# EDITORIAL COMMENTS

## The Gravel Amendment to the Trade Reform Act of 1974: Congress Checkmates a Presidential Lump Sum Agreement

Although the Jackson Amendment to the Trade Reform Act of 1974 has monopolized public attention, a lesser-known legislative rider to the same statute sponsored by the junior Senator from Alaska warrants equal attention from international lawyers, especially ones concerned with the foreign relations law of the United States. This provision—the Gravel Amendment [1]—effectively blocked a lump sum agreement initialed by the United States and Czechoslovakia in July 1974 which sought to settle the claims of U.S. nationals arising from Czechoslovakia's postwar nationalization program.[2] While Congress's blowing the whistle on the Executive's negotiation of yet another unsatisfactory lump sum agreement [3] was a sport, in that the opportunity arose under a unique fact pattern unlikely to occur again, its long-overdue reassertion of an active role in the international claims settlement process certainly is a welcome sign. Moreover, for political and possibly constitutional reasons, this action by Congress has a significance that goes well beyond the pending Czech Agreement, a significance the Executive can ignore in future situations only at some risk.

### I.

### Background of the Pending Czech Agreement

Immediately after World War II, Czechoslovakia launched an extensive nationalization program which culminated in the taking of most U.S. owned property.[4] Although promising to pay just compensation early on,[5] a promise that it reiterated periodically right up to the Communist coup

[1] Trade Act of 1974, Pub. L. No. 93-618, §408, 88 Stat. 2064 (Jan. 3, 1975).

[2] On July 5, 1974, Czechoslovakia and the United States reached preliminary agreement on such a settlement. *See* N.Y. Times, July 6, 1974, at 5, col. 1; The Daily Telegraph (London), July 7, 1974, at 7, col. 6 (QE2 ed.).

[3] The last such settlement being the Agreement with Hungary, March 6, 1973, [1973] 1 UST 522, TIAS No. 7569, 1 R. Lillich & B. Weston, International Claims: Their Settlement by Lump Sum Agreements 324 (1975). *See* Lillich, *The United States–Hungarian Claims Agreement of 1973*, 69 AJIL 534 (1975).

[4] *See* Rado, *Czechoslovak Nationalization Decrees: Some International Aspects*, 41 *id.* 795 (1947). *See also* Doman, *Postwar Nationalization of Foreign Property in Europe*, 48 Colum. L. Rev. 1125, 1143–46 (1948); *id., Compensation for Nationalized Property in Post-War Europe*, 3 Int. L. Q. 323, 332–35 (1950); and Drucker, *The Nationalisation of United Nations Property in Europe*, in 36 Transact. Grot. Soc'y 75, 87–89 (1951).

[5] *See* [1945] 4 Foreign Rel. U.S. 478 (1968).

d'etat in 1948,[6] Czechoslovakia never did, despite the receipt of massive aid and credits from the United States.[7] During the 1950's, with Czechoslovakia still refusing to compensate claimants, the United States resorted to self-help, vetoing the release of 18.4 metric tons of Nazi-looted Czech gold and seizing and selling for $9 million a steel mill ordered and paid for by the Czechs.[8] Finally, in 1958, Congress enacted Title IV of the International Claims Settlement Act, authorizing the use of the proceeds from the sale of the steel mill to make pro rata payments to claimants obtaining adjudicated awards from the Foreign Claims Settlement Commission (FCSC).[9]

In a four-year period ending September 15, 1962, the FCSC received and determined, "in accordance with applicable substantive law, including international law,"[10] the validity and amount of 4,024 claims against Czechoslovakia.[11] It rendered 2,630 awards amounting to $113,645,205.41, including $72,614,634.34 in principal and $41,030,571.07 in interest.[12] Since only $8,540,768.41 remained in the Czechoslovakian Claims Fund after the payment of administrative expenses,[13] claimants holding awards over $1,000 received only 5.3 percent of their awards.[14] Thereupon the United

[6] *See id.* at 420–557 *passim*; [1946] 6 FOREIGN REL. U.S. 178–241 *passim* (1969); and [1947] 4 FOREIGN REL. U.S. 196–255 *passim* (1972). Czechoslovakia's clearest commitment to pay compensation is found in Paragraph 7 of the Agreement with Czechoslovakia relating to Commercial Policy, Nov. 14, 1946, 61 Stat. (3) 2431, TIAS No. 1569, 6 C. BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES 1776–1949, at 1314, 1315–16 (1971):

> The Government of the United States and the Government of Czechoslovakia will make adequate and effective compensation to nationals of one country with respect to their rights or interests in properties which have been or may be nationalized or requisitioned by the Government of the other country. In this connection, the Government of the United States has noted with satisfaction that negotiaions concerning compensation on account of such claims will shortly begin in Praha.

[7] Such aid and credits totaled at least $191 million. SENATE COMM. ON FINANCE, TRADE REFORM ACT OF 1974, S. REP. No. 93-1298, 93d Cong., 2d Sess. 216 (1974) [hereinafter cited as SENATE REPORT]. For an earlier breakdown, see Telegram from Ambassador Steinhardt to the Secretary of State, [1946] 6 FOREIGN REL. U.S. 209 (1969):

> As the $20,000,000 cotton credit, $50,000,000 surplus war material credit, $2,500,000 American relief for Zecho, $2,000,000 American Red Cross, $1,000,000 Catholic welfare and $275,000,000 UNRRA gift have been made available without any move by Zecho Government other than vague general promises to compensate American citizens for their properties which have been nationalized, I am disturbed at the prospect of our last trump, the $50,000,000 reconstruction loan, being played before we have a definite commitment from the Czechs that adequate and effective compensation means to them what it means to us.

[8] SENATE REPORT 215.

[9] International Claims Settlement Act of 1949, *as amended,* 72 Stat. 527 (1958), 22 U.S.C. §1642a (1970).

[10] International Claims Settlement Act of 1949, *as amended,* 72 Stat. 528 (1958), 22 U.S.C. §1642c (1970).

[11] For the leading decisions under the Czech Claims Program, see FCSC, DEC. & ANN. 379–455 (1968).

[12] *Id.* at 379.

[13] *Id.*

[14] Under the provisions of Title IV, the principal amounts of awards under $1,000 were paid in full, plus 5.3 percent of the principal amounts of awards in excess thereof. Doman, *Remarks,* 58 ASIL PROCEEDINGS 53 (1964).

States began negotiations with Czechoslovakia in an effort to obtain as much of the balance of their adjudicated awards as possible.

In late 1963, when it appeared that the Executive was prepared to waive the above claims against Czechoslovakia in return for its payment of an additional $15 million,[15] the late Senators Keating and Douglas introduced a "sense-of-Congress" resolution "to require Senate ratification [*sic*] of any claims agreement made with foreign nations for claims adjudicated by the Foreign Claims Settlement Commission."[16] Although conceding that the resolution was not legally binding upon the President,[17] Senator Keating argued the need to demonstrate "to the State Department through this and other methods that we will not tacitly accept the seizure of U.S. property overseas and then settle for a mere pittance of the true value. This measure should appreciably strengthen the hand of our Government in all such negotiations, by giving the Senate an opportunity to pass on claims settlements before they go into effect."[18] The Keating Resolution, opposed by the Department of State,[19] never was enacted into law, but neither was the $15 million settlement concluded.

## II.

### Controversy over the Pending Czech Agreement

Over a decade after the introduction of the Keating Resolution, the Executive initialed a draft lump sum agreement in Prague on July 5, 1974.[20] Although not officially published, the pending agreement apparently provides that:

> 1. The United States should immediately release to Czechoslovakia the 18.4 tons of gold and all other blocked assets it has been holding as security for Czechoslovakia's payment of the $105 million expropriation debt.

[15] N.Y. Times, Jan. 7, 1965, at 8, col. 5.

[16] 109 Cong. Rec. 25148 (1963). S. 2405, 88th Cong., 1st Sess. (1963), was designed to amend Section 4 of Title I of the International Claims Settlement Act of 1949 by adding the following subsection:

> (k) It is the sense of the Congress that any agreement hereafter entered into between the Government of the United States and any foreign government relating to the settlement of claims, determined or in the process of determination by the Foreign Claims Settlement Commission, by nationals of the United States against such foreign government shall be submitted to the Senate for its advice and consent.

*Id.* at 25149.

[17] *Id.* at 21593. *Compare* text at and accompanying notes 65–69 *infra.*

[18] *Id.* at 25149. "What is more, even the Czechs, who now plead poverty, might think twice if they expected such an argument to be weighed by the Senate, which is well aware of Czech foreign aid to Cuba and other nations around the world." *Id.* at 21592.

[19] "I am sure the State Department is opposed to the amendment, because it does not want any interference in regard to the amount for which it can settle such claims of U.S. citizens against other countries." *Id.* at 21593. *Compare* text at note 56 *infra.*

[20] *See* note 2 *supra.*

> 2. Czechoslovakia's $105 million expropriation debt to citizens of the United States should be fully and finally settled for only $20.5 million, such sum to be paid in installments over the next 12 years.
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> 3. Upon passage of [the Trade Reform Act of 1974], Czechoslovakia would be eligible to apply for most-favored-nation treatment under our tariff laws and for extension of . . . other important economic benefits. . . .[21]

While the amount of compensation payable by Czechoslovakia under the above arrangement is roughly one-third more than the amount contemplated a decade ago,[22] this increase is more than offset by the additional passage of time. Thus, from the perspective of U.S. claimants, the pending agreement is even less satisfactory than the earlier effort which provoked the Keating Resolution.[23]

Fortunately for the claimants, who in the normal course of events would have been faced with a *fait accompli,* the pending agreement, unlike other postwar lump sum settlements concluded by the United States, involves the granting of *quid pro quos* which require congressional approval. In the first place, the agreement apparently is conditioned upon the U.S. granting most-favored-nation treatment and other economic benefits to Czechoslovakia,[24] the bestowal of which by the Executive requires prior congressional authorization. The Executive, therefore, had little choice in the case of the pending agreement but to seek such authorization, which it hoped to obtain under the blanket provisions found in Title IV of the bill that eventually became the Trade Reform Act of 1974.[25] Thus Congress

[21] SENATE REPORT 216.

[22] *See* text at note 15 *supra.*

[23] Extended discussion of the *merits* of the pending agreement is beyond the scope of this Editorial, which is concerned primarily with the *process* by which such lump sum agreements are concluded by the United States. In brief, though, the Department of State, claiming a 42 percent return thereunder, argues that "[i]t is the most favorable settlement we have concluded with any Eastern European country during the postwar period." Statement of Robert S. Ingersoll, Deputy Secretary of State, before the Senate Finance Committee, September, 1974 (unpublished). These contentions, according to a claimant's attorney, "are patently false." Statement of Edward L. Merrigan, Attorney for Aris Gloves, Inc., before the Senate Finance Committee, September, 1974 (unpublished). *Accord,* SENATE REPORT 217 (above contentions are "simply not true"). From an examination of available data, it is apparent that the Department of State greatly overstated its case, for the return actually is nowhere near 42 percent, and would be one of the lowest—if indeed not the lowest—obtained by the United States under its postwar lump sum agreements.

[24] *See* text at note 21 *supra.* In the past, the United States has refused to condition lump sum agreements upon the granting of such *quid pro quos.* Note, however, that in the recent Agreement with Hungary, note 3 *supra,* the United States agreed in Annex F to seek authority from Congress to extend most-favored-nation treatment to Hungary, a commitment which if not fulfilled apparently allows Hungary to suspend payments thereunder. *See* Lillich, *supra* note 3, at 557.

[25] Trade Act of 1974, Pub. L. No. 93-618, §§401–409, 88 Stat. 2056 (Jan. 3, 1975). Title IV of the Act authorizes the President to extend, under certain circumstances, most-favored-nation (nondiscriminatory) trade concessions to countries whose products do not currently receive such treatment. The only countries not now receiving nondiscriminatory treatment in the U.S. market are the communist nations

was presented with the unique opportunity of putting conditions on Czechoslovakia's coverage under Title IV and, by so doing, effectively vetoing the pending agreement in the absence of compliance with those conditions. Secondly, although the Executive could have authorized the release of the 18.4 metric tons of Nazi-looted Czech gold, held by the Tripartite Commission for the Restitution of Monetary Gold established under the Paris Reparations Agreement of 1946,[26] without congressional authorization,[27] prior to such Executive action—delayed by the need to obtain congressional approval of the first *quid pro quo*—Congress presumably possessed the power in this "twilight" area to lay down conditions governing that release.

In the event, Senator Gravel introduced an amendment to Title IV providing that "Czechoslovakia, which owes U.S. citizens a balance of $105 million for expropriation of their properties in the late 1940's, would not become eligible for most-favored-nation treatment, or for U.S. loans or credits, or for the release of certain gold the U.S. Government has been holding as security for the payment of that expropriation debt, until that country first pays at least the principal amount it owes U.S. citizens ($64 million)." [28] The Senate Finance Committee, noting that most-favored-nation treatment "could result in new trade for Czechoslovakia worth hundreds of millions of dollars a year" [29] and that the Czech gold "has increased in market value from $20 million in 1946 to approximately $100 million in 1974," [30] found the compensation provided for in the pending agreement "completely unacceptable" [31] and, anxious to obtain more ade-

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(with the exception of Poland and Yugoslavia, whose products do receive such treatment).

STAFFS OF SENATE COMM. ON FINANCE AND HOUSE COMM. ON WAYS AND MEANS, 93RD CONG., 2D SESS., TRADE ACT OF 1974, at 17 (Comm. Print 1974).

[26] To implement Part III of the Paris Reparations Agreement, Jan. 14, 1946, 4 C. BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776–1949, at 5, 17–18 (1970), France, Great Britain, and the United States established the Tripartite Commission for the Restitution of Monetary Gold on September 27, 1946. 15 DEPT. STATE BULL. 563 (1946). The bulk of Nazi-looted gold under its jurisdiction was restored to its rightful national owners long ago, but 18.4 tons belonging to Czechoslovakia has been withheld at the behest of the United States pending the conclusion of a satisfactory lump sum agreement. SENATE REPORT 215. *See* Int. Herald-Tribune, Dec. 18, 1974, at 2, cols. 2–4.

[27] The Executive had not sought congressional authorization to release non-Czech gold in the past. *Cf.* the Aide-Memoire to the Agreement with Yugoslavia of 1948, July 19, 1948, 62 Stat. 2658, TIAS No. 1803, 2 R. LILLICH & B. WESTON, *supra* note 3, at 10, by which the Executive released Yugoslav gold reserves in the United States as part of that lump sum agreement.

[28] SENATE REPORT 214–15. [29] *Id.* at 216.

[30] *Id.*

[31] *Id.*

One-sided agreements of this nature are especially dangerous to the United States and its citizens at this particular time in history when nations in various parts of the world are threatening to expropriate or nationalize U.S. properties worth billions of dollars, while other nations have already taken valuable U.S. holdings

quate funds for claimants, promptly approved the amendment.[32] Subsequently, Senator Gravel introduced a second amendment to the bill, approved by the full Senate, permitting the use of the Czech gold to pay claimants the principal amount of their awards if Czechoslovakia failed to do so.[33]

When the Conference Committee considered Title IV, it retained the gist of Senator Gravel's first amendment, with one significant modification, but rejected his second amendment entirely.[34] As enacted into law, Section 408 of the Trade Reform Act of 1974 (The Gravel Amendment) provides that:

> (a) The arrangement initialed on July 5, 1974, with respect to the settlement of the claims of citziens and nationals of the United States against the Government of Czechoslovakia shall be renegotiated and shall be submitted to the Congress as part of any agreement entered into under this title with Czechoslovakia.
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> (b) The United States shall not release any gold belonging to Czechoslovakia and controlled directly or indirectly by the United States pursuant to the provisions of the Paris Reparations Agreement of January 24, 1946, or otherwise, until such agreement has been approved by the Congress.[35]

In brief, the amendment directs the President, supposedly through officials "other than those who negotiated the unreasonable first tentative

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without the payment of just compensation. The United States simply cannot afford to proclaim in the face of this trend that expropriations of U.S. properties will quickly be forgotten if the taking nation ultimately offers a relative pittance in return.

*Id.* at 217.

[32] As the Committee pointed out, the amendment "does not prohibit the granting of most-favored-nation status or other economic benefits to [Czechoslovakia]. Rather, it provides that those benefits may be extended, but only after Czechoslovakia first pays at least the principal amount ($64 million) owed on its outstanding $105 million expropriation debt." *Id.* *See* text at notes 12–13 and 28 *supra.* In effect, the amendment merely preserves the status quo ante pending agreement.

[33] 120 CONG. REC. S21445–46 (daily ed. Dec. 13, 1974). The second amendment goes well beyond its author's first one, in that it does not just preserve the status quo ante pending agreement but provides a source of funds to compensate U.S. claimants even if Czechoslovakia refuses to conclude a lump sum agreement on the terms laid down by Congress.

The Department of State had maintained that "[w]e have no legal authority to vest and sell the gold to satisfy domestic claimants and we have no legal way to attain that authority." Statement of Robert S. Ingersoll, note 23 *supra.* Note, however, that 16 years earlier it had had no such difficulty with respect to the vesting and selling of a Czech steel mill for the identical purpose. *See* text at notes 8–9 *supra.* On the use of self-help in such situations, see Christenson, *The United States–Rumanian Claims Settlement Agreement of March 30, 1960,* 55 AJIL 617, 636 (1961).

[34] In view of Czechoslovakia's subsequent refusal to renegotiate the pending agreement (*see* text at notes 43–44 *infra*), further legislative attempts to use the Czech gold to compensate claimants can be anticipated.

[35] *See* note 1 *supra.*

agreement," [36] to renegotiate "a more equitable claims settlement" [37] as a condition precedent to the granting of most-favored-nation treatment, the extension of other economic benefits, and the release of the Czech gold.[38] While the requirement that the renegotiated agreement provide U.S. claimants with payment in full of the principal amount of their awards has been deleted [39]—the significant modification mentioned above, which wisely introduces an element of flexibility into the amendment [40]—clearly it is Congress's intention that the new negotiators come as close as possible to this goal.[41] In any event, Congress has reserved the right to pass upon the adequacy of compensation obtained under the renegotiated agreement when it is submitted for its approval.[42] Such submission apparently will not occur in the near future, however, since Czechoslovakia, fulfilling the

[36] CONFERENCE REPORT, TRADE ACT OF 1974, H.R. REP. No. 93-1644, 93d Cong., 2d Sess. 49 (1974).

[37] *Id.*

[38]

> Under the Act, the President is directed to renegotiate the agreement with Czechoslovakia on the settlement of U.S. claims. There must be a full and fair settlement before most-favored-nation treatment will be granted. Czechoslovakian gold held by the United States will remain in the United States until a settlement is negotiated and submitted to Congress as part of any bilateral commercial agreement with Czechoslovakia. Both must be approved by both Houses of Congress before nondiscriminatory treatment and credits may be extended.

STAFFS OF SENATE COMM. ON FINANCE AND HOUSE COMM. ON WAYS AND MEANS, *supra* note 25, at 19.

[39] Newspaper accounts have not picked up this important point. *See, e.g.*, Wash. Post, Jan. 17, 1975 at A18, col. 3: "When the trade bill was passed in December, it contained an amendment . . . requiring that Czechoslovakia pay U.S. claims in full before the gold could be returned and most-favored-nation status granted." *See also* N.Y. Times, Aug. 6, 1975, at 2, col. 4.

[40] Requiring the Executive to seek payment in full of the principal amount of the FCSC's adjudicated awards would have placed a heavy burden upon the Department of State, since, with all due respect to the FCSC's decisionmaking process, there is no reason why Czechoslovakia should be expected to accept automatically the unilateral determination by the United States of the validity and amount of each and every claim. *See generally* R. LILLICH, THE PROTECTION OF FOREIGN INVESTMENT: SIX PROCEDURAL STUDIES 180–81 (1965).

It is worth noting that the Keating Resolution also took a flexible approach in this regard. According to its co-sponsor, the late Senator Douglas:

> I do not think this amendment interferes improperly with the responsibilities of the Department of State. We do not ask for a 100 percent settlement, merely for Senate review of the settlement the State Department asks that we accept. Perhaps a case can be made that other considerations among the issues at stake justify a less than 100 percent settlement. But in a case in which the decision of the responsible agency [the FCSC] is threatened with almost complete contradiction by another agency, I think we can properly insist on Senate review to provide an opportunity for the protection of legitimate interests of citizens.

109 CONG. REC. 21594 (1963).

[41] *See* the references to "a more equitable" and "a full and fair" settlement agreement contained in the text at note 37 and accompanying 38 *supra*.

[42] *See* text at note 35 and accompanying note 38 *supra*. In this respect, the Gravel Amendment goes beyond the Keating Resolution, which would have required only the Senate's advice and consent. *See* text at and accompanying note 16 *supra*.

Department of State's prophecy in this regard,[43] has announced that it will not renegotiate the pending agreement to satisfy the "political conditions" contained in the amendment.[44]

## III.

### Ramifications of the Gravel Amendment

Although the Gravel Amendment effectively blocks only the pending Czech Agreement, its political and possibly constitutional ramifications are much wider. The amendment, in short, is not just a petulant response by a particular Congress to an especially unsatisfactory lump sum agreement, but rather a *cri de coeur* from a long-neglected Legislative branch anxious at last to play its rightful coordinate role in the international claims settlement process. If the Executive continues to ignore such manifestations of concern, the likelihood is that it will provoke congressional efforts to limit or restrict its executive agreement-making power in this area.[45] Such efforts would become unnecessary if the Executive, in its future negotiation of settlement agreements, harked back to certain fundamental principles of constitutional law and practice.

There is no doubt, of course, that the President possesses the power to settle the claims of U.S. nationals against foreign countries.[46] Moreover, at least since the case of the "Wilmington Packet" in 1799, Presidents have claimed the right to settle them by executive agreement.[47] Accord-

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> It is our firm conviction that [the Gravel Amendment] would not bring the Czechoslovaks promptly back to the negotiating table. We do not believe that the Czechoslovak Goverment would, in the foreseeable future, be willing to participate in new negotiations on the claims, particularly if they knew in advance that we would demand settlement in full of the claims in order to have the gold returned. . . . In our judgment they would react sharply and negatively if we repudiate the initialled settlement.

Statement of Robert S. Ingersoll, note 23 *supra*.

[44] Wash. Post, Jan. 17, 1975, at A18, cols. 1–3. *See also* Letter from Ambassador Spacil to the Editor, Wash. Post, Feb. 14, 1975, at A31, cols. 4–6. On the worsening of Czech–United States relations in recent months, see Int. Herald-Tribune, June 7–8, 1975, at 5, cols. 5–8. This situation, of course, cannot be attributed exclusively to the effect of the Gravel amendment. N.Y. Times, Aug. 15, 1975, at 2, cols. 4–5.

[45] *See* text at and accompanying notes 65–69 *infra*.

[46] "That the President's control of foreign relations includes the settlement of claims is indisputable." United States v. Pink, 315 U.S. 203, 240 (1942) (Frankfurter, J., concurring). *Cf.* Moore, *Treaties and Executive Agreements,* 20 Pol. Sci. Q. 385, 403 (1905) (emphasis added): "[P]ecuniary claims against foreign governments have constantly been settled by the president, and no question as to his possession of such a power, *apart from discussions as to its possible limitations,* appears ever to have been seriously raised."

[47] "The case of the 'Wilmington Packet' set a precedent which was to be followed in a long line of subsequent claims, settlement of which has been sought by the authority of the Executive alone." W. McClure, International Executive Agreements 44 (1941). *See generally* E. Corwin, The President's Control of Foreign Relations 119 (1917); J. Mathews, American Foreign Relations: Conduct and Policies 543 (rev. ed. 1938); and Q. Wright, The Control of American Foreign Relations 244 (1922).

ing to McClure, during the period 1817–1917 "no fewer than eighty executive agreements were entered into by the United States looking toward the liquidation of claims of its citizens. . . ." [48] On the other hand, numerous settlement agreements during the nineteenth century also took the form of treaties,[49] and, despite occasional statements to the effect that Senate approval never was necessary,[50] that form of international agreement-making probably predominated.[51] Indeed, in so far as major lump sum agreements are concerned, 15 of the 17 concluded prior to World War II actually were submitted to the Senate for its advice and consent.[52] Thus regal statements to the effect that "[i]t has not been the practice of the Department of State to obtain the approval of the Senate for the settlement of international claims," [53] to the extent that they have any validity at all, must be limited to post-World War II practice.[54]

[48] W. McCLURE, *supra* note 47, at 53. *See generally* 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 247 (1970): "A large number of executive agreements have been concluded for the settlement of claims of American nationals against foreign governments."

[49] Moore, *supra* note 46, at 399–403, whose examples include many lump sum agreements.

[50] 'In 1859 Secretary [of State] Cass took occasion to declare that it was not necessary to submit claims conventions to the Senate." W. McCLURE, *supra* note 47, at 44, *citing* 2 G. HAYNES, THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE 643 (1938), who notes that despite Cass's comment "that continued to be the general practice prior to 1870." *See* text at note 51 *infra*.

In 1860 President Buchanan, in submitting to the Senate "an agreement with Venezuela, signed January 14, 1859, for the settlement of claims of citizens of the United States as the result of their expulsion by the Venezuelan authorities from the Aves Island, said: 'Usually it is not deemed necessary to consult the Senate in regard to similar instruments relating to *private claims of small amount when the aggrieved parties are satisfied with their terms.*'" S. CRANDALL, TREATIES: THEIR MAKING AND ENFORCEMENT 108 (2d ed. 1916) (emphasis added). Under this settlement agreement, found in 2 W. MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 1776–1909, at 1843 (1910), Venezuela paid the United States $130,000 in satisfaction of five claims.

[51] *See* text accompanying note 50 *supra*. *See also* Moore, *supra* note 46, at 399: "Such an agreement the president no doubt may in any case submit to the Senate, if he sees fit to do so; and we find, especially in former times, that this course was often taken."

[52] *See* R. LILLICH, INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS 7–9 (1962).

[53] 14 M. WHITEMAN, *supra* note 48, at 247. Such statements are in marked contrast to earlier assertions by the Department of State, which were far less dogmatic and much more sensitive to the need for Executive self-restraint in this "twilight" area. *See* text accompanying note 50 *supra*. *See also* S. CRANDALL, *supra* note 50, at 108: "Agreements for the adjustment or settlement or pecuniary claims of citizens against foreign governments, *which meet with the approval of the claimants*, . . . are not usually submitted to the Senate." (Emphasis added).

[54] Since World War II the Executive has relied almost exclusively upon the executive agreement as the vehicle for settling claims against foreign countries. For the last major lump sum agreement submitted to the Senate for its advice and consent, see Agreement with Panama, Jan. 26, 1950, [1950] 1 UST 685, TIAS No. 2129, 2 R. LILLICH & B. WESTON, *supra* note 3, at 35.

This postwar trend toward near exclusive Executive control over the international claims settlement process is the product of several factors.[55] In the first place, if executive agreements and treaties are interchangeable devices for settling international claims, superficially at least the Executive in these busy times has little to gain and a lot to lose by going the treaty route. "A President or Secretary of State seldom wishes to run the gauntlet of the Senate unless necessary," observes Mathews, since "he is likely to have found by experience that consulting the upper house jeopardizes the success of the project, and he may consequently be minded to rely as largely as possible upon executive agreements in lieu of treaties." [56] Secondly, with rare exceptions,[57] Congress has abdicated its responsibilities in the process of claims settlement. Thus even the author of the recent Case Act,[58] which requires the transmittal to Congress of international agreements other than treaties, has remarked casually that "I am not really concerned about that matter." [59] Finally, the principal beneficiaries of the settlement agreements—U.S. claimants—unfortunately are looked upon more as charitable cases than as persons deprived of valuable rights and hence legally entitled to just compensation.[60] If one regards a settlement agreement, no matter how poor, as a "windfall" to claimants,[61] one obviously has little reason to concern oneself with how it has been achieved.

The Gravel Amendment hopefully portends a change of attitude across the board. Congress, on its part, has aroused itself from its attitude of benign neglect, and, at the very least, the Executive has been sensitized to the fact that it no longer can overlook the interests of claimants in its desire to achieve other foreign policy objectives vis-à-vis foreign countries. After all, even McClure, the staunchest supporter of executive agreements, readily admitted that it is "no small thing for the President, acting thus on his own responsibility, to conclude a matter affecting so closely the

[55] The trend, incidentally, is exactly the opposite of the one described by McDougal in his classic work. "The notion that the Executive has exclusive control over the settlement of international private claims has, however, yielded in favor of a doctrine of coordinate control, with primary presidential responsibility." M. MCDOUGAL & ASSOCIATES, STUDIES IN WORLD PUBLIC ORDER 491 n.167 (1960). When and where the notion has yielded is left unsaid. Certainly this writer has seen little evidence of an emerging "doctrine of coordinate control" during the twentieth century, much less during the postwar period.

[56] J. MATHEWS, *supra* note 47, at 546–47. In this regard, at least three treaties dealing with claims have been rejected by the Senate and returned to the President. 2 G. HAYNES, *supra* note 50, at 630 n.1.

[57] The ill-fated Keating Resolution being a rare effort to reassert Congress's responsibilities in this area. *See* text at notes 15–19 *supra*.

[58] 1 U.S.C. §1126 (Supp. III 1974).

[59] *Hearings on S. 596 Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 74 (1971).

[60] On the question of just what constitutes just compensation, see generally 1–3 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW *passim* (R. Lillich ed. & contrib. 1972–1975).

[61] Comment, *Blocked Assets and Private Claims: The Initial Barriers to Trade Negotiations Between the United States and China*, 3 GA. J. INT. & COMP. L. 449, 455 (1973).

fortunes of individual citizens." [62] With lump sum agreements involving China and Cuba awaiting negotiation,[63] the Executive would do well to rethink its recent near exclusive reliance upon executive agreements and return, at least in cases of major concern, to its prior practice of seeking formal Senate approval of lump sum settlements.[64] Otherwise, absent extensive and genuine consultations which might make the "doctrine of coordinate control" [65] a reality, another constitutional confrontation may well materialize,[66] bringing in its train legislative proposals requiring congressional approval of all settlement agreements.[67] In this regard, a recent study contends that "[t]he Congress, at least arguably, has the constitutional authority to enact legislation restricting the capacity of the President to enter into [such] executive agreements," [68] and the extent of this authority soon may be tested if the lessons of the Gravel Amendment are not learned.[69]

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[62] W. MCCLURE, *supra* note 47, at 44. More recently Berger, questioning the constitutional basis of the Executive's claim 'to oust Senate participation in the making of such settlement agreements," has underscored "the confiscatory impact of such settlements on the reimbursement claims of citizens." R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 153 (1974).

[63] Claims against these countries have been preadjudicated by the Foreign Claims Settlement Commission under Title V of the International Claims Settlement Act of 1949, *as amended*, 22 U.S.C. §1643 (1970). *See* Murphy, *Claims Against the Republic of Cuba*, 27 U. MIAMI L. REV. 372 (1973), and Redick, *The Jurisprudence of the Foreign Claims Settlement Commission: Chinese Claims*, 67 AJIL 728 (1973).

[64] *See* text at note 52 *supra*.

[65] *See* MCDOUGAL & ASSOCIATES, note 55 *supra*.

[66]

> The recent spate of criticism of presidential usage of the executive agreement would probably mean that a decision to consummate such a transaction [a lump sum agreement with China predicated upon the utilization of blocked Chinese assets] would precipitate a congressional-executive confrontation which the President would be well-advised to avoid. If a decision to settle claims with China through a self-executing executive agreement is made, we might expect certain elements in Congress to initiate a legislative effort to define and limit the scope of the executive agreement power.

Comment, *Self-Executing Executive Agreements: A Separation of Powers Problem*, 24 BUFFALO L. REV. 137, 158 (1974).

[67] *See* text accompanying note 66 *supra*. Senator Byrd of Virginia has indicated that he intends to introduce legislation "calling for congressional approval of U.S. claims if they are settled for less than 100 cents on the dollar." Wash. Post, Jan. 17, 1975, at A5, col. 1. *Compare* text at and accompanying note 40 *supra*.

[68] Ohly, *Advice and Consent: International Executive Claims Settlement Agreements*, 5 CALIF. WESTERN INT. L.J. 271, 273 (1975). The Congressional Research Service of the Library of Congress has acknowledged that "it would seem that Mr. Ohly's [article] arguably contains a constitutional basis upon which Congress could enact the proposed legislation." D. Sale, International Claims Settlement Executive Agreements, Oct. 16, 1974 (Library of Congress, Congressional Research Service, American Law Division CRS-8).

[69] While the President, as matters now stand, "certainly possesses the inherent power to settle international claims by executive agreement and thus avoid the necessity of securing Senate consent," R. LILLICH, *supra* note 40, at 198, attempts to limit or restrict this power, raising acute constitutional questions, apparently are in the offing. *See* text at and accompanying notes 65–68 *supra*.