Yugoslavia in 1948.²²⁹ Under the agreement, the United States released blocked Yugoslav assets, the Yugoslavian government paid \$17 million to settle all U.S. claims against it, and the U.S. government paid individual claimants.²³⁰

Although the State Department concluded the agreement with Yugoslavia as a sole executive agreement, Congress enacted the International Claim Settlement Act in the following year, creating the International Claim Settlement Commission as the domestic mechanism for making payments to individual claimants pursuant to this, and future, claims settlement agreements.²³¹ The act provides congressional approval for executive branch settlement of international claims related to the taking of property, but limits its authorization to claims against foreign governments.²³² The *Dames & Moore* opinion relied on this act to show congressional acquiescence in the practice of claims settlements by sole executive agreement,²³³ but neither the act, nor the conclusion of acquiescence, apply to claims against private parties.²³⁴

The executive branch has negotiated at least twelve lump sum claims settlement agreements related to nationalization²³⁵ that have been administered by the International Claims Commission²³⁶ (now the Foreign Claims Set-

227. The 1911 agreement with Nicaragua and a 1941 agreement with Mexico established a mixed claims commission; the Cuban and Guatemalan claims were resolved by one-time arbitration. *Id.* at 1074-76, 1079-81.

228. See generally 1 LILLICH & WESTON, *supra* note 142, at 30-31 (discussing the history of lump sum agreements and the increase in their use after World War II).

229. EXPROPRIATION REPORT, *supra* note 226, at 1082.

230. *Id.*

231. Pub. L. No. 81-455, 64 Stat. 12 (1950) (codified at 22 U.S.C. § 1621 (2002)).

232. The International Claims Settlement Act provides: "The Commission shall have jurisdiction to receive, examine, adjudicate, and render final decisions with respect to claims of the Government of the United States and of nationals of the United States included within the terms of the Yugoslav Claims Agreement of 1948, or included within the terms of any claims agreement hereafter concluded between the Government of the United States and a foreign government (exclusive of governments against which the United States declared the existence of a state of war during World War II) similarly providing for the settlement and discharge of claims of the Government of the United States and the nationals of the United States against a foreign government, arising out of the nationalization or other taking of property, by the agreement of the Government of the United States to accept from that government a sum in en bloc settlement thereof." *Id.* § 4(A), 64 Stat. at 13-14.

233. *Dames & Moore v. Regan*, 453 U.S. 654, 680-82 (1981).

234. *Id.*

235. The Foreign Claims Settlement Commission (FCSC) has administered some claims programs not related to nationalization, including (after the merger with the War Claims Commission) some related to war claims. See 1973 FCSC ANN. REP. 30-31 (administering claims by prisoners of war in Vietnam); *id.* at 14-15, 17-18 (administering war claims against Italy).

236. AGREEMENT ON THE SETTLEMENT OF CERTAIN OUTSTANDING CLAIMS, U.S.-Alb., Mar. 10, 1995, T.I.A.S. No. 12,611; AGREEMENT CONCERNING THE SETTLEMENT OF CERTAIN PROPERTY CLAIMS, U.S.-Vietnam, Jan. 28, 1995, T.I.A.S. No. 12,602; AGREEMENT CONCERNING THE SETTLEMENT OF CERTAIN PROPERTY CLAIMS, U.S.-F.R.G., May 13, 1992, T.I.A.S. No. 11,959; COMPENSATION AGREE-

tlement Commission).²³⁷ With the exception of the agreement with Hungary, none of the nationalization agreements explicitly resolve claims between U.S. and foreign nationals. The Hungarian agreement provides that

[t]he Government of the Hungarian People's Republic agrees to pay, and the Government of the United States agrees to accept, the lump sum of \$18,900,000 (eighteen million nine hundred thousand dollars) in United States currency in full and final settlement and in discharge of all claims of the Government *and nationals* of the United States against the Government *and nationals* of the Hungarian People's Republic *which are described in this Agreement*.²³⁸

Although this language appears to contemplate the settlement of national-to-national claims, none of the categories of claims covered by the agreement explicitly includes such claims.²³⁹ Moreover, legislation passed by Congress

MENT, U.S.-Eth., Dec. 19, 1985, T.I.A.S. No. 11,193; AGREEMENT ON THE SETTLEMENT OF CERTAIN OUTSTANDING CLAIMS AND FINANCIAL ISSUES, U.S.-Czech. Soc. Rep., Jan. 29, 1982, T.I.A.S. No. 11,264; AGREEMENT CONCERNING THE SETTLEMENT OF CLAIMS, U.S.-P.R.C., May 11, 1979, 30 U.S.T. 1957; AGREEMENT CONCERNING CLAIMS OF NATIONALS OF THE UNITED STATES, U.S.-Egypt, May 1, 1976, 27 U.S.T. 4214; AGREEMENT REGARDING THE SETTLEMENT OF CLAIMS, U.S.-Hung., Mar. 6, 1973, 24 U.S.T. 522 [hereinafter SETTLEMENT OF CLAIMS, U.S.-Hung.]; AGREEMENT REGARDING CLAIMS OF UNITED STATES NATIONALS, U.S.-Yugo., Nov. 5, 1964, 16 U.S.T. 1; AGREEMENT REGARDING CLAIMS OF UNITED STATES NATIONALS AND RELATED FINANCIAL MATTERS, U.S.-Bulg., July 2, 1963, 14 U.S.T. 969; AGREEMENT RELATING TO FINANCIAL QUESTIONS, U.S.-Rom., Mar. 30, 1960, 11 U.S.T. 317; AGREEMENT REGARDING CLAIMS OF NATIONALS OF THE UNITED STATES, U.S.-Pol., July 16, 1960, 11 U.S.T. 1953.

237. Reorg. Plan No. 1 of 1954, 19 Fed. Reg. 3985 (July 1, 1954), *reprinted as a note to* 5 U.S.C. § 1622 (2002), *and in* 68 Stat. 1279 (1954). A handful of other sole executive agreements resolved nationalization issues apparently without the involvement of the Foreign Claims Settlement Commission. AGREEMENT CONCERNING THE SETTLEMENT OF CERTAIN PROPERTY CLAIMS, U.S.-Cambodia, Oct. 6, 1994, T.I.A.S. No. 12,193; CLAIMS: MARCONA MINING COMPANY, U.S.-Peru, Sept. 22, 1976, T.I.A.S. No. 8,417; SETTLEMENT OF CERTAIN CLAIMS, U.S.-Peru, Feb. 19, 1974, 25 U.S.T. 227. Other sole executive agreements with Egypt and Vietnam resolved claims related to the property of the U.S. *government*, with no mention of claims by U.S. nationals. AGREEMENT CONCERNING OFFICIAL CLAIMS OF THE GOVERNMENT OF THE UNITED STATES, U.S.-Egypt, May 19, 1979, 30 U.S.T. 7303; MUTUAL WAIVER OF CERTAIN CLAIMS, U.S.-Vietnam, Feb. 9, 1965, 16 U.S.T. 140.

238. SETTLEMENT OF CLAIMS, U.S.-Hung., *supra* note 236, art. 1(1) (emphasis added).

239. The agreement resolved four types of claims: (1) those concerning property rights affected by Hungarian nationalization measures; (2) certain obligations expressed in U.S. currency; (3) obligations of the Hungarian government under the Treaty of Peace between Hungary and the United States; and (4) losses referred to in a diplomatic note from the United States to the Government of Hungary on December 10, 1952, which is not duplicated in the agreement. *Id.* art. 2. Public Law Number 93-460, which amended the International Claims Settlement Act, gave the FCSC the power to make awards against the Hungarian *government* for claims in the first category. 88 Stat. 1386 (1974). The third category also applied to government obligations. The second category speaks in terms of obligations expressed in the currency of the United States "arising out of contractual or other rights acquired by nationals of the United States prior to September 1, 1939," which could include obligations of Hungarian nationals. SETTLEMENT OF CLAIMS, U.S.-Hung., *supra* note 236, art. 2(2). The implementing legislation did not, however, authorize the FCSC to make payments based on this provision, *id.*, and the FCSC reasoned that this language referred to claims based on bonds issued by the government of Hungary, expressed in U.S. currency, based in part on Annex E of the 1973 agreement, which refers to the "settlement of outstanding dollar bonds issued by predecessor Hungarian governments." In the Matter of the Claim of Nita Mea Aubel, Claim No. Hung-2-021, Decision No. HUNG-2-014, 1975 FCSC ANN. REP. 43. Elsewhere, the

implementing the agreement refers only to claims against the Hungarian Government;²⁴⁰ no courts have used this agreement to deny or dismiss claims against Hungarian nationals, and the Commission appears to have required state responsibility by the Hungarian government before granting claims.²⁴¹

6. Executive Settlement of Holocaust-Related Claims of U.S. Nationals

The executive branch also has negotiated Holocaust-related claims settlement agreements outside of the reparations and expropriation contexts, including some in the past twenty years; but none of these agreements settled claims against private parties.²⁴² Most significantly, a recent agreement

FCSC reasoned that the terms "obligations . . . arising out of contractual or other rights," as used in Section 303(3) of the Act, was not limited to bonds . . . but also included other types of government obligations." FOREIGN CLAIMS SETTLEMENT COMM'N, DECISIONS AND ANNOTATIONS 245-46 (1968) (emphasis added).

240. 22 U.S.C. § 1641(b) (2002). See also 1975 FCSC ANN. REP. 30-32 (describing the work of the FCSC with respect to claims against the Government of Hungary).

241. See Claim of European Mortgage Series B. Corp., Claim No. Hung-22,020, Decision No. 1,605, reprinted in FCSC SEMI-ANN. REP., Jan.-June 1959, at 72, 76-77.

242. Three agreements with China from 1999 resolved claims related to the bombing of the Chinese Embassy in the Federal Republic of Yugoslavia in May 1999. MEMORANDUM OF UNDERSTANDING BETWEEN THE DELEGATION OF THE UNITED STATES OF AMERICA AND THE DELEGATION OF THE PEOPLE'S REPUBLIC OF CHINA, U.S.-P.R.C., Jul. 30, 1999, Temp. State Dep't No. 99-116, 1999 WL 798688; AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA, U.S.-P.R.C., Dec. 16, 1999, Temp. State Dep't No. 00-15, 1999 WL 1565467; MEMORANDUM OF UNDERSTANDING BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA, U.S.-P.R.C., Dec. 16, 1999, Temp. State Dep't No. 00-16, 1999 WL 1565468. An agreement with Japan concerned the rights of Japanese and Micronesian nationals against Japan and the United States. AGREEMENT CONCERNING THE TRUST TERRITORY OF THE PACIFIC ISLANDS, U.S.-Japan, Apr. 18, 1969, 20 U.S.T. 2654. Even if the agreement can be read to cover claims between private parties, it does not undermine the argument advanced in this Article, because the agreement was implemented domestically through an act of Congress. See *Antolok v. United States*, 873 F.2d 369 (D.C. Cir. 1988). Four agreements with Russia renegotiated the payment by Russia of debts to or guaranteed by the United States. AGREEMENT REGARDING THE RESCHEDULING OF CERTAIN DEBTS OWED TO OR GUARANTEED BY THE UNITED STATES GOVERNMENT, U.S.-Russ., Feb. 6, 1997, Hein's No. KAV 4885, Temp. State Dep't No. 97-75. Similar agreements were negotiated with Russia in 1993, 1994, and 1995. See *id.* art. II.1(b)-(d). An agreement with Canada resolved environmental claims against the U.S. military. AGREEMENT ON A FULL AND FINAL SETTLEMENT OF ALL CLAIMS FOR COSTS OF ENVIRONMENTAL CLEAN-UP AT FORMER U.S. MILITARY INSTALLATIONS IN CANADA, U.S.-Can., Oct. 7-9, 1996, Hein's No. KAV 4776, Temp. State Dep't No. 96-191. An agreement with the United Kingdom resolved claims by the U.S. government relating to user charges by the U.K. government imposed at Heathrow Airport. AGREEMENT CONCERNING AIR SERVICES, U.S.-U.K., July 23, 1977, 28 U.S.T. 5367, amended by AGREEMENT AMENDING THE AGREEMENT OF JULY 23, 1977, AS AMENDED, U.S.-U.K., Dec. 4, 1980, 33 U.S.T. 655. Agreements with Iran resolved claims pending before the Iran-U.S. Claims Tribunal. SETTLEMENT AGREEMENT REGARDING CERTAIN CLAIMS BEFORE THE IRAN-U.S. CLAIMS TRIBUNAL, U.S.-Iran, Feb. 9, 1996, Hein's No. KAV 4609, Temp. State Dep't No. 96-82. See also *Bederman & Borchert, supra* note 139 (discussing a 1990 executive agreement settling small claims by U.S. nationals against Iran). Other agreements with Iran settled Iranian claims against the U.S. government related to the "aerial incident of 3 July 1998," which was the subject of a suit at the International Court of Justice. SETTLEMENT AGREEMENT ON THE CASE CONCERNING THE AERIAL INCIDENT OF JULY 3, 1988 BEFORE THE INTERNATIONAL COURT OF JUSTICE, U.S.-Iran, Feb. 9, 1996, Hein's No. KAV 4610, Temp. State Dep't No. 96-83; GENERAL AGREEMENT ON THE SETTLEMENT OF CERTAIN I.C.J. AND TRIBUNAL CASES, U.S.-Iran, Feb. 9, 1996, Hein's No. KAV 4611, Temp. State Dep't No. 96-84. A 1989 agreement with Iraq provided for compensation to the families of those who were killed when the U.S.S. *Stark* sank. AGREE-

with Germany settled certain claims against the German government on behalf of victims of National Socialist persecution who were U.S. nationals at the time of their persecution.²⁴³ The agreement does not purport to resolve U.S. claims against German nationals, even though achieving this result was one of the purposes of the agreement.

The agreement was prompted by the case of Hugo Princz, a U.S. citizen who lived in what is now Slovakia when he was arrested in 1942 and sent to a concentration camp, where his entire family died.²⁴⁴ Princz did not receive compensation from Germany because he was a U.S. citizen, and the D.C. Circuit dismissed his case against Germany under the Foreign Sovereign Immunities Act.²⁴⁵ In response, the U.S. House of Representatives passed a bill that would have stripped Germany of immunity.²⁴⁶

The pending legislation prompted Germany to agree to a resolution of the issue through diplomatic channels.²⁴⁷ Pursuant to the executive agreement negotiated in response, Germany paid three million German marks to settle all known claims within the scope of the agreement, and agreed to make comparable payment to other victims identified by the United States.²⁴⁸ The agreement permitted payment only if the "national executes a waiver of all compensation claims within the meaning of article 1 against the Federal Republic of Germany *and against its nationals* (including natural and juridical persons)."²⁴⁹ In other words, in order to benefit from the settlement, claimants had to waive their rights to bring suit against German nationals.

MENT CONCERNING CLAIMS RESULTING FROM THE ATTACK ON THE U.S.S. STARK, U.S.-Iraq, Mar. 27–28, 1989, Hein's No. KAV 934, Temp. State Dep't No. 89-106. Finally, an agreement between the United States and the Multinational Force and Observers (MFO), settled (for over \$19 million) all claims of the U.S. government related to injuries to U.S. military personnel participating in the MFO. The United States agreed that none of its agencies or instrumentalities would bring any legal action against the MFO and other parties. The United States also agreed, in the event of third party litigation against the MFO (or against Egypt or the State of Israel), to consult with them regarding immunities and, "as appropriate," offer "support and cooperation, including participation in legal proceedings, in securing proper recognition and enforcement of such immunities." AGREEMENT CONCERNING THE SETTLEMENT OF CLAIMS, ¶ C, U.S.-MFO, May 3, 1990, Hein's No. KAV 2644, Temp. State Dep't No. 90-216, art. C. The agreement thus formally settles all claims of the U.S. government. As to claims by other parties that might arise in U.S. courts, the United States pledged its assistance but did not purport to resolve them.

243. AGREEMENT CONCERNING FINAL BENEFITS TO CERTAIN UNITED STATES NATIONALS WHO WERE VICTIMS OF NATIONAL SOCIALIST MEASURES OF PERSECUTION, U.S.-F.R.G., Sept. 19, 1995, Hein's No. KAV 4453, Temp. State Dep't No. 95-226 [hereinafter AGREEMENT CONCERNING FINAL BENEFITS].

244. Delissa A. Ridgway, *Justice for the "Forgotten Victims": U.S. Survivors of the Holocaust*, 9 J.L. & POL'Y 767, 769 (2001).

245. *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1168 (D.C. Cir. 1994).

246. Ridgway, *supra* note 244, at 772.

247. *Id.* at 771–72.

248. AGREEMENT CONCERNING FINAL BENEFITS, *supra* note 243. Congress then passed legislation permitting the Federal Claims Settlement Commission to identify and adjudicate the claims not yet known. Holocaust Survivors Claims Act, § 119 (incorporated by reference in Pub. L. No. 104-99, § 211, 110 Stat. 37–38 (1996)).

249. AGREEMENT CONCERNING FINAL BENEFITS, *supra* note 243, arts. 1–3, 4(3) (emphasis added).

The agreement did not, however, purport to resolve such claims of its own force.²⁵⁰

7. Other Indicia of Congressional Intent

Congress has in a number of ways encouraged private litigation in the United States against foreign parties for violations of human rights. The dramatic rise of Alien Tort Statute cases during the last two decades might have led Congress to limit its scope. However, Congress instead enhanced the scope of the act, by adding U.S. nationals (rather than just "aliens") to those who may bring claims against foreign sovereigns for torture.²⁵¹ Since September 11, the State Department has sought to prevent former hostages from recovering against the government of Iran, while Congress has voted to permit the hostages to collect.²⁵² The passage of a House Bill stripping Germany of immunity in certain Holocaust-related cases prompted, as described above, an executive agreement in which Germany paid millions of dollars to compensate U.S. victims of the Holocaust.

In 1998, Congress passed the U.S. Holocaust Assets Commission Act of 1998,²⁵³ which created a commission to investigate potential possession by the federal government of assets obtained from victims of the Holocaust and to encourage the investigation of Holocaust-era practices of insurance companies.²⁵⁴ This legislation, the Ninth Circuit concluded, "at least implicitly" encouraged states to conduct their own investigations into insurance companies doing business in Europe between 1920 and 1945, which is what some states have done.²⁵⁵ California has passed legislation requiring disclosures by insurance companies and lifting statutes of limitations for claims based on Holocaust-era insurance policies.²⁵⁶ California legislation also created a right of action for forced and slave labor cases based on World War II-era conduct,²⁵⁷ although a federal district court in California struck down the California slave-labor statute as an unconstitutional infringement upon

250. A second agreement provided an additional 34.5 million German marks to resolve claims that were unknown at the time of the first agreement. SUPPLEMENTARY AGREEMENT TO THE AGREEMENT OF SEPTEMBER 19, 1995 CONCERNING FINAL BENEFITS TO CERTAIN UNITED STATES NATIONALS WHO WERE VICTIMS OF NATIONAL SOCIALIST MEASURES OF PERSECUTION, U.S.-F.R.G., Jan. 25, 1999, Temp. State Dep't No. 99-37, 1999 WL 212166.

251. See *Slaughter & Bosco*, *supra* note 23, at 112 (describing this and other ways that Congress has supported private causes of action for wrongs inflicted by foreign sovereigns, often over the objection of the administration).

252. Matthew L. Wald, *Seeking Damages from Iran, Ex-Marine Must Battle Bush Administration, Too*, N.Y. TIMES, Feb. 10, 2002, at 15.

253. Pub. L. No. 105-246, 112 Stat. 611 (1998).

254. *Id.*

255. *Gerling Global Reinsurance Corp. v. Low*, 240 F.3d 739, 749 (9th Cir. 2001).

256. CAL. INS. CODE §§ 13800-13807 (1999). The statute has been challenged by insurance-industry plaintiffs. *Gerling*, 240 F.3d at 754 (holding that the statute did not violate the dormant commerce clause but remanding for consideration of plaintiffs' due process argument).

257. CAL. CIV. PROC. CODE § 354.6 (1999).

the federal government's foreign affairs power.²⁵⁸ Both state and federal legislatures have thus shown significant support for providing relief to Holocaust victims through state and federal courts.²⁵⁹ This fact puts these cases on significantly different footing than those at issue in *Dames & Moore*.²⁶⁰

C. Conclusion

As discussed in Part II, there is support in the text of the Constitution for the presidential power to conclude sole executive agreements, but both the Treaty Clause and the Supremacy Clause appear, as a textual matter, to impose some limits on this authority. Historical practice provides one way of

258. *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160, 1173 (N.D. Cal. 2001). See generally Curtis A. Bradley, *World War II Compensation and Foreign Relations Federalism*, 20 BERKELEY J. INT'L L. 282, 290–92 (describing California legislation and cases).

259. See generally Murphy, *supra* note 48.

260. The importance of *Dames & Moore* for claims against private parties is also limited for another reason: in the context of foreign sovereign immunity, both the President and Congress had successfully exerted sweeping authority over claims against foreign sovereigns. In other words, the determination of whether such cases would go forward was already entirely within the control of the federal government either through the FSIA, or through deference to executive branch statements of immunity. In *Ex Parte Republic of Peru*, 318 U.S. 578 (1943), the Supreme Court held that the courts *must* accept suggestions of immunity for foreign sovereigns by the executive branch as a "conclusive determination by the political arm of the Government" that the suit in question would interfere "with the proper conduct of our foreign relations." *Id.* at 589. See also *Republic of Mexico v. Hoffmann*, 324 U.S. 30, 35 (1945) ("It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.").

After 1945, suggestions of immunity by the Department of State have been treated as conclusive by both federal and state courts. See, e.g., *Rex v. Cia. Pervana De Vapores*, 660 F.2d 61, 68 (3d Cir. 1981) (listing cases); *Kline v. Kaneko*, 535 N.Y.S.2d 303, 304 (N.Y. Sup. Ct. 1988). This represented a limitation on the power of state courts, which had, until 1943, decided issues of foreign sovereign immunity not only on the basis of international law but also on their own determinations as to whether application of the doctrine would promote justice. See, e.g., *Pilger v. U.S. Steel Corp.*, 127 A. 103, 108 (N.J. Ch. 1925). In 1976 Congress passed the FSIA, which comprehensively addressed the amenability of foreign sovereigns to suit in the United States. The executive branch supported the FSIA in part because it did not like the pressure that foreign countries applied to the State Department to secure suggestions of immunity, and in part because it recognized that such suggestions were not entirely consistent from case to case. See *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong. 24, 26–27 (1976) (statement of Monroe Leigh, Legal Advisor, U.S. Department of State) [hereinafter *Jurisdiction Hearings*].

Thus when *Dames & Moore* upheld the claims settlement agreement in part because of congressional acquiescence in executive branch practice, it did so where both the executive branch and Congress had exercised wide-ranging authority over such claims. There is no similar context for the resolution of claims against private parties; upholding such agreements means that sole executive branch action makes significant inroads into state legislative authority in a way that *Dames & Moore* did not. The point is not that *Dames & Moore* had no impact on state law claims: some claims nullified by the executive order at issue in that case were brought under state law. The point is instead that when it enacted the FSIA, the federal government exercised its "undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983). One of the key questions for the *Dames & Moore* case was whether the President had the authority to nullify claims in U.S. courts that were explicitly permitted by the FSIA. Outside the operation of the FSIA, the executive branch continues to have complete control over the immunity of foreign heads of state. See, e.g., *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 296–97 (S.D.N.Y. 2000). But in the context of private defendants, there is no sweeping federal statute, and the search for congressional acquiescence therefore makes far less sense.

delimiting the President's power. By this measure, there is no long-standing history of executive settlement of claims against private parties. Moreover, such settlements raise particularly acute Supremacy Clause concerns, since they potentially nullify both federal and state law claims in an area of uncertain executive authority. For these reasons, the executive branch does not have the authority to nullify outright the claims resolved by the recent executive agreements with France, Germany, and Austria. The bids for deference pursuant to the recent executive agreements should be viewed in this context.

IV. SCHOLARSHIP

As set forth above, deference to sole executive agreements that seek to terminate domestic litigation against private parties threatens to undermine the Treaty and Supremacy Clauses of the Constitution. Especially where there is no long-standing history of such agreements from which this authority might be inferred, convincing arguments by scholars that executive agreements terminating private litigation need not be concluded as treaties would resolve much of the constitutional tension inherent in deference to these sole executive agreements. However, as the following discussion explains, scholars have not focused on the claims settlement power, nor have they focused on how deference can undermine the distinctions between executive agreements and treaties.²⁶¹

Professor Ramsey argues, based on constitutional text and original intent, that the President has the power to enter into minor and temporary short-term sole executive agreements that lack any domestic legislative effect,²⁶² but does not have the power to resolve by sole executive agreement litigation pending in the U.S. courts, whether against foreign sovereigns or individuals.²⁶³ Thus, the Supreme Court was wrong to give domestic legal effect to the executive agreements at issue in *Belmont*, *Pink*, and *Dames & Moore*.²⁶⁴

The textual argument is based in part on the Supremacy Clause and its use of the term "Treaties," rather than broader language such as "compact," or "agreement," discussed in Part II above. From this text, and evidence of original intent, Ramsey concludes, executive agreements should not be given "domestic" or "legislative effect."²⁶⁵

261. See, e.g., Bradley, *supra* note 14; David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439 (1999) [hereinafter Bederman, *Deference or Deception*]; David Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953 (1994) [hereinafter Bederman, *Revivalist Canons*]. Professor Bradley examines the role of *Chevron*-style deference in the foreign affairs context but does not discuss how deference helps define the independent law-making power of the executive branch in foreign affairs. See Bradley, *supra* note 14, at 678–79, 709. Professor Bederman considers the role of deference in the interpretation of treaties. See Bederman, *Deference or Deception*, *supra*, at 1440.

262. Ramsey, *supra* note 35, at 136–37.

263. *Id.* at 137 n.19 (providing author's definition of "domestic legal effect").

264. *Id.* at 218–35, 237–40, 238 n.410.

265. *Id.* at 225–31, 238–40.

What, however, constitutes “domestic” and “legislative effect?”²⁶⁶ This question is both important and difficult, as consideration of the claims settlement power illustrates. Ramsey argues that executive settlement of cases against foreign sovereigns during the late eighteenth and early nineteenth centuries had no “domestic effect” because foreign sovereigns were, under international law, immune from suit in U.S. courts.²⁶⁷ By the middle of the twentieth century, questions of foreign sovereign immunity had become the prerogative of the executive branch.²⁶⁸ Because the executive branch made the final decision as to whether a foreign government could be sued in U.S. courts, would not the decision to *settle* a case with a foreign sovereign through a sole executive agreement have a “domestic effect?” On the other hand, if the Constitution gives the President sole power to determine the amenability of foreign sovereigns to suit, and if the President has enjoyed such power since 1799, would the President not have the power to settle such suits as well?²⁶⁹

After Congress (at the suggestion of the President) passed the FSIA, executive settlement of claims arising under the act clearly had “domestic effect.” Thus, under Ramsey’s analysis, the President lacks the power to settle such claims pursuant to a sole executive agreement.²⁷⁰ But to conclude that the executive branch also lacked the power to settle claims *before* the enactment of FSIA creates the anomaly that it had control over such claims, except to settle them (and that it historically had, but lost, this power to settle such claims). To conclude that the executive branch did have the power to settle claims before the FSIA would mean that somehow the FSIA nullified that power, although neither Congress nor the President appears to have so intended.²⁷¹

The first general point here is that the line demarcating “domestic effect” is blurred. As soon as sovereign immunity ceased to be an absolute doctrine (assuming that, as Ramsey suggests, it was absolute at one time) and the courts began to consider the view of the executive branch on the question of

266. Ramsey defines an international agreement as having “domestic legal effect” if it “alters rights and obligations as a matter of U.S. law.” *Id.* at 137 n.19.

267. *Id.* at 230 n.380.

268. See discussion *supra* note 260.

269. Professor Ramsey has suggested elsewhere that he does not agree with the deference that the courts gave to executive branch suggestions of immunity, drawing a distinction between presidential determinations of status (i.e., recognition) from which legal consequences might follow, and an immunity decision made by the President on a case by case basis in the context of particular litigation. See Prakash & Ramsey, *supra* note 79, at 263 n.125. That does not solve the problem, however, for Prakash and Ramsey still leave us with the issue of distinguishing between treaties and executive agreements based on “legislative effect.” Without a systematic treatment of deference doctrines and their relationship to “legislative effect,” the exception threatens to swallow the rule.

270. Ramsey, *supra* note 35, at 238. Professor Ramsey, although largely limiting his analysis to “original design,” nonetheless suggests that executive agreements with domestic effect might be justified if the Senate does not have the time to consider the agreements. *Id.* at 238 n.410, 239.

271. See *Dames & Moore v. Regan*, 453 U.S. 654, 685–86 (1981) (explicitly rejecting the argument that FSIA limited the President’s power to enter into claims settlement agreements, based in part on the drafting history of the FSIA).

immunity, foreign claims settlements began having some “domestic effect,” even outside the operation of the formal application of Article VI. The problem is not resolved by lodging the authority to make sole executive agreements in Article II’s vesting of executive power with the President; the treaty power, shared with the Senate, is a limitation on the President’s general executive power (as Ramsey and Prakash argue).²⁷² Hence a line must still be drawn between treaties and executive agreements.²⁷³

The second general point is that although demarcating the bounds of the Supremacy Clause helps to map the constitutional limits on executive authority to enter into sole executive agreements that are enforced in U.S. courts, no matter where these lines are drawn the real action is sometimes on another stage—the one on which deference is playing. This point is forcefully illustrated by the development of the foreign sovereign immunity doctrine, and by the differing positions of Professors Clark and Ramsey on the outcome of the Supreme Court cases enforcing sole executive agreements. Ramsey suggests that *Belmont* and *Dames & Moore* were incorrectly decided.²⁷⁴ By contrast, Clark, who agrees with Ramsey that non-treaty agreements raise important Supremacy Clause issues,²⁷⁵ defends *Belmont* as judicial deference to the executive branch under the act of state doctrine,²⁷⁶ and *Dames & Moore* as the executive branch response to an “important foreign policy crisis”²⁷⁷ that “recalls” the political question doctrine.²⁷⁸ Judicial deference

272. Prakash & Ramsey, *supra* note 79, at 253–54.

273. Professor Tribe has offered a text-based argument against the interchangeability of congressional-executive agreements but concedes that some types of international agreements do not rise to the level of treaties under Article II of the Constitution and may be concluded by the President alone. Tribe, *supra* note 34, at 1266–67. Tribe distinguishes the two based on the degree to which an agreement “constrains federal or state sovereignty and submits United States citizens or political entities to the authority of bodies wholly or partially separate from the ordinary arms of federal or state government.” *Id.* at 1268. There are problems with Tribe’s formulation, as other scholars have noted. See Spiro, *supra* note 34, at 973–81; Yoo, *supra* note 21, at 788–98. Applying his formulation here implies that any executive agreement referring claims to another arbitral body for resolution (including the *Dames & Moore* agreement and all of the nineteenth-century sole executive agreements referring claims against foreign sovereigns to arbitration commissions) would be unconstitutional, but a claims settlement agreement that outright nullified existing claims (against foreign sovereigns or individuals) would be constitutional, at least from a separation of powers perspective. Focusing on the extent to which an agreement constrains federal or state sovereignty by looking at the extent to which it conflicts with “ordinary state and federal law-making authority,” Tribe, *supra* note 34, at 1268 (quoting a letter from Professor Anne-Marie Slaughter to Sen. Hollings of October 18, 1994), may suggest an approach consistent with the Supremacy Clause as well as state interests. See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1345 (2001) (arguing that the “procedures governing the adopting of treaties were also designed to facilitate state influence”). This part of Tribe’s inquiry asks, at least in part, how consistent the operation of the sole executive agreement is with the Supremacy Clause—whether something other than a treaty or law of the United States can act as the “Supreme Law of the Land” and thereby bind judges in every state.

274. Ramsey, *supra* note 35, at 234–40. With respect to *Dames & Moore*, Ramsey argues that because the case involved “material nonexecutory agreements,” it would “likely” not come within the President’s power to conclude non-treaty agreements. *Id.* at 238.

275. Clark, *supra* note 273, at 1438–52.

276. *Id.* at 1448–49.

277. *Id.* at 1452.

278. *Id.* at 1452 n.830. See also CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE:

thus threatens to swallow textual commitments of authority in difficult cases. A complete picture of the President's power to conclude executive agreements that diminish the rights of private parties in U.S. courts must include an analysis of the political question and other deference-based doctrines.²⁷⁹

Another loosely grouped set of scholars has focused upon the practice of the executive branch and Congress as a significant guide to demarcating the boundaries between treaties and other constitutionally permissible forms of international agreements—particularly congressional-executive agreements—but without significant attention to the courts' role in mediating such practice. Professors Ackerman and Golove argue that a "constitutional moment" in the 1940s legitimated the full interchangeability of treaties and congressional-executive agreements.²⁸⁰ Professor Spiro argues that practice provides the basis for incremental changes in the Constitution's allocation of power,²⁸¹ and Professor Yoo argues that contemporary practice confirms the textual allocation of authority.²⁸² However, with the exception of Professor Spiro, these scholars do not offer guidance to the courts as to when they must consider executive branch and Congressional practice in resolving textual interstices.²⁸³ Professor Spiro provides such guidance through a powerful theory of constitutional "increments," where the importance of practice is evaluated based on acceptance, contestedness, age, and pedigree,²⁸⁴ but he does not (fully) develop how courts would apply this methodology, nor does he em-

JURISDICTION 2D § 3534.2 (2d ed. 1987) (speculating that *Dames & Moore* did not mention the political question doctrine because the case involved private property rights).

279. Other distinctions between constitutional and unconstitutional executive agreements are also undermined by the claims settlement history. Professor Paul, for example, posits that sole executive agreements were originally used only for "contemporaneous exchanges which imposed no future obligations on any party." Paul, *supra* note 34, at 737. Because of this "temporal limitation," such agreements had "no effect on U.S. domestic law." *Id.* at 742. This logic is difficult to follow: a one-time, contemporaneous agreement to nullify claims pending in U.S. courts in return for a lump-sum payment by a foreign government to the United States seems to qualify as "contemporaneous," yet has significant domestic effect. Professor Paul argues that before the Roosevelt administration, executive agreements were used "in a few limited circumstances," in accordance with (what he terms) the traditional view that they should only be used for contemporaneous exchanges. *Id.* Yet in the late nineteenth century, executive agreements established a number of arbitration commissions to resolve claims. See *infra* note 176 and accompanying text. If these claims commissions fall within the definition of "contemporaneous exchanges," then why does *Dames & Moore* not fit within that definition? See *id.* at 761–66 (criticizing *Dames & Moore*). A major difference, of course, is that in *Dames & Moore* the President nullified claims in U.S. courts, but this is not the difference upon which Professor Paul relies.

280. Ackerman & Golove, *supra* note 34.

281. Spiro, *supra* note 34, at 1009–35.

282. Yoo, *supra* note 21. Professor Yoo relies on current practice and text but, as Professor Spiro notes, does not provide for changes in practice. Spiro, *supra* note 34, at 1007–09.

283. This is because their theories are not directed at the courts. Ackerman's theory permits constitutional change only at watershed moments, involving participation of the people, not intended to describe a theory of deference for the courts. Ackerman & Golove, *supra* note 34, at 873–75. Yoo describes current practice as reflecting allocation of constitutional powers, without considering whether and how changes in practice are legitimate or inform our reading of the constitutional allocation of authority. Yoo, *supra* note 21.

284. Spiro, *supra* note 34, at 1026–27.

phasize a strong separation of powers framework for this analysis. As a result, when courts actually consider challenges to congressional-executive agreements (i.e., when the “rubber meets the road”),²⁸⁵ they begin (and often end) with the political question doctrine, which provides a substantially different analysis than that of scholars who write about the constitutionality of congressional-executive agreements.²⁸⁶ Thus, for example, when courts actually considered challenges to the North American Free Trade Agreement (NAFTA)—an issue much debated in the scholarship discussed above—their analysis was framed almost entirely by the political question doctrine. The argument that “major and significant” agreements require Senate ratification as treaties—an argument that scholars have defended²⁸⁷—was rejected by the Eleventh Circuit under the political question doctrine as beyond judicial expertise.²⁸⁸

In short, deference scholarship has not squarely confronted separation of powers issues; the work on the textual commitments of foreign affairs authority has skirted important deference questions; and scholars that have focused on constitutional change based on practice have not fully considered the role of courts. For the most part, these issues were simply outside the scope of each author’s respective thesis. However, as the recent Statements of Interest illustrate, textual commitments of authority and deference-based doctrines need better integration.

V. DOCTRINAL APPROACHES

The first four Parts of this Article have considered the constitutional tension created by judicial deference to sole executive agreements to terminate domestic litigation, as well as several potential ways of resolving the tension. However, historical practice by the executive branch, other indicia of congressional intent, and academic scholarship on the issue have not provided a basis for executive lawmaking that would answer the Treaty and Supremacy Clause problems. This Part considers other arguments in favor of deference. Courts considering the issue have applied the political question doctrine²⁸⁹

285. I am indebted to Professor Jack Chin for calling my attention to this phrase, albeit in a somewhat different context (my reappointment vote).

286. See, e.g., *Made in the USA Found. v. United States*, 56 F. Supp. 2d 1226, 1254 (N.D. Ala. 1999), vacated by 242 F.3d 1300 (11th Cir. 2001).

287. See MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 183 (1990).

288. *Made in the USA Found.*, 242 F.3d at 1315–16. The court also rejected Tribe’s approach for similar reasons. *Id.* at 1315 n.33. One could argue, perhaps, that the Eleventh Circuit was simply referring to the appellant’s briefing of this issue, and that had the briefing provided better standards applying this line, the court might have reasoned differently. See *id.* at 1315. The point here, however, is that courts approach this question by looking first at issues like “judicial expertise,” which is not how scholars have addressed it.

289. *Nazi Era Cases*, 129 F. Supp. 2d 370, 374 (D.N.J. 2001). Cf. *In re Austrian and German Holocaust Litig.*, 250 F.3d 156, 163–64 (2d Cir. 2001) (granting mandamus relief in cases where plaintiffs sought voluntary dismissal and referring to the political question doctrine when ordering the district court to strike parts of its order).

and international comity²⁹⁰—the same doctrinal approaches were used by courts to dismiss Holocaust-era cases even before the agreements were concluded.²⁹¹ The doctrines also fail to provide a convincing rationale for deference. Although rooted in separation of powers concerns, they fail to alert courts to the separation of powers problems raised by deference to these sole executive agreements. The final Part considers an alternative approach that stays far closer to the text and balance of power of the Constitution.

A. Political Question Doctrine

The political question doctrine provides that certain matters are not suited for determination by the federal judiciary. The leading case on the doctrine, *Baker v. Carr*, noted that the doctrine may have particular force in the context of foreign affairs because the issues raised by such cases frequently “defy judicial application,” or are committed to the discretion of the executive branch or Congress.²⁹² Furthermore, such issues frequently require the nation to speak with a single voice.²⁹³ The *Baker* court also commented, however, that not all such cases lie “beyond judicial cognizance.”²⁹⁴ The Court listed six factors that help to determine whether to apply the doctrine: (1) textual commitment of the issue to a “coordinate political department”; (2) lack of judicially discoverable or manageable standards to resolve the issue; (3) the impossibility of deciding the issue without making a nonjudicial policy determination; (4) the potential for showing a lack of respect that is otherwise due other branches of government; (5) an “unusual need for unquestioning adherence to a political decision already made,” or (6) the potential for embarrassment from “multifarious pronouncements by various departments on one question.”²⁹⁵ Scholars have debated at length the extent to which the political question doctrine undermines the “rule of law” and any duty of courts to decide cases.²⁹⁶ Other commentators have characterized the doctrine as one form of deference among many others afforded by the courts to the executive branch and Congress.²⁹⁷ Application of the political

290. *Nazi Era Cases*, 129 F. Supp. 2d at 386–88.

291. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 483–91 (D.N.J. 1999).

292. 369 U.S. 186, 211 (1962).

293. *Id.*

294. *Id.*

295. *Id.* at 217.

296. See generally J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97, 108–118 (1988) (describing the debate over the doctrine among Judge Learned Hand, Herbert Wechsler, Alexander Bickel, Louis Henkin, and others). There is no shortage of scholarship criticizing the doctrine. See, e.g., THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* (1992); Martin Redish, *Judicial Review and the “Political Question,”* 79 NW. U. L. REV. 1031 (1984).

297. See, e.g., Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597, 599 (1976); Bradley, *supra* note 14, at 659–61 (describing the political question doctrine as a form of deference); Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 242 (2002) (arguing that the political question doctrine is part of a “spectrum of deference that is inferred from the Constitution’s text, structure, and history”).

question doctrine in response to recent executive agreements and to foreign foundations designed to compensate plaintiffs in World War II–related litigation in U.S. courts highlights both the use of the doctrine as a form of judicial deference and the conflicts that often arise between Congress and the executive branch when the doctrine is invoked.²⁹⁸

Applying the political question doctrine, the *Nazi Era Cases* court dismissed a forced labor case against corporations despite the plaintiff's objections,²⁹⁹ pursuant to the recently concluded German Agreement.³⁰⁰ Although the agreement in question did not actually resolve or settle the claims, the district court reasoned that the Statement of Interest submitted by the U.S. government pursuant to the agreement, coupled with the history of attempts to resolve post–World War II reparations issues through government negotiation, warranted dismissal.³⁰¹ Judicial resolution of the claims, the court concluded, would constitute “lack of respect due coordinate branches of government” (the fourth *Baker* factor) and would potentially embarrass the United States (the sixth *Baker* factor).³⁰²

Unfortunately, the factors articulated in *Baker* invite courts to engage in a superficial and potentially meaningless separation of powers analysis. Here, the court consistently referred to World War II reparations as an issue for the “political branches,” conflating the executive branch with “the governmental level,” the “government,” and the “political branches.”³⁰³ What the court neglected in this analysis are two key separation of powers points: (1) that treaties and executive agreements are constitutionally distinct, and that the resolution of an issue by the “political branches” through a treaty is not equivalent to resolution by sole executive agreement; and (2) that if indeed the complaint stated a cause of action—an issue that the court conveniently did not reach—that valid cause of action would itself be an action of the “political branches,” if one that was in potential conflict with the views of the executive branch in this particular litigation. There may turn out to be little conflict between executive and legislative wishes, or it may turn out that the Constitution and/or historical practice resolve a conflict in favor of

298. Scholars have neglected this conflict, and many iterations of the doctrine mask it. See, e.g., *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (“The political question doctrine excludes 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.”).

299. *Nazi Era Cases*, 129 F. Supp. 2d at 372. The Second Circuit mentioned the Statements of Interest in the context of a motion for voluntary dismissal made by plaintiffs who wanted to present their claims to the Foundation. See *In re Austrian & German Holocaust Litig.*, 250 F.3d at 159. The opinion suggests that the Statements raise political question doctrine issues, but it is unclear to what extent the opinion's holding (that the district court judge had exceeded her authority with parts of the order dismissing the case) relied upon the Statements of Interest or the political question doctrine. *Id.* at 163–65.

300. See GERMAN AGREEMENT, *supra* note 2.

301. *Nazi Era Cases*, 129 F. Supp. 2d at 383.

302. *Id.* at 382.

303. *Id.* at 381–83.

the Executive.³⁰⁴ Courts should, however, identify separation of powers issues and look to constitutional text and historical practice for assistance in sorting them out. With this framework in place, the court would have made much better sense of the *Nazi Era Cases*.³⁰⁵

Instead, the court saw refusing to honor the Statement of Interest as “in effect say[ing] that the [German] Foundation and all of the treaties that have gone before are inadequate, and that this Court could somehow do a better job of fashioning relief for the victims of the Nazi era.”³⁰⁶ This spin neglects the fact that if Congress or the states have already created a cause of action that applies, then they believe that the courts can resolve such disputes.³⁰⁷ If the President and the Senate wanted to create the German Foundation and nullify the claims by treaty, they could. In a sense, the court’s statement is deeply distrustful of the way the Constitution allocates authority: either existing treaties preclude the claims or they do not. If they do, dismissal is warranted. If they do not, then a cause of action has been created through the appropriate constitutional mechanism; whether the treaty is “inadequate” is another matter. Indeed, the court’s reasoning creates a treaty “penumbra”: issues “like” those resolved by treaties are “meant” to be resolved through the “political branches.”³⁰⁸ The constitutional allocation of author-

304. I am not arguing that dismissing a case that states a cause of action undermines the “rule of law” or violates a “duty” of the judiciary to hear cases. Instead, I assume that the courts have no such “duty” to hear cases, and suggest that whether the plaintiffs have stated a claim is highly relevant to the issue of whether the court ought to defer to the executive branch’s suggestion of dismissal. If there is no cause of action, then there is no conflict. If there is a cause of action, on the other hand, there may be a conflict (of lesser or greater magnitude) between the direction provided to the courts by Congress and by the Executive. Resolution of such conflict may depend upon a variety of factors (including the textual commitment by constitution of relevant powers to each branch), as argued in the balance of this Article, but identifying such conflict is surely the first step in the analysis.

305. Frumkin argued, for example, that his claim was different from those addressed in the reparations agreements because he brought it against private companies, not governments. The court reasoned that after the establishment of the foundation this is an “irrelevant distinction.” *Nazi Era Cases*, 129 F. Supp. 2d at 377.

306. *Id.* at 383.

307. How explicitly the cause of action applies to the case may be relevant in this analysis. Holocaust-specific legislation creates a greater conflict than a tort action that may reach the same conduct. Even in the tort action, however, if the court concludes that the complaint states a claim, then there is a conflict. Resolution in favor of the Executive on the grounds that many treaties might have—but did not—nullify the claims makes little sense.

308. Two other district courts have also created a treaty “penumbra.” In the case of *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d 1160, 1168 (N.D. Cal. 2001), the court concluded that the Peace Treaty with Japan does not preempt forced labor claims by Chinese and Korean nationals, although that treaty does preempt such claims by U.S. plaintiffs. This “paradox”—that claims of American veterans were preempted while identical claims by non-Americans might be litigated in the U.S.—helped convince the court that the California statute permitting forced labor claims was an unconstitutional violation of the federal government’s foreign affairs power. *Id.* at 1165–66, 1168. The court’s approach thus gave the treaty a penumbral effect beyond its text and formal preemption. A district court in Washington, D.C., used comparable reasoning in another “comfort women” case, this one directed at Japan itself. *Hwang v. Japan*, 172 F. Supp. 2d 52, 64–67 (D.D.C. 2001). The court reasoned:

Although as plaintiffs argue the claims of the ‘comfort women’ might not have been specifically mentioned in these treaties, the series of treaties signed after the war was clearly aimed at resolving all war claims against Japan.

ity means little if courts conclude that because treaties resolved issues *like* these, it is just as if the treaty *actually* resolved them.

The “national embarrassment” point (the sixth *Baker* factor) suffers from similar flaws. In dismissing the case, the court concluded that both industry and litigants had relied on the existence of an alternative forum to litigation,³⁰⁹ without considering, however, that a treaty could still be negotiated, signed, and ratified after any decision refusing to dismiss the case. All of the arguments directed at the court by the U.S. government’s Statement of Interest about the merits of the German Foundation, which the court ironically reasoned were not for it to consider, could then be directed to the Senate which, as the court acknowledges, is far better capable of evaluating the merits of various reparations schemes.³¹⁰ Instead, the court’s reasoning permits the executive branch to shoehorn uncertainty into deference, and then (potentially) deference into precedent and reliance, as the embarrassment point will work with greater force in the future, once precedent exists to support the government’s use of Statements of Interest pursuant to executive agreements.

The *Iwanowa* court also used the political question doctrine to dismiss World War II–related litigation against private companies that included forced labor claims, but unlike in *Nazi Era Cases*, it did so without the benefit of Statements of Interest from the executive branch and before the conclusion of the executive agreements.³¹¹ The court reasoned that it lacked judicially manageable standards to resolve the case (the fourth *Baker* factor) because of the difficulties in sorting out all of the treaties that might apply to plaintiffs of different nationalities, because sources of evidence were scattered all over the world, and because the claims arose out of a war that took place more than fifty years ago.³¹² The court did not consider, however, that: (1) through statutes of limitation, legislatures routinely make decisions about the appropriate length of time between the original injury and the suit; and (2) Congress not only created, but also recently expanded the Alien

There is no question that this court is not the appropriate forum in which plaintiffs may seek to reopen those discussions nearly a half century later. Just as the agreements and treaties made with Japan after World War II were negotiated at the government-to-government level, so too should the current claims of the ‘comfort women’ be addressed directly between governments.

Id. at 67. Here again the treaty is given a penumbral power and the “government” is conflated with the “executive branch.”

309. *Nazi Era Cases*, 129 F. Supp. 2d at 383.

310. *Id.*

311. *Iwanowa*, 67 F. Supp. 2d at 424. The court in *Burger-Fischer v. DeGussa AG* concluded that the 1954 Transition Agreement (concluded by the United States as a treaty) “subsumed” private forced labor claims. 65 F. Supp. 2d 248, 278 (D.N.J. 1999). To the extent the court held that the claims in question were barred by a treaty, this article is not directed to the decision; extinguishing state law causes of action through a treaty is perfectly consistent with the Supremacy Clause.

312. *Iwanowa*, 67 F. Supp. 2d at 489. The court also reasoned that the Constitution relegated these issues to the “political branches,” noting in support that reparations are often resolved by treaty. *Id.* at 485. This reasoning would support a refusal by the court to create a cause of action, or reasoning that U.S. laws did not intend to reach this conduct, but it provides no support for dismissing otherwise valid causes of action created by the political branches. *Id.* at 485–87.

Tort Statute, which provides for suits by foreign plaintiffs.³¹³ In other words, if the case stated a claim, there is every reason to believe that Congress (or state legislatures) considered these *very* issues, and concluded nonetheless that this case belonged in the courts. Ironically, this holding was not even necessary: the court had already concluded that the statute of limitations had run on the state and foreign law claims,³¹⁴ and relied on the political question doctrine as an alternative basis for dismissal. Thus, there was no need for the political question doctrine because Congress (or the state legislatures) had already reached the same conclusion that the court sought: that the conduct in question happened too long ago. Had the limitations period *not* run (pressing into service the court's alternative argument), the cases would be presumed timely by Congress or the state legislatures. It would thus be hard to couch the court's refusal to resolve the case on statute of limitations grounds as a bow to the "political branches."

B. *International Comity*

International comity is another potential tool for evaluating Statements of Interest requesting the dismissal of private claims. The leading case on international comity defines it as the "recognition" that one nation provides to the "legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."³¹⁵ More recently, the D.C. Circuit described international comity as "the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum."³¹⁶ The Supreme Court has applied the international comity doctrine to determine when U.S. courts should honor judgments of foreign courts³¹⁷ and to determine when U.S. law should be applied extraterritorially.³¹⁸

In *Iwanowa* the court invoked the doctrine of international comity on the basis of two documents: a letter from a German official to the German Chancellor stating that under international law the term "reparations" includes claims by injured individuals, and a German government report concluding that under international and German law, forced labor claims can only be pursued by way of governmental agreements.³¹⁹ These documents

313. See discussion *supra* Part III.7. *Iwanowa's* claims were based in part on the Alien Tort Statute. 67 F. Supp. 2d at 438–39.

314. *Iwanowa*, 67 F. Supp. 2d at 472–82. The court also concluded that some, but not all, of the Alien Tort Statute claims were barred by the statute of limitations.

315. *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

316. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984).

317. *Hilton*, 159 U.S. at 143 (considering the effect that U.S. courts should give a French judgment).

318. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) (considering whether the Sherman Act applies to conduct that took place in London).

319. *Iwanowa*, 67 F. Supp. 2d at 490.

arguably could be relevant to: (1) interpreting German-U.S. agreements;³²⁰ (2) determining the content of German law;³²¹ or (3) determining the proper extraterritorial application of U.S. law (i.e., whether the Alien Tort Statute or the restitution and other state law claims should be applied to include the conduct alleged by Iwanowa).³²² However, the court did not use these self-serving statements of the German government as tools for interpreting German law, U.S. treaty obligations, or the reach of domestic laws. Nor did it rely on executive acts—like confiscatory decrees in some countries—that have legislative force within Germany.³²³ Instead, the court used the internal statements of the German government—not even specifically referring to this litigation—to provide an *independent basis* for outright dismissal of litigation that was otherwise cognizable in U.S. courts. The cases cited by the court in support of its ruling involve deference to *judgments or proceedings of foreign courts*;³²⁴ *Iwanowa* fails to explain why this well-developed body of law (similar to the domestic doctrine of *res judicata*)³²⁵ should be expanded to give domestic force to internal statements of the German government. Indeed, it is a breathtaking proposition that U.S. courts can dismiss domestic litigation of state and federal causes of action based upon the foreign government's internal view of German and international law. The separation of powers issue is clear: the court concluded that the pronouncements of the German *executive branch* provided the basis for dismissal, even if U.S. domestic law provided a cause of action. The federalism issue is likewise clear: the federal court, based upon the pronouncements of the German executive branch, refused to enforce a state law cause of action.³²⁶

320. See generally Bederman, *Revivalist Canons*, *supra* note 261, at 1007–15.

321. See, e.g., *Republic of Turkey v. OKS Partners*, 146 F.R.D. 24 (D. Mass. 1993).

322. For example, the court could have concluded that applying these causes of action would violate international law and thus declined to read state and federal law to encompass them. See *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (reasoning that “an act of Congress could never be construed to violate the law of nations, if any other possible construction remains . . .”). It is unclear whether this rule of construction does or should apply to state law. See Michael D. Ramsey, *Escaping “International Comity,”* 83 IOWA L. REV. 893, 947–48 (1998).

323. See Ramsey, *supra* note 322, at 937. Ramsey notes that it is “difficult to discern” what is intended by “executive acts” that are purportedly entitled to comity. Executive acts with legislative force should be treated like foreign legislative acts, but these executive acts do not have legislative force in Germany. He also notes that executive acts might be relevant in assessing the importance of a foreign state's interest when the court must decide whether to apply U.S. law extraterritorially. *Id.* But this was not how *Iwanowa* used the German executive statements; it used them as a basis for a flat out dismissal of domestic litigation, separate from any choice of law issues. *Iwanowa*, 67 F. Supp. 2d at 489–91.

324. The only Supreme Court case that *Iwanowa* cites is *Hilton*. It also cites lower court cases that consider the deference that U.S. courts should give *judgments or proceedings of foreign courts*. See, e.g., *United States ex rel. Saroop v. Garcia*, 109 F.3d 165 (3d Cir. 1997); *Philadelphia Gear Corp. v. Philadelphia Gear de Mexico*, 44 F.3d 187, 191 (3d Cir. 1994); *Turner Entertainment Co. v. Degeto Film GMBH*, 25 F.3d 1512 (11th Cir. 1994); *Spatola v. United States*, 925 F.2d 615, 618 (2d Cir. 1991); *Samportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435 (3d Cir. 1971).

325. See Ramsey, *supra* note 322, at 897–99.

326. The concern here is not with the outcome. The court might have concluded (and, as to some causes of actions, did conclude) that the case was barred by a treaty or by the statute of limitations, or that it simply failed to state a claim. The problem is that to the extent the court relied on the international comity doctrine, it created a significant separation of powers and federalism issue that went en-

The *Nazi Era Cases* court, on the other hand, was presented with a Statement of Interest by the State Department recommending dismissal in the foreign policy interests of the United States. By the time the district court decided the case, the German Foundation had been established.³²⁷ Thus, the court could have viewed this as an issue of whether it should apply California law extraterritorially (to the events that happened in Europe during the war), or whether it should decline to apply California law in favor of the legislation establishing the German Foundation. Indeed, the court describes part of the comity issue before it as “whether the Court should defer judgment in this case, to lend effect to the laws of a foreign state.”³²⁸

The problem with the court’s use of comity is that it completely misses important separation of powers and federalism issues. First, the court divorces questions about the extraterritorial application of domestic law from legislative intent. That is, in dismissing the case, the court might have concluded that state and federal law was not intended to reach foreign conduct governed by the German Foundation.³²⁹ Here, however, that conclusion would have been entirely implausible, at least to the extent that Frumkin relied on the California statute that *explicitly* created a cause of action based on Nazi slave and forced labor and extended the limitations period for such claims until December 31, 2010.³³⁰

The *Nazi Era Cases* opinion relies upon *Hartford Fire Insurance Co. v. California*³³¹ for its application of the international comity doctrine but misses part of the significance of that case. In *Hartford Fire Insurance*, there was disagreement about the role that international comity should play in the decision to apply the Sherman Act extraterritorially.³³² The dissent argued that comity is a tool for understanding legislative intent, and concluded that in light of international law, Congress would not have intended for the Sherman Act to reach the extraterritorial conduct at issue.³³³ Under this analysis, the *Nazi Era Cases* court’s use of comity appears to fail, at least with respect to state law, because the intent of the California legislature appears

tirely unrecognized. Ramsey has identified this problem in other contexts and convincingly argued that the international comity doctrine actually includes what should be several distinct issues, and that the term obfuscates federalism issues. *Id.* at 946–51.

327. See Detlev Vagts & Peter Murray, *Litigating the Nazi Labor Claims: The Path Not Taken*, 43 HARV. INT’L L. J. 503, 503 (2002).

328. *Nazi Era Cases*, 129 F. Supp. 2d at 387.

329. See Ramsey, *supra* note 322, at 906 (arguing that “legislative comity” may mean that an “apparently applicable U.S. law should not govern particular conduct because that conduct is more properly the concern of a foreign nation”).

330. CAL. CIV. PROC. CODE § 354.6 (1999); *Nazi Era Cases*, 129 F. Supp. 2d at 373 n.5. A federal district court has since held the statute unconstitutional because it encroached upon the federal government’s exclusive power over foreign affairs. *In re World War II Era Japanese Forced Labor Litig.*, 164 F. Supp. 2d at 1160. The *Nazi Era Cases* court considered a case filed in state court but removed based on diversity and because it raised questions of international law. 129 F. Supp. 2d at 372–73. The court did not consider the extent to which any of the laws in question were intended to apply extraterritorially.

331. 509 U.S. at 764.

332. *Id.* at 797–98.

333. *Id.* at 817–18 (Scalia, J., dissenting).

clear and because the court reached no conclusion with respect to international law.

The majority opinion in *Hartford Fire Insurance* considered, but explicitly refused to decide, whether or not the federal courts could decline to exercise Sherman Act jurisdiction over foreign conduct based upon principles of international comity.³³⁴ The court did not reach this issue because it concluded that international comity did not apply.³³⁵ *Nazi Era Cases*, on the other hand, failed even to consider this issue and concluded that it could dismiss under international comity otherwise cognizable state law claims on the basis of an executive branch request to dismiss the litigation in favor of the German Foundation.

The federalism question is plain: can the President preempt state law that is inconsistent with executive foreign policy objectives by relying on international comity, even where the President lacks the plenary power to do so? The *Nazi Era Cases* court, however, missed the issue entirely. Thus the court rendered the international comity doctrine susceptible to the sort of “mischief” that Ramsey has noted elsewhere—namely, the use of “that imprecise and misunderstood term which allowed the court to reach a conclusion that, if asserted directly, would be a substantial and controversial expansion of executive power.”³³⁶

As set out in detail at the beginning of this Article, the executive branch lacks the authority to order this litigation dismissed: for courts to accept this power would expand executive authority, creating tension with the Supremacy Clause. Yet through the comity doctrine, the issue of state-federal power is completely obfuscated. As Ramsey notes, “[f]ogging the matter with the invocation of ‘international comity’ finesses the appropriate discussion of presidential power, and allows the matter to be seen solely as a matter of reasonable judicial administration.”³³⁷

C. Functional Considerations

One might argue that the courts’ responses to the Statements of Interest are best understood—and perhaps justified—in functional terms. That is,

334. *Id.* at 798.

335. After noting Congress’s silence on the issue, the Court concluded that, in any event, “international comity would not counsel against exercising jurisdiction in the circumstances alleged here.” *Id.*

336. Ramsey, *supra* note 322, at 945. The opinion does mention *Pink* in a footnote, but only to question the constitutionality of the California statute itself. *Nazi Era Cases*, 129 F. Supp. 2d at 386 n.26. A holding by the court that the plaintiff had no cause of action because the California statute was unconstitutional would be extremely hard to justify on the basis of *Pink*, but an explicit analysis of executive authority over international claims—even if reaching a questionable outcome—would have been far superior to the analysis the court did provide, which gave virtually no hint of the constitutional issues raised in the case.

337. Ramsey, *supra* note 322, at 945–46. As Ramsey notes, “if the President issued an executive order, pursuant only to inherent authority, that a certain state law should not be enforced because it undermined an ‘executive policy,’ that would be a controversial assertion of executive power.” *Id.* at 945. Yet stripped of the label “international comity,” this is exactly what the *Nazi Era Cases* permits.

deference is justified based on political exigencies such as the threat of international conflict and the political damage to the United States that could result from the courts' refusal to bow to the agreements negotiated by the State Department.³³⁸

The risk of conflict and embarrassment that might result from the courts' refusal to defer to the executive branch fails, however, to provide a convincing rationale for deference in these cases. First, the *Baker v. Carr*³³⁹ factors include "embarrassment," and, as discussed above, the potential for embarrassment here results not from the factual situation confronted by the State Department, but from the State Department's own decision to resolve this issue through non-treaty means. Second, as other scholars have detailed, post-Cold War foreign policy lacks at least some of the high-stakes risks of the past, which weakens, at least as a general matter, the support that this rationale provides for judicial deference to the executive branch.³⁴⁰ Third, and related to the first two points, this matter presented no true national emergency or foreign policy crisis that threatened to push the United States into or towards armed conflict. Whatever force the deference argument might have in a high-stakes situation, the facts in these cases do not support its application. Indeed, the State Department's request for deference is based in large part on concern about the plaintiffs, including their age and the weaknesses in their legal claims, as well as the justice and fairness of the German Foundation itself.³⁴¹ True foreign policy concerns play a surprisingly limited role in the Statements of Interest, which do little beyond mentioning the importance of Germany as an ally and economic partner, and the general interest in good relations with Israel and other nations.³⁴²

Fourth, using embarrassment as a key inquiry (outside of truly exceptional cases) puts courts in the difficult position of either invariably relying on deference to the executive branch—despite the strength of the textual and historical arguments in opposition—or of using its own calculus to weigh the risk of foreign policy embarrassment. Finally, functional constraints should explain why the Constitution's normal allocation of authority does not apply—why these agreements are better concluded as executive agreements rather than treaties. In some situations one might argue, for example, that time constraints prevent the presentation of the agreement to the Senate. The functional arguments advanced in this context, on the other hand, explain why the agreements are a good idea, but they do not explain

338. See, e.g., Paul, *supra* note 34 (explaining, but not defending, the rise in executive agreements and deference to the executive branch as a result of Cold War urgency in the area of foreign affairs); Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 653 (2002) (arguing that the political question doctrine once had a functional basis in the historically high stakes of international conflict where states are assumed to be unitary actors, and the need for unquestioned secrecy is present, but that these underpinnings have been eroded by globalization).

339. 369 U.S. 186, 217 (1961).

340. See Paul, *supra* note 34, at 766–68; Spiro, *supra* note 338, at 659–67.

341. See GERMAN AGREEMENT, *supra* note 2, annex B (quoted in full *supra* note 63).

342. *Id.* annex B.4.

why the Senate is not the appropriate body to consider the virtues of the agreements.³⁴³

VI. A BETTER APPROACH

This Article has described three principal problems with the deference to the Statements of Interest filed pursuant to the recent executive agreements. First, as Part II described, the use of sole executive agreements stands in considerable tension with the Supremacy and Treaty Clauses. Second, as Part III described, executive practice provides one benchmark of constitutionality, meaning that the deference afforded to these agreements sets constitutionally significant precedent for future agreements. This precedential effect is confirmed by the discussion in Part V of the political question doctrine—issues of respect and embarrassment will weigh more heavily on future courts considering such executive agreements because the executive branch will come to expect such deference when negotiating these agreements. Third, the doctrinal tools used by the courts fail to account for any of these issues, a problem compounded by the rise in litigation with foreign affairs implications. Deferring to the Statements of Interest based on flimsy and incoherent doctrine bodes poorly for courts' ability to chart successfully a course through the difficult constitutional issues raised by domestic litigation with foreign affairs implications.

A better approach would do the following. First, courts applying international comity and political question doctrines to dismiss litigation in favor of the executive branch should frame their analyses in the text of the Constitution. If the Constitution provides an explicit source of executive authority over the issue, courts should defer. In *Nazi Era Cases*, which considered a Statement of Interest filed pursuant to the German Agreement,³⁴⁴ this ap-

343. One might also use these functional arguments to explain the executive branch's historic control over litigation against foreign sovereigns and why such control need not extend to cases against private parties. As Spiro has noted, courts have shown "a demonstrably greater willingness to entertain foreign relations matters that do not directly implicate other countries." Spiro, *supra* note 338, at 680. Before globalization, Spiro argues, foreign countries did not distinguish between the actions of courts and those of the state itself; courts' decisions thus could create significant foreign policy risks, particularly given the high stakes of armed conflict. *Id.* at 667–71, 680. Litigation against foreign states implicates, by definition, the interests of other countries while litigation against private parties may or may not do so. Thus, litigation against foreign sovereigns potentially raises the pre-globalization risks identified by Spiro. Interestingly, however, this functional analysis does not provide a complete historical picture of these cases: early cases raising questions of foreign sovereign immunity were decided by courts applying international law. See G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 27–28, 134 (1999). Moreover, the executive supported adoption of the FSIA in 1976 in part because judicial (as opposed to executive) resolution of sovereign immunity issues would conform to the practice of other countries. See *Chas. T. Main Int'l Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 813 n.22 (1st Cir. 1981) (citing H.R. REP. NO. 94-1487, at 7 (1976), reprinted in 1976 U.S.C.A.N. 6604, 6606). Thus, even though they directly implicated the interests of foreign sovereigns, such questions were resolved by courts, suggesting that either foreign governments were able to disaggregate constituent actors within nation states or that these cases directly involving foreign sovereigns created no significant foreign policy risks.

344. *Nazi Era Cases*, 129 F. Supp. 2d 370, 372 (D.N.J. 2001).

proach would alert courts to the Treaty and Supremacy Clause problems created by deference to such sole executive agreements. In *Iwanowa*, which involved neither an executive agreement nor a request for deference by the State Department, but where the court nonetheless dismissed the litigation based on prior government-to-government negotiations and informal statements by the U.S. Department of State,³⁴⁵ this approach would have alerted the court to Supremacy Clause issues raised by dismissal. If the Constitution provides no clear answers, the courts should then look to executive practice. A history of sole executive agreements that terminated private claims would have provided some historical basis for executive authority in *Nazi Era Cases*. This historical basis, in turn, could answer the tension created between sole executive action and the Supremacy Clause, as it did in *Dames & Moore*.³⁴⁶ Instead, however, both courts relied on a history almost entirely of treaties to support sole executive authority. Finally, where courts consider dismissing litigation in spite of the tension between executive authority and the Supremacy Clause, they should look for conflict on the matter between the executive and legislative branches. Where it exists, they should be more reluctant to defer. Why? Much deference to the Executive sits in tension with the Supremacy Clause (as described below), but there is little room to argue that courts should never defer. In addition to considering the textual basis for executive authority, the courts should also consider the posture of the legislative branches with respect to the issue. This approach informally preserves the balance of power created by the Constitution by taking agreement of the executive and legislative branch to trump inconsistent state law under the Supremacy Clause. This approach would also resolve the three principal problems posed by the Statements of Interest. Courts would be forced to ground themselves in the text of the Constitution, to consider significant changes in practice, and to seek to resolve the tension between deference and the Treaty and Supremacy Clauses.

Courts should focus first on the constitutional text and actors. In the forced labor cases,³⁴⁷ the key question was what deference the courts should afford the executive branch. The issue is similar to the one presented by *Dames & Moore*,³⁴⁸ *Pink*,³⁴⁹ *Belmont*,³⁵⁰ and *Youngstown*,³⁵¹ all of which involved assertions of authority by the President over private property and private causes of action in U.S. courts.³⁵² The issue also arises in cases that

345. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 487 (D.N.J. 1999).

346. 453 U.S. 654 (1981).

347. *Nazi Era Cases*, 129 F. Supp. 2d at 370; *Iwanowa*, 67 F. Supp. 2d at 424. In *Iwanowa*, the court dismissed the litigation under the political question doctrine in part because of informal executive branch statements that reparations should be determined on a governmental level. 167 F. Supp. 2d at 486.

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

349. *United States v. Pink*, 315 U.S. 203 (1942).

350. *United States v. Belmont*, 301 U.S. 324 (1937).

351. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

352. Hence the confusion as to why cases like *Dames & Moore* did not involve "political questions." See *supra* note 278 and accompanying text.

do not directly involve the U.S. government, such as private litigation³⁵³ involving issues of foreign state succession,³⁵⁴ the duration of hostilities,³⁵⁵ territorial sovereignty of foreign governments,³⁵⁶ diplomatic immunity,³⁵⁷ and head of state immunity.³⁵⁸ Courts have labeled some of these, but not others, “political questions,” but all constitute domestic “lawmaking” by the President,³⁵⁹ all involve one kind of deference or another to the executive

353. Here and in the paragraphs that follow I use “private litigation” to mean litigation that does not directly challenge the constitutionality of (U.S.) governmental (state or federal) action. Thus a case against a foreign government would qualify as private here, because such a case is not a direct challenge to U.S. governmental action.

354. See 767 Third Ave. Assoc. v. Consulate Gen. of Socialist Fed. Republic of Yugo., 218 F.3d 152, 160 (2d Cir. 2000) (holding issue of succession of foreign governments a nonjusticiable political question).

355. See, e.g., *Brown v. Hiatts*, 82 U.S. 177, 183–84 (1872) (holding in diversity cases that where statute of limitations did not run in Kansas during the Civil War, executive branch actions would determine duration of hostilities for purposes of limitation period). See also *Baker v. Carr*, 369 U.S. 186, 214 (1962) (characterizing as political questions the duration of hostilities, “even in private litigation”).

356. See, e.g., *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839).

357. Consistent with my argument here, Ramsey views diplomatic immunity to state law claims as potentially raising Supremacy Clause issues. See Michael Ramsey, *International Law as Non-preemptive Federal Law*, 42 VA. J. INT'L L. 555, 566–70 (2002). To some extent, diplomatic immunity is governed by federal statute, raising no obvious Supremacy Clause issues. See, e.g., 22 U.S.C. § 254d (2002). See also *Fernandez v. Fernandez*, 545 A.2d 1036 (Conn. 1988). Although Ramsey treats diplomatic immunity as governed by international law, it is also a function of federal executive authority. For instance, state courts view immunity defenses to state law causes of action as governed, at least in part, by the actions of the federal executive branch. See, e.g., *Traore v. State*, 431 A.2d 96, 98 (Md. 1981) (reasoning that “the State Department’s determination that from June 16, 1976, to December 29, 1978, the defendant Traore’s status entitled him to immunity from criminal and civil liability should be respected by the judiciary,” and that “if the State Department had made a contrary determination, such determination would ordinarily be deemed conclusive,” but also refusing to defer to the State Department’s interpretation of a federal statute); *Bolkiah v. Superior Court*, 88 Cal. Rptr. 2d 540, 549 n.6 (1999) (reasoning that “only individuals whom the United States recognizes as legitimate heads of state qualify” for immunity, and that “the determination whether an individual qualifies as a head of state is the exclusive function of the executive branch, to which the court must defer”). This deference to the Executive may or may not be correct—that determination should rest on the text of the Constitution and historical practice—but the point is that it has the same potential to undermine the Supremacy Clause as if state courts applied international law as controlling federal law (rather than choosing to incorporate or apply international law as a matter of state law, which would, of course, raise no Supremacy Clause issues).

358. *Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 280 (S.D.N.Y. 2001) (dismissing state and federal claims against the Queen of Jordan on the basis of “the Executive Branch’s determination that Queen Rania is a head of state who should be immune from suit in courts of the United States,” and concluding that “[s]uch an Executive Branch decision is entitled to conclusive deference from the courts”). State courts also view themselves as bound by executive branch suggestions of immunity under *Ex Parte Republic of Peru*, 318 U.S. 578 (1943). See, e.g., *Anonymous v. Anonymous*, 581 N.Y.S. 2d 776 (N.Y. App. Div. 1992) (holding head of state entitled to immunity in matrimonial suit on basis of suggestion of immunity by executive branch); *Kline v. Kaneko*, 535 N.Y.S. 2d 303, 305 (N.Y. Gen. Term 1988) (accepting as binding State Department suggestion of immunity for the wife of the President of Mexico).

359. Henkin lists as examples of “Presidential ‘Law-Making’” executive agreements and treaties that become the law of the land, the domestic effect of termination of international agreements, the domestic effect of the President’s decision to recognize (or not) foreign states and governments, the President’s decisions about diplomatic and sovereign immunity, and other acts by the President with “domestic legal consequences.” HENKIN, *supra* note 80, at 54–56. As I am using the term, it does not include direct constitutional challenges to presidential actions that would otherwise have no impact on domestic litigation, such as the challenge to the President’s termination of a treaty with Taiwan brought in *Goldwater v. Carter*, 444 U.S. 996 (1979).

branch,³⁶⁰ and all raise Supremacy Clause issues when used to preempt state law causes of action. The focus in these cases—as well as in international comity cases where deference to the executive branch is suggested—should be on the source and scope of executive authority with respect to domestic courts, particularly in light of the Supremacy Clause, and the ways in which the Constitution provides for lawmaking. Courts should focus first on constitutional text, and consult the historical practice of both branches when the text provides no clear answers to the question of law-making authority. This approach recognizes that many long-standing areas of executive authority have no obvious textual antecedent,³⁶¹ and that in such areas the courts have no monopoly on constitutional interpretation, either as a normative or descriptive matter.³⁶²

Forcing the courts to consider potential political questions in terms of the constitutional sources of, and limitations on, executive authority may seem mundane. Moreover, one might argue that the political question doctrine does not apply to cases involving individual rights and liberties,³⁶³ and in any event that this doctrinal distinction has more power than a simple bid to return to constitutional text. Yet attempting to fix the political question doctrine in these cases through the overlay of another set of categories with fuzzy edges ought to be resisted. Distinguishing between cases raising separation of powers and federalism concerns and those involving “individual liberties” is not always easy.³⁶⁴ More importantly, focusing on this distinc-

360. Sometimes the executive branch specifically requests application of the political question doctrine—or other deference-based doctrines—through a Statement of Interest or Suggestion of Immunity, and the courts honor that request. *See, e.g., Leutwyler*, 184 F. Supp. 2d at 280. Other times the courts follow the executive branch's determination that the case does not involve a political question. *See, e.g., Kadic v. Karadzic*, 70 F.3d 232, 250 (2d Cir. 1996). Courts also apply the political question doctrine and leave the issue to executive branch determination even over State Department objection. *See, e.g., Belgrade v. Sidex Int'l Furniture Corp.*, 2 F. Supp. 2d 407, 415–17 (S.D.N.Y. 1998). In still other instances, courts make the determination without a specific recommendation or request from the State Department. *See, e.g., Iwanowa*, 67 F. Supp. 2d 424. By “deference” I do not mean just deference to the precise request of the executive branch in pending litigation; instead, I mean the court's decision that the issue lies within the control of the executive branch to decide, even if that branch would prefer the courts to resolve it in that particular case.

361. Congressional-executive and sole executive agreements provide obvious examples. *See supra* Part II.

362. *See Barkow, supra* note 297, at 323–36 (arguing for greater deference by the courts to the political branches' constitutional determinations in foreign affairs and other areas); *Spiro, supra* note 34, at 973–81, 1009–10 (explaining the problems with a purely text-based approach to non-treaty agreements); *Yoo, supra* note 21, at 799 (“practice is of particular importance in foreign affairs law. Due to the lack of authoritative judicial precedent, many of the issues involving the Constitution and international relations do not have clear answers. In such circumstances, the executive and legislative branches often have taken the lead in interpreting the Constitution, and this practice can provide us with guidance as to a realistic, workable construction of its terms.”).

363. *See, e.g., 13A WRIGHT ET AL., supra* note 278, at § 3534.2 (speculating that *Dames & Moore* did not mention the political question doctrine because the case involved private property rights). *See generally Barkow, supra* note 297, at 250, 325–27 (discussing the political question doctrine and individual liberties).

364. *See Barkow, supra* note 297, at 326 & n.545 (listing sources that discuss the distinction between questions that “directly implicate individual liberties” and those “concerning the operation of govern-

tion would hide the real concerns involved in the forced labor cases: the constitutional basis for executive authority and the Treaty and Supremacy Clauses. Cases that directly challenge state or federal laws, or that challenge executive branch conduct with no domestic implications, pose different constitutional questions.³⁶⁵

In considering the deference appropriate to the executive branch, courts should consider the extent of conflict between state and federal lawmakers and the practice of the executive branch.³⁶⁶ In other words, there are four constitutional actors involved in these cases: the executive branch, Congress, state lawmakers, and federal judges. Looking at the degree of conflict between state and federal lawmakers on the one hand, and the executive branch on the other, acknowledges that practice plays an important role in mapping these boundaries, and the courts ought to consider more carefully how they mediate and direct such practice.³⁶⁷ Highlighting both horizontal and vertical disagreement may provide better opportunity for correction and ongoing dialogue among Congress, state courts, and the executive branch.³⁶⁸ Instead, the forced labor decisions overlooked the potential tension between the executive and legislative branches of the federal government, as well as

ment").

365. Specifically, direct challenges to state or federal laws do not have the same hidden Supremacy Clause issues that are raised by the private litigation in question, nor do cases in which the lawmaking by the executive branch is not asserted as authority in domestic litigation, as for example, in *Goldwater v. Carter*, 444 U.S. 996 (1979), where members of Congress sued the President over his termination of a mutual defense treaty with Taiwan.

366. This is similar to some aspects of the "constitutional increments" theory articulated by Spiro, *supra* note 34, at 1009–34. His approach provides that historical practices "have the force of constitutional law," *id.* at 1010, and evaluates such practices based on their acceptance, "contestedness," age, and pedigree, *id.* at 1013–16. The approach outlined here is similar not only in its acceptance of the place of historical practice in constitutional interpretation in the area of foreign affairs, but also in some of the ways in which it analyzes such practice. For example, addressing the extent of conflict between lawmakers and the executive branch is one way of asking, as Spiro does, how "accepted" the practice is. *Id.* at 1013. Here, the focus is on the conflict between specific constitutional actors. Professor Spiro also bases constitutional legitimacy on contestedness; the more contested, the stronger the norm that emerges. *Id.* at 1014. Here, the focus is on how courts promote contestedness; that is, I argue that courts should identify potential and actual conflict between the executive branch and lawmakers, and the constitutional problems that such conflict raises. Thus courts act to strengthen the norms that emerge, rather than avoiding potential conflicts and weakening such norms.

367. This approach appears to have some similarity to Tribe's argument that the constitutionality of executive agreements depends in part on the degree to which they "have a direct impact on matters normally regulated by state and federal legislative processes." Tribe, *supra* note 34, at 1267 (quoting a letter from Professor Anne-Marie Slaughter to Senator Earnest Hollings). But Tribe does not develop this argument, and he would likely disagree with the emphasis here on historical practice and changes in the constitutional allocation of authority. See *id.* at 1278, 1280–81 (arguing that "even if the constitutional text were truly ambiguous, one should not view such ambiguity as license immediately to leap outside the discourse of text and structure," and that history is rarely persuasive in constitutional interpretation unless it extends back to the founding).

368. See generally Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1 (1998) (discussing the advantages of judges highlighting their disagreement with Congress on constitutional issues, including the possibility that this practice would enhance dialogue between Congress and the judiciary); Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 822–35 (2002) (describing the costs associated with legal uncertainty).

the tension between state and federal governments. This problem is generated by the doctrines themselves; most iterations of the political question doctrine speak in terms of the “political branches,” neglecting to consider that they are not a monolith. Focusing on how the Constitution allocates law-making authority and on the Supremacy Clause should help courts do a better job of disaggregating the “political branches” and pinpointing exactly to whom they should defer.³⁶⁹

This approach creates explicit links between executive branch “law-making” authority, the Supremacy Clause, and questions of deference to the executive branch. Deference to the executive branch can, as we have seen throughout this Article, undermine the law-making system devised by the Constitution, but there is no serious argument that the Constitution somehow forbids all such deference.³⁷⁰ This tension is best resolved by justifying

369. Recent Supreme Court cases provide some support for this analysis by favoring formal lawmaking rather than deference to the executive branch. In *Barclays Bank PLC v. Franchise Tax Board of California*, 512 U.S. 298 (1994), the Court refused to strike down a California tax statute despite executive branch filings, briefs, and statements urging the court to do so in the foreign policy interests of the United States. *Id.* at 324–30. The opinion considers the textual commitment to Congress of the power to regulate foreign commerce, notes Congress’s explicit consideration and rejection of a variety of bills that would have preempted California’s law, and refuses to defer to the executive branch. *Id.* at 325–30. Although specifically refusing to address displacement of state law by executive agreement, *id.* at 329, the Court’s attention to the constitutional allocation of authority and its refusal to permit deference to the executive branch to replace Congress’s role in lawmaking, suggest that courts should scrutinize carefully the request for deference that would permit the executive branch to avoid the Treaty power and the Supremacy Clauses.

Similarly, in *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 366 (2000), the Court held that a state statute restricting the Massachusetts government from making purchases from Burma was preempted by a federal statute. Although the district court struck down the statute, it did so under the doctrine of the dormant foreign affairs power. *Id.* at 371. The First Circuit agreed and also reasoned that federal law preempted the state law. *Id.* The Supreme Court agreed on the preemption point and refused to reach the dormant foreign affairs power argument. *Id.* at 372–74. The Court’s reading of the federal statute allowed it to rely on preemption (and the Supremacy Clause) instead of judge-made common law, and signaling, perhaps, a preference for foreign affairs “lawmaking” through the methods spelled out explicitly in the Constitution, rather than through the deference of the courts.

In *Japan Whaling*, 478 U.S. 221, 229 (1986), unlike in *Crosby* and *Barclays Bank*, the Court explicitly considered the political question doctrine. In that case, wildlife conservation groups filed suit to compel the Secretary of Commerce to certify Japan as engaging in fishing operations that diminished the effectiveness of international whaling quotas, thereby triggering mandatory sanctions under federal law. *Id.* at 227–28. Plaintiffs argued that the statute required the Secretary to certify Japan, *id.*; the administration, on the other hand, had negotiated an executive agreement with Japan, requiring adherence to harvest limits in return for a promise not to certify. *Id.* at 228. The *Japan Whaling* case involved a pointed and ongoing disagreement between Congress and the executive branch as to certification. When called upon to interpret the statute Congress had passed in response to the executive branch refusal to impose sanctions, the Court refused to let the executive agreement with Japan transform this issue into a political question. *Id.* at 229–30.

370. While recognition of foreign governments, for example, frequently has domestic legal ramifications, the President’s constitutional power to “receive ambassadors,” under Article II, Section 3 of the Constitution, provides a strong textual basis for such recognition, and deference to this determination is unproblematic. One might argue that the President may make the determination as to the status of the foreign government, but that he should exercise no direct control over the domestic legal consequences of recognition. See, e.g., Prakash & Ramsey, *supra* note 79, at 263 n.125. This approach, however, has two related problems: first, it fails to resolve the difficulty in distinguishing between the status determination and its legal ramification; and second, it provides only for total deference or none at all. For example,

deference based on the text of the Constitution, historical practice, and an examination of the extent of conflict between state and federal lawmakers and the executive branch. Even informal agreement among these constitutional actors helps to preserve the balance of power created by the Constitution, which requires, after all, a very high level of agreement between the Senate and the President in order to preempt state law with a treaty, and some agreement between the Congress and the President (or a very high level of congressional support) to create "laws."³⁷¹

Consider the following two cases. In the first, *Williams v. Suffolk Ins.*, a Connecticut policyholder sued a Massachusetts insurance company for losses arising out of the seizure and detention of a schooner in the Falkland Islands by authorities from Buenos Aires.³⁷² The case hinged upon whether the Buenos Aires government had jurisdiction over the Falkland Islands.³⁷³ On this question, the court deferred to the executive branch, reasoning that courts should not inquire as to whether the Executive "be right or wrong," but that it is "enough to know, that in the exercise of [its] constitutional functions, [the Executive] has decided the question."³⁷⁴ As the second case, consider *Nazi Era Cases*, in which a California resident, pursuant to California law, sued both U.S. and foreign defendants for Nazi-era atrocities.³⁷⁵ The court, as we have seen, dismissed the case in the foreign policy interests of the United States, based upon the request of the executive branch.

The second case, as I have argued, raises important Supremacy Clause issues, while the first does not. Both, however, involve "private rights." The stronger the textual grant of authority to the executive branch, the weaker the Supremacy Clause problems. These cases likely could be distinguished

although access to the courts used to follow invariably from the recognition of a foreign government, the State Department changed its recognition policy during the twentieth century and refused to recognize an increasingly large number of governments. As a result, it began to request even that *unrecognized* governments have access to the courts. See Mary Beth West & Sean D. Murphy, *The Impact on U.S. Litigation of Non-Recognition of Foreign Governments*, 26 STAN. J. INT'L L. 435, 440–60 (1990). In other words, "recognition" has no fixed meaning; to argue that the State Department has some static power to "recognize" governments—a power the President has enjoyed since the framing—denies the change and transformation in what that term means. A successful approach to "presidential lawmaking" in foreign affairs must provide the tools for courts to facilitate and recognize changes in practice.

371. Conceptually, this approach has some similarities to *Chevron*-type deference to the executive branch. Such deference is based on a "theory of delegation" that presumes Congress has delegated "law-making power" to the agency (or, here, to the executive branch). Bradley, *supra* note 14, at 670. The argument presented in this Article—that "political questions" and executive branch lawmaking should be marked by a continuum of deference, and that courts should use the same tools to evaluate both—bears some similarity to *Chevron* deference, in that it looks to agreement (of which delegation is one type) between lawmakers and the executive branch as one basis for deference.

372. *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 414 (1839).

373. The defendant insurance company maintained that the ship's master had not acted in good faith because the Buenos Aires authorities had outlawed the seal trade in which the ship was engaged. The plaintiff argued that the Buenos Aires government had no jurisdiction over the Falkland Islands, and that the ship's master thus was not bound to give up the purpose of his voyage on the basis of this unauthorized threat. *Id.* at 420–21.

374. *Id.* at 420.

375. 129 F. Supp. 2d at 370.

on this basis alone, but the degree of conflict between the state legislatures and the executive branch is also germane to this analysis. One reason the Supremacy Clause is less of a problem in *Williams* than in *Nazi Era Cases* is that in *Williams*, the state law of insurance coverage did not explicitly attempt to answer questions about foreign territorial sovereignty. In *Nazi Era Cases*, on the other hand, the state legislature could not have been clearer as to its attempt to regulate the conduct in question. In the latter situation, the Supremacy Clause issue is in sharp relief. Even for causes of action for wrongful death and unjust enrichment, the level of conflict is still higher in the forced labor cases than in the insurance coverage dispute. This is so because state laws have attempted to address the *conduct* in question—slave and forced labor (if the complaint states a cause of action).³⁷⁶ Insurance coverage litigation, on the other hand, has nothing to do with foreign territorial sovereignty.³⁷⁷ This analysis also helps to clarify the constitutional basis for the weaknesses in the courts' reasoning in the forced labor cases. Courts should, for example, decide first whether the complaint states a cause of action, thereby potentially drawing into light the views of the state legislature.³⁷⁸ Likewise, the courts should not decide that events happened "too long ago" as a basis for applying the political question doctrine, because state statutes of limitations already express the legislature's view on that very question.

376. As noted above, several courts have distinguished between cases against private parties and those against governmental actors, and between dismissing the entire suit and holding that particular issues qualify as political questions. As Justice Frankfurter reasoned in *Baker v. Carr*:

Where the question arises in the course of a litigation involving primarily the adjudication of other issues between the litigants, the Court accepts as a basis for adjudication the political departments' decision of it. But where its determination is the sole function to be served by the exercise of the judicial power, the Court will not entertain the action.

369 U.S. 186, 282–83 (1961) (Frankfurter, J., dissenting). See also *Koohi v. United States*, 976 F.2d 1328, 1332 n.3 (9th Cir. 1992) (remarking that "we have found no Supreme Court or Court of Appeals decisions which have dismissed a suit brought against a private party on the basis of the political question doctrine"). The approach here makes clear a potential constitutional basis for these distinctions: the extent to which a state law cause of action itself is undermined by the deference to the executive branch. Litigation involving "primarily the adjudication of other issues" involves causes of action created for purposes other than testing the constitutionality of governmental actions; to dismiss this litigation entirely would undermine state law. Causes of action directly challenging governmental action as inconsistent with the U.S. Constitution are not based on state law and, in any event, dismissing them does not undermine other causes of action unrelated to governmental powers.

377. The Second Circuit's decision in *767 Third Avenue Associates v. Consulate General of the Socialist Federal Republic of Yugoslavia*, 218 F.3d 152 (2d Cir. 2000), provides another example. In that case, landlords sought unpaid rent from the former Yugoslavia, which no longer exists, so the landlord brought suit against five successor states as well as other defendants. *Id.* at 155. The State Department filed a Statement of Interest urging the court to dismiss the case because the executive branch had not resolved the extent to which the new countries were liable as successors for the debts of the former Yugoslavia. *Id.* at 157. Nothing about New York property law suggests that the legislature had considered the issue of the liability of the successor government. Moreover, decisions about succession of governments have traditionally been within the power of the federal executive branch, and the power to receive ambassadors provides at least an arguable textual hook for this power. International law provides no contrary rule.

378. It also potentially avoids unnecessary constitutional adjudication: if the complaint states no cause of action, the case is over without recourse to the political question doctrine.

VII. CONCLUSION

The executive agreements that President Clinton negotiated with France, Germany, and Austria highlight the weak link in the constitutional balance of powers over foreign affairs: the judiciary. Lacking the authority to terminate the litigation, the executive branch relied on the deference of the courts to achieve the same result. However, the doctrinal tools the courts have developed for considering requests for deference—the political question doctrine and international comity—distract courts from the analysis of constitutional text and historical practice that ought to frame these requests. Pursuant to this faulty analysis, the courts have given effect to executive agreements and nullified state law causes of action, without so much as a nod to the Treaty and Supremacy Clauses. On the other hand, scholars who describe the separation-of-power boundaries created by these clauses do so without so much as a nod to the political question doctrine or other theories of deference that inform the courts' approaches.

The appropriate response to the Statements of Interest made pursuant to the executive agreements would focus first on constitutional text and historical practice. Indeed, historical practice makes constitutional sense only when coupled with text. In concluding that the power over World War II claims settlement rests with the “political branches,” for example, the courts drew no distinction between historical agreements concluded as treaties and those concluded as sole executive agreements. A careful view of history coupled with the text of the Constitution would have alerted the courts that a constitutionally significant departure from prior practice was at issue.

Viewing the “political branches” as a monolith is the second primary problem with the political question analysis. The courts should instead consider the request for deference to the executive branch in conflicting with the cause of action created by the legislative branch. Such conflict ought to militate against deference.

International agreements that establish foundations in Europe for resolution of the European slave labor claims may be the best approach to compensation for legal, political, cultural, and social reasons. The question this Article has considered, however, is different: how do these international agreements become part of U.S. law and ensure the dismissal of the private state and federal claims that prompted the agreement? Constitutional text and history provide an easy answer: the Treaty Clause.