ASSOCIATION OF BUSINESS TRIAL LAWYERS

abtl REPORT

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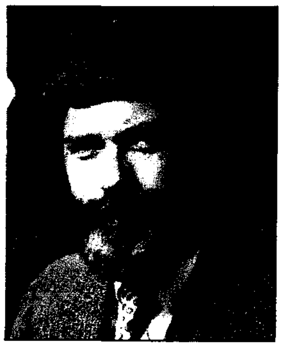
Letter from the President

ABTL will celebrate its eighth birthday on December 4, 1981. For many of us active in the organization, the experience of the past eight years has been rewarding for a number of reasons, high among which has been the intellectual and social camaraderie of the many capable trial lawyers who participate and regularly attend ABTL functions.

Most of our founding fathers are still active professionally and continue to contribute their time to the organization. All have been instrumental in helping ABTL grow to its present stature.



Howard P. Miller

On October 23-25 we will have our Eighth Annual Seminar at the Canyon Hotel in Palm Springs. Based on the quality of speakers and the written materials assembled for this year's program, "Techniques of Persuasion," I am certain that, like its predecessors, this seminar will be outstanding.

Since inception, ABTL has witnessed a consistent presentation of quality programs at our bi-monthly dinner meetings. On December 8th, for the first time, ABTL will hold its dinner meeting on the west side at the Century Plaza Hotel. The program will feature Judge Julius Title and Richard Floum as well as two of our *Report* editors, Tom King and past president Tom McDermott, addressing themselves to the topic of "New and Novel Remedies in Contract Actions."

Additional activities in progress include the possible formation of chapters in San Francisco and San Diego, the involvement in State Bar certification of standards for trial lawyer specialization, the current updating of our expert witness list and, along with Southwestern University School of Law, the possible presentation of a symposium on non-judicial arbitration.

Among ABTL's accomplishments has been the publication since 1976 of this *Report*, which has offered a forum for articles of special interest to the business trial lawyer. The last two issues have been devoted exclusively to the problems of court congestion and alternatives to the normal judicial process. The "Guide to Faster Trials"

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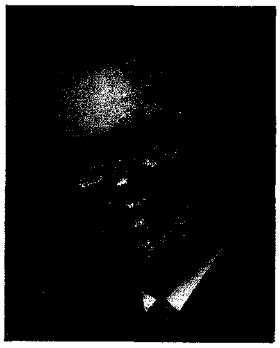
Presiding Judge Explains New LASC Policies

On June 19, 1981, the Los Angeles Superior Court submitted a detailed, written plan to attack the problem of delay in resolving civil cases. Particular emphasis was focused on the Central District where about 60 percent of the civil cases are filed.

For purposes of this article, we assume that the reader is basically familiar with that written June 19th outline and the *pro bono* voluntary settlement conference program contained in the press release of July 23. These remarks are intended to supplement those basic protocols.

ABTL members are primarily concerned with general and civil trial matters, particularly in the commercial area. However, in order to understand the complexities of reducing the time from the filing of a civil action to trial, we must examine the dynamics of judicial assignment policies and case flow management strategies in more detail.



Hon. David N. Eagleson

Criminal and juvenile courts are fully staffed to satisfy constitutional and statutory requirments of a speedy trial. As a matter of strong social policy, we attempt to adequately staff the family law and probate courts. The supercharged issues inherent in dissolution cases and the obvious need for settling the affairs of decedents to permit timely payment of creditors' claims and death taxes compel this assignment policy. We allocate one judge and a commissioner to the Mental Health Department and the Chief Justice currently assigns four of our judges to the Appellate Department. (This does not include an ad hoc

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Problems: Iranian Assets Case and U.S. Business

On July 2, 1981, the last day of its 1980 Term, the United States Supreme Court handed down its decision in the Iranian assets case, *Dames & Moore v. Regan*, No. 80-2078 (—U.S.—, 69 L. Ed. 2d 918,101 S. Ct.—).

Dames & Moore, a Los Angeles-based engineering firm, contended that President Carter had exceeded his constitutional authority when, without the approval of Congress, he agreed to (1) terminate all litigation brought by American companies in American courts against the Iranian Government and its agencies and to remit the plaintiffs to an international tribunal of uncertain effectiveness and (2) vacate attachments by American plaintiffs on $3-$4 billion worth of Iranian assets in the United States and transfer the same to Iran free and clear of American claims. (By contrast, the international tribunal was to have a security fund of only $1 billion.)

Two federal district judges held that the President had acted unconstitutionally in entering into these agreements.[1] However, the majority of lower federal courts found the President's acts to be within his authority, and a unanimous Supreme Court agreed.

The result reached by the Supreme Court, and its underlying rationale, make clear that American businesses engaged in commercial transactions with foreign governments assume the risk of adverse economic effects resulting from diplomatic agreements entered into by our Government. The Supreme Court flatly held that the President can utilize the economic interests of American citizens as bargaining chips in international negotiations, although the Government may subsequently have to compensate the Americans injured by presidential action. Whether or not such compensation turns out to be meaningful in the Iranian case will have to await a later court decision. For now, about all that American businesses can do is to recognize the risks of entering into business transactions with foreign governments and take these into account in pricing the goods and services they contract to deliver.

The Iranian Litigation

Following the seizure of the American Embassy in Tehran on November 4, 1979, and the freezing of Iranian assets in this country by executive order on November 14, 1979, approximately 400 American plaintiffs commenced litigation in the United States courts against the Government of Iran and its various agencies, seeking damages of some $3-$4 billion in the aggregate.[2] In the case of Dames & Moore, it sought to collect approximately $3.5 million in unpaid invoices rendered for professional services in connection with a study of potential nuclear power plant sites in Iran.

Most of the 400 lawsuits were jurisdictionally premised upon the provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. Sections 1330, 1602-11, enacted in 1976, which confers on United States courts personal and subject matter jurisdiction over commercial disputes between American citizens and foreign governments based on acts or activities, or causing a direct effect, in the United States. Prior to enactment of the Foreign Sovereign Immunities Act, claims of American businesses against foreign governments were generally resolved not by litigation before the courts but by negotiation with the foreign power conducted by the State Department.

This resulted because, if a foreign government was sued in the United States by an American plaintiff, and if the foreign government could persuade the State Department (for whatever reason) to enter a claim of sovereign immunity in the American court, our court routinely honored such claims.[3] Once the immunity claim was honored by the courts, the American plaintiff had no practical remedy against the foreign government other than negotiation by the State Department on the plaintiff's behalf. Moreover, even though the State Department adopted a formal policy in 1952 of not entering immunity claims in purely commercial disputes, that policy was not followed in practice, and diplomatic considerations frequently determined whether or not an immunity claim was made.[4]

The purpose of the Foreign Sovereign Immunities Act was to take commercial disputes between American citizens and foreign governments out of the hands of the State Department and place them in the hands of the courts.[5] No immunity would be available as a matter of law, and the State Department was thus relieved — as it asked to be — of the pressure brought to bear by foreign governments to make claims of immunity based on diplomatic considerations.[6] Henceforth, American commercial claims against foreign governments were to be litigated on their merits, not resolved on diplomatic considerations.[7]

C. Stephen Howard

The Foreign Sovereign Immunities Act not only abrogated sovereign immunity in commercial disputes, it also provided — mostly for the first time — for service of process, attachment, and execution against the property of foreign countries. Under these provisions, many American plaintiffs in the Iranian cases obtained judicial attachments on Iranian property in this country — said to total about $3-$4 billion. To the extent that the attached property was of a kind that could be quickly removed from the United States, some of these attachments might not have been successfully levied if it had not been for the prior presidential freeze of Iranian assets. A great deal of the attached property, however, was not quickly removable from the United States. For example, Dames & Moore had attached at a hangar in Everett, Washington a partially constructed Boeing 747, which was being built for delivery to Iran, and Iran's contract right relating to that aircraft. Other creditors attached such assets as paintings on loan to the National Gallery and Iranian property sitting in crates at American harbors awaiting shipment.

The Hostage Deal

Against this background, President Carter, on January 19, 1981, entered into two unprecedented executive agreements — the so-called Algerian Declarations — that were ultimately found authorized. To secure the release of our hostages the President agreed to "terminate" all American lawsuits against Iran and its agencies. Although the

400 lawsuits pending in the United States courts (with all of their procedural safeguards) were authorized by an express congressional grant of jurisdiction, the plaintiffs, or at least some of them, were to be remitted to an international tribunal which the United States and Iran agreed to establish. The tribunal was to be made up of one-third Iranians, one-third Americans, and one-third from other countries. How well this tribunal will function — indeed whether it will function at all — was by no means clear in January — nor is it clear now. To date, Iran and the United States have each selected three arbitrators, and they in turn have selected the three other arbitrators; little more has been done. Estimates are that the tribunal, if it functions at all, may take from five to fifteen years to complete its work.

In addition to agreeing to terminate litigation in American courts, President Carter agreed to wipe out the American plaintiffs' security by vacating all attachments on Iranian property in the U.S., and returning the same to Iran, free of any American claims. The only consolation to the American companies which had attached Iranian assets was that $1 billion of the $3-$4 billion returned would go into a security fund for disposition by the international tribunal. Although Iran agreed to put additional monies into this fund in the future, this promise is totally unsecured, and American businesses can take little comfort from contentions by our Government that Iran will surely put in the additional funds to protect its image in the international community. Iran has shown little concern about that image in the recent past.

For most American plaintiffs, with lawsuits pending against Iran in United States courts and adequate assets attached to satisfy potential judgments, President Carter's agreement with the Iranians was a disaster.[8] The plaintiffs lost both their American lawsuits and their security; in return they were given, at best, an opportunity to take their claim to a remote tribunal of uncertain effectiveness with apparently insufficient funds to pay the claims before it. Moreover, plaintiffs with lawsuits based on contracts with certain forum selection clauses requiring litigation in Iran (clauses that would very likely be held unenforceable in the United States courts) could not even take their claims to the international tribunal. For such plaintiffs, litigation in Tehran appeared to be their only remedy.

Some government spokespersons, adopting President Carter's "no ransom" rhetoric, have attempted to portray the Algerian Declarations as actually putting American claimants in a better position than they were in before the deal was struck.[9] It is difficult to understand how American litigants with their cases in United States courts and $3-$4 billion available for satisfaction of their claims could be better off with their claims remitted to an uncertain and remote tribunal with only $1 billion available as security. The Algerian Declarations undoubtedly represent a diplomatic triumph by skillful American negotiators; but it demeans that accomplishment to pretend that no price was paid to secure the return of our hostages.

The Supreme Court's Decision

In its decision, the Supreme Court held that, while American businesses might have a claim against the United States Government for a taking of property without just compensation, President Carter was within his constitutional authority in entering into the Algerian Declarations and carrying them out even acting without Congress. In reaching this conclusion, the Court made two sweeping holdings. First, it held that a 1977 statute, the International Emergency Economic Powers Act, which had lifted certain obtuse and complex language from an old World War I statute, was to be interpreted literally, allowing the President in times of an international emergency unlimited power over assets in which any foreign government, or foreign citizen, had any interest — even power to dispose of those assets in a manner contrary to the interests of American creditors.[10] Under this statutory grant of power, the Supreme Court held, President Carter had validly voided American attachments in Iranian property and had the power to transfer the $3-$4 billion in Iranian assets out of the country, shielded from all claims of American citizens.[11]

Second, with regard to terminating lawsuits in American courts and remitting the plaintiffs to an international tribunal, the Supreme Court upheld this portion of the Algerian Declarations as an exercise of an alleged long-

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established practice of "executive settlements" of private claims against foreign governments — a practice allegedly acquiesced in by Congress by its silence.[12] Dames & Moore had contended that the history of executive settlements before the enactment of the Foreign Sovereign Immunities Act was irrelevant, because American businesses with claims against foreign governments previously had no way of getting these claims resolved in court, and settlement by assistance from the State Department was the only real remedy. While the practice of executive assistance to private American claimants in resolving their commercial disputes against foreign governments had existed before the enactment of the Foreign Sovereign Immunities Act, this had dried up after enactment of the Foreign Sovereign Immunities Act. (Executive settlements of certain other types of claims outside the Foreign Sovereign Immunities Act — not commercial claims — had however continued.) At no time in American history had a President ever settled, over the objection of the claimant, a claim of an American citizen validly pending before an American court.

The Supreme Court decided that executive power to settle commerical claims of American citizens against foreign governments survived the enactment of the Foreign Sovereign Immunities Act. Thus, if the State Department had desired in 1976, as it then said it did, to be freed from pressure from foreign governments to resolve private commercial claims based upon diplomatic considerations, the Department certainly did not succeed. The Iranian case became exactly what the Foreign Sovereign Immunities Act was supposed to avoid — a situation where a foreign government, illegally holding Americans hostage, successfully pressured the United States Government to compromise the claims of American citizens in American courts.[13]

The Possibility of Compensation

Dames & Moore also argued in the Supreme Court that, even if the President had been authorized to do what he did, his acts constituted a taking of property for which the plaintiffs were entitled, under the Fifth Amendment of the Constitution, to just compensation. Conceding that some aspects of the taking question might be premature, Dames & Moore pressed the Court to decide, at a minimum, that there was a remedy for any such taking in the Court of Claims. Until the Supreme Court argument in the *Dames & Moore* case, the Government had suggested that there was no such remedy because of a certain statutory exception to the jurisdiction of the Court of Claims.[14] During oral argument, Solicitor General-Designate Rex Lee conceded, under tough questioning from the Justices, that the statutory exception did not apply and there would be a remedy in the Court of Claims for any taking of property resulting from the implementation of the Algerian Declarations. In its opinion, the Supreme Court expressly adopted this concession as its holding.[15]

While this portion of the Supreme Court's opinion no doubt gives some comfort to the American plaintiffs, it is not precisely clear how meaningful such a taking remedy may be. The Supreme Court held in a footnote that President Carter's vacating of the attachments and his transferring of Iranian assets out of the country was not itself a taking. If courts should later hold that removing lawsuits from the United States courts was a taking of property, one can fairly predict that the Government will counter by arguing that the value of the property taken — which the Government will characterize as a lawsuit without any security or property to execute upon — is minimal. This argument, if accepted, could render the taking remedy a charade. Whether the courts will allow the Government to gut the taking claim in this fashion remains for another opinion.

What Can American Businesses Do?

Under the Supreme Court's decision, unless Congress should intervene with new statutory provisions (which Congress does not appear to be inclined to do), the President is allowed virtually unlimited power to (1) dispose of foreign assets in any way the President deems fit in the context of an international emergency (including removing those assets from the reach of American creditors) and (2) "settle" any claim of an American citizen against a foreign government, even a purely commercial claim pending in an American court.

Under these circumstances, American businesses which choose to enter into commercial transactions with foreign governments must recognize that they are taking the risk that resultant disputes may not be resolved in a fair manner on the merits; rather, diplomatic considerations may take priority. Any foreign fund or property held as security for the resolution of a claim or dispute may be, in effect, seized by the President. This would be true even if funds were held in an American bank from the outset of the business arrangement. Even letters of credit drawn on American banks could be bargained away in an "executive settlement." If American businesses were to provide in their contracts with foreign governments that disputes are to be resolved solely by litigation in American courts, the President could give that point away as well in any settlement, if the foreign policy interests of the United States so dictated. While the injured business might have a taking claim against the United States Government, that claim may or may not prove meaningful.

The power afforded the President under *Dames & Moore v. Regan* is so sweeping that there is little that American businesses can do to protect themselves — except to build a risk factor into the price of the goods or services to be supplied. And hope for the best.

—C. Stephen Howard

1. *Marshall Co. v. Iran National Airlines Corp.*, No. 79 Civ. 7035 (CBM) (S.D.N.Y., June 11, 1981); *Electronic Data Systems Corp., Iran v. Social Security Organization of the Government of Iran*, No. CA3-79-218-F (N.D. Tex., June 8, 1981).
2. A few such suits were filed before the Embassy seizure and asset freeze.
3. *See, e.g.* Ex Parte Peru, 318 U.S. 578 (1943).
4. *See* H.R. Rep. No. 1487, 94th Cong., 2d Sess. 1, 6-10, 12 (1976) (hereinafter "FSIA House Report"), *reprinted in* (1976) U.S. Cong & Ad. News 6604, 6605-08, 6610 (citations hereinafter are to U.S. Code Cong. & Ad. News); *Hearings on* H.R. 11315 *Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. at 25, 34-35 (June 2 and 4, 1976) (hereinafter "1976 *House Committee Hearings*").
5. FSIA House Report at 6605-07, 6610-11, 6613; *see generally* 1976 *House Committee Hearings*.
6. 1976 *House Committee Hearings* at 25, 29, 34-35, 59; *see* FSIA House Report at 6605-06.
7. *See* FSIA House Report at 6605-06; 1976 *House Committee Hearings* at 24-27, 30-31.
8. An exception is the major United States banks, many of whose loans to Iran were paid off as part of the hostage deal.
9. We are asked to believe in effect that the Iranians offered to give our hostages back for nothing and the United States refused to take them until the Iranians would make additional concessions.
10. Section 1702 of the International Emergency Economic Powers Act, 50 U.S.C. §§1701 *et. seq.*, which defines "Presidential authorities," provides, in part:

    At the times and to the extent specified in Section 202 (50 U.S.C. §1701), the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise . . .

    Investigate, regulate, direct, and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest; by any person, or with respect to any property, subject to the jurisdiction of the United States.
11. Slip Opinion at 11-16.
12. Slip Opinion at 16-30.
13. The result was remarkably similar to that in *Rich v. Naviera Vacuba*, 197 F. Supp. 710 (E.D. Va.), *aff'd*, 295 F. 2d 24 (4th Cir. 1961), where the State Department entered a claim of immunity in an American court to get a hijacked airliner back from Cuba. The enactors of the Foreign Sovereign Immunities Act agreed this situation should never be repeated. *See, e.g.*, 1976 *House Committee Hearings* at 67, 90 ("the so-called flexibility the State Department has under any present practice, if it is flexibility, is achived at a price that is paid by some individual citizen or corporation. That is not the way this government does business and it is not the way we ought to do business."). Ironically, the Supreme Court has now read the Foreign Sovereign Immunities Act in such a way as to allow history to repeat itself once again.
14. 28 U.S.C. §1502.
15. Slip Opinion at 30-31.

Hostage Settlement with Iran Fair to Business

In November, 1979, Iranian militants took over the American Embassy at Tehran and held more than 70 United States citizens hostage. About one week later the United States froze approximately $8 billion in Iranian assets, although it denied that the freeze was in retaliation for the events in Tehran.[1] Concurrently, the press reported statements allegedly made by then Finance Minister Bani-Sadr to the effect that all Iranian foreign debts were repudiated. Thus, the stage was set for the Iranian Assets litigation.

On November 12, 1979, President Carter ordered "blocked" all assets of the Iranian Government, the Iranian Central Bank, and all "instrumentalities and controlled entities" of Iran, and delegated to the Secretary of the Treasury authority to promulgate appropriate regulations.[2] The Iranian Assets Control Regulations, 31 C.F.R. Part 535 ("the Regulations") were then issued. They applied the blocking order to the property of Iran, its agencies and instrumentalities, and all entities "substantially owned or controlled" by Iran.[3] The Regulations blocked all such property in or subject to the jurisdiction of the United States, or in the possession of any person subject to the jurisdiction of the United States (*e.g.*, foreign branches of American banks).[4]

Although the only evidence I ever saw were newspaper clippings claiming that all the Iranian banks had been "nationalized," creditors and virtually everyone else assumed these were "substantially owned or controlled" by the Government of Iran and its agencies and instrumentalities (including all other Iranian banks). Thus, the banks could be sued on *alter ego* theories and their assets both blocked and attached.

Our client, Bank Saderat Iran ("BSI"), had maintained agency offices in New York and Los Angeles for many years before the hostage crisis, conducting a normal commercial banking business. In this new atmosphere, BSI found itself sued and its assets attached for over $2 billion although the bank itself was involved in less than $20 million of the claims made against it.

Peter H. Strong

Steve Howard's article is in substantial part a reprise of his Supreme Court brief, and Justice Rehnquist's opinion is a better refutation of it than I can offer.[5] What I would like to discuss, therefore, is the notion that the law has done something both terribly and uniquely unfair to claimants such as Dames & Moore.

Dames & Moore is a California partnership. It formed a Venezuelan corporation that opened an office in Tehran to do business with the Atomic Energy Organization of Iran ("AEOI"). In short, it was using a foreign subsidiary to do atomic power plant work for a foreign state.

Following the Iranian revolution, the AEOI exercised its right to terminate its contract with the Dames & Moore subsidiary, which was then allegedly owed over $3 million. The contract provided for resolution of all disputes in Iranian courts, but after the hostages had been taken and the President blocked Iran's assets, Dames & Moore decided it would prefer to sue in American courts. As a first step, it caused the Venezuelan company to assign to it all rights under the contract. BSI claimed this was in violation of the blocking order. As a fallback position, Dames & Moore argued that just as the Iranian bank corporations were shams, so too its subsidiary was not a separate entity and should be ignored.

Dames & Moore sued not only the AEOI and the Government of Iran, but every Iranian bank it could find. It obtained *ex parte* writs of attachment against all the defendants and commenced discovery. By the time the President entered into the Hostage Settlement Agreements,[6] Dames & Moore, in direct violation of the Regulations,[7] had obtained a judgment against the AEOI and the Government of Iran and was attempting to execute. The Hostage Settlement undid all that.

Mr. Howard seems to have two principal complaints about the Hostage Settlement: (1) the tribunal might not be fair and effective; as he puts it, the disputes "may not be resolved in a fair manner on the merits;" and (2) if so, Dames & Moore will have been deprived of property, possibly without just compensation.

To be sure, I do not believe that the American courts were deciding BSI's rights fairly and on the merits. It would be more accurate to say there was a total breakdown in the rule of law in the Iranian cases. For example, during the first two months after suits and attachments were allowed by the Regulations,[8] courts in California alone issued over $500 million in *ex parte* attachments against BSI — all based on claims that the frozen assets might disappear at any time. Furthermore, all but $800,000 of those attachments were based on *alter ego* theories. These attachments were levied in direct violation of the attachment law,[9] all issued on affidavits stating the typical *alter ego* conclusions on information and belief.

Contrary to popular and even judicial belief, such attachments really did injure BSI and its innocent customers. On the same day the assets were blocked, the Treasury issued a license allowing BSI to use blocked funds for certain limited purposes. Thus, the typical American claimant's argument that the attachments were really not prejudicial to the defendant — after all, the assets were blocked — was false. If there had been notice and hearing, some of the judges might not have authorized the attachments.

The Iranian defendants probably lost 80% of the time in the trial courts, but won about 80% of the proceedings in the Courts of Appeal. The higher courts had to write opinions and set precedents. They couldn't afford to misconstrue important statutes simply in response to current passions. They couldn't even construe the treaty between Iran and the U.S.[10] too one-sidedly because it was a form treaty, containing the same language as treaties with some of our most important allies and trading partners.

American claimants in general, and Dames & Moore in particular, were not in as strong a position before the settlement as Mr. Howard implies. Nor did they come out so badly under the settlement as he suggests.

First, it is not clear that Dames & Moore's contract was totally commercial in nature. This point is important because the Foreign Sovereign Immunities Act generally

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confers jurisdiction only with regard to commercial transactions.[11] With the formation of a neutral tribunal, American contractors working on military or other non-commercial matters may be better off now than before the settlement, when they would have been forced to sue in Iran if American courts were closed to them.

Next, complaint is made about the value of the property returned to Iran as part of the settlement, property that arguably could have gone to pay judgments in favor of American claimants. In fact, most of the released money belonged to Iranian banks, and most of the unpaid claims were based on contracts with non-bank defendants. (American banks, which held most of the American claims and virtually all of the direct claims against Iranian banks, were paid under the settlement.) So the claimants would have to successfully assert their *alter ego* claims to recover the money. And the treaty specifically states that the juridical status of each country's corporations will be recognized in the other.[12]

Finally, Mr. Howard contends that the just compensation remedy may be illusory. That may well be true. The history of executive settlements is long and well established. Those who deal with foreign states do so subject to the power of the federal government to settle claims arising out of such dealings. It may will be that in exercising its power the federal government takes no property. Compare *United States v. Willow River Power Co.* 324 U.S. 499 (1945). Certainly Dames & Moore has lost no more than many victims of non-compensable exercises of the police power — no more, for example, than a developer whose land is down zoned to one residence for each fifty acres.

So what is the foreign contractor to do? He can only get sound legal advice, consider the risk, and decide whether to deal and on what terms. Indeed, most American contractors in Iran had frequently conducted business both there and elsewhere in the Third World, routinely setting prices reflecting political risks.

American contractors should also try to be paid by letters of credit opened by an American or third country bank, and against which they can draw without the consent of the buyer. And maybe they should make inquiry at Lloyd's of London.

But nothing has changed. The Iranian crisis, like a 50-year flood, was something we think about only rarely — at least until we remember that the Office of Foreign Assets Control is still administering blocked Korean, Cuban, Vietnemese and Cambodian assets, and has its form blocking orders and regulations ready for the next crisis.

—Peter H. Strong

1. K. Lissakers, *Money and Manipulation*, 44 Foreign Policy 107, 110-111 (Fall, 1981).
2. Executive Order No. 12170, 44 F.R. 65729 (Nov. 15, 1979).
3. 31 C.F.R. §535.301 (a) (2), 44 F.R. 65957 (Nov. 15, 1979).
4. The Regulations prohibited, except as otherwise authorized by general or specific license, every conceivable transaction involving any property, of any type whatsoever, in which "Iran" had any type of interest. This specifically included filing suit, levying attachments, obtaining liens or judgments, and levying executions. 31 C.F.R. §535.310, 44 F.R. 75352 (Dec. 19, 1979).
5. *Dames & Moore v. Regan*, —U.S.—, 69 L-Ed. 2d 918,101 S. Ct.—, 1981.
6. *Declaration of the Government of the Democratic and Popular Republic of Algeria* (Jan. 19, 1981), *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* (Jan. 19, 1981).
7. 31 C.F.R. §535.310, *supra* n. 4.
8. "Judicial proceedings" against Iran were authorized on November 23, 1979, 31 C.F.R. §535.504, 44 F.R. 67617 (Nov. 26, 1979). On December 17, 1979, the Office of Foreign Assets Control published an interpretation of Section 504 of the Regulations indicating that attachments which could be levied without taking the property into custody were included within the authorized judicial proceedings. 31 C.F.R. §535.418, 44 F.R. 75353 (Dec. 19, 1979).
9. Code of Civil Procedure, Section 482.040 requires that affidavits for attachments be on personal knowledge, contain competent evidence, and show facts with particularity.
10. *Treaty of Amity, Economic Relations and Consular Right*, 8 U.S.T. 899 (entered into force June 16, 1957).
11. 28 U.S.C. §1605 (a).
12. Treaty of Amity, *supra*, Art. III, ¶1.

New LASC Policies

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program of assigning Superior Court judges as pro tem appellate justices.)

It is difficult to precisely quantify departmental assignments, since some judges try both civil and criminal cases and because probate and family is only part time for some of our colleagues. However, for fiscal year 1980-81, we estimated:

Number of filled criminal courts	70
Number of filled juvenile courts	39
Number of filled probate courts	5
Number of filled family courts	47
Number of special activities courts (Appellate-Mental Health)	5
Number of civil courts	76
Number of filled judicial positions	242

The staffing pattern is similar this year.

From the civil court complement we must deduct the number of judges assigned to the writ departments and civil law and discovery. Two conclusions are immediately apparent:

A. The more work that is generated for the law departments, the fewer judges there are available for the trial of cases.

B. The full impact of delay in filling trial court vacancies, in vetoing legislation authorizing increased judicial personnel or refusing to fund commissioner positions, falls on the civil trial sector since the other units of the court must remain fully staffed at all times.

To the extent that the need for judges in criminal, juvenile, family and probate can be reduced or held constant, more judicial personnel can be assigned to civil trials.

Criminal Trial Delay Reduction

We have commenced a pilot program of early mandatory settlement conferences in the South District (Long Beach) to reduce delay in criminal case disposition. The experiment is scheduled to end on or about November 1, 1981. If successful, it will be expanded selectively to other seriously congested districts over the next couple of years. Assuming that the criminal filings remain fairly constant, we should see a reduction in criminal case backlog, shortening of time from the filing of the criminal complaint to the time of disposition, and a reduction of the number of judges that we must assign to the criminal sector.

Civil Trial Delay Reduction

The first components announced on June 19 are in place and working well. The panel of eight settlement judges, who now hear all mandatory settlement conferences, has settled into its routine, but because of vacations and a short statistical base, it is too early to tell whether the overall settlement rates are up. Most certainly, daily trial time per civil trial judge is up. All Federal District Court judges have been made aware of the Central District pro-

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gram and several have expressed their concern for our problem. I trust that all will honor the priority we have set for counsel starting trial on time and remaining in trial all day long in the Central District to the exclusion of other commitments. I believe they will.

Arbitration Status Conferences And Trial Setting Conferences

The judges in our East District (Pomona) have come out of the starting blocks rapidly and are currently setting 100 arbitration status conferences per week. Preliminary figures indicate about 70 percent of the cases noticed for hearing are settled, or are diverted to mandatory arbitration. The Central District program will commence on September 14. Early reports there are encouraging. More than 14,000 status conference notices have been sent out, and at this writing the clerk has received 1,054 elections to arbitrate and 383 stipulations to arbitrate, and 763 cases have been settled with the concomitant filing of disimissals. Each of these categories will swell by several thousand as soon as we have purged the entire civil case backlog, which we expect to have completed by February 15, 1981.

Arbitration status conferences in the Central District are noticed for Department 3, a large courtroom across from Department 1. Hearings will be held both morning and afternoon. When we are able to curtail the volume of this operation, the trial setting portion of our multifaceted program will be snapped into place.

Each program will initially be presided over by a judge. After workflow calculations are determined and procedures are fine-tuned, the two functions will be commissioner-supervised. In the event of a refusal to stipulate to a commissioner, the matter will be later assigned on a different day for hearing in the afternoon in Department 1.

Early Settlement Conferences

Leaders of trial attorney groups have previously told us they desire to provide assistance to help settle cases at an early stage. One appropriate point, of course, is at the time of the arbitration status conference, but at this writing no definite plan or specific commencement time have been promulgated. Our court has publicly stated, and repeats, its willingness to cooperate with attorney trial groups to implement any feasible attorney settlement officer program that is offered.

Voluntary Settlement Conferences

On July 23, the court announced a *pro bono* voluntary settlement conference program staffed by 23 (now 24) retired judges and commissioners. The scope of the plan was contained in a news release and essentially repeated in a further written release on August 12. This is a unique opportunity for commercial litigators to select an experienced judge or commissioner to hear a VSC regardless of the size of the case and fills a gap created by the uplifting of the threshold requirements for a voluntary settlement conference with a sitting judge — 20 days of of trial time and a written stipulation that the amount in controversy is in excess of $100,000. Please call Civil Courts Coordinator Arnold Pena, 974-5408, for further details.

Family Law Case Backlog Reduction Program

On July 27, 1981, Judge Billy G. Mills and I unveiled a comprehensive program to reduce the case backlog in the Central District Family Law Department. Accelerated settings, special handling of short cause cases, meet and confer requirements, attorney mediators, a tough no-continuance policy and additional commissioner personnel are its main components. The success of this effort should redound to the advantage of the civil litigant because we may be able to function in the family law sector with fewer judicial bodies.

Delayed Filing Of At-Issue Memorandum

Master calendar judges in the Central District generally believe and practice the view that if a motion to set a civil case for an early trial is placed on calendar in sufficient time to permit the moving party to give 15 days' written notice of trial, and thereby avoid mandatory dismissal under CCP§583 (b) (five-year rule), the motion must be granted subject to the right of the defendant to move under CCP 583(a) (two-year rule) to dismiss the action for failure to timely prosecute. (The normal 45-day notice required by California Rules of Court is drastically shortened to permit this motion.)

It serves little useful purpose to discuss the practicality of the appellate philosophy that has spawned this practice. Currently, defense counsel feel as though they have been taken advantage of (the solution, of course, is to unilaterally waive the five-year rule — but defense counsel are reluctant to do this), and the court's orderly calendar management procedures are severely interrupted by the granting of these motions.

When we have finished off the alligators, we will devote our energies to draining the rest of the swamp. Translation: As soon as we pull away from the five-year problem by setting for trial the oldest cases first, and diverting the smaller ones to arbitration, we plan to institute a policy in Department 1 of noticing for dismissal, on the court's own motion pursuant to CCP 583(a), all cases more than two years old where an at-issue memo has not been filed. Since the trigger event for calendar setting purposes is the filing of an at-issue memo, the not-at-issue case lying around in our backlog unknown and unnoticed is a small administrative time bomb ready to be set off, under current practice, at the whim of plaintiff's or cross-complainant's counsel. The new game plan calls for these court-ordered OSCs in re dismissal to be noticed in Department 1, the master calendar department (not in the law departments), where, perhaps, a more impersonal, academic view of the realities of calendar management is practiced. By this process one of two things will happen — either the case will be dismissed or at least an at-issue memo will be filed, thus springing the case into plain view where we can keep an eye on it.

Special Tracking Patterns

This discussion is not designed to further debate the Master Calendar vs. Direct Calendar Systems. Our court rules presently contemplate the existence of cases that are appropriately the subject of an all-purpose assignment. Motions requesting this type of preferential treatment are filed but very few granted for reasons which we need not belabor here. It may well be that after cleaning out the smaller cases from the system (in 1979, the Central District determined that 71 percent of all tort cases and 67 percent of all commercial cases involved amounts in controversy of less than $15,000), we may be able to institute a program to place complicated and uncomplicated cases on different tracks. The complicated cases would receive earlier judicial attention. Whether or not this is feasible remains to be seen.

Purportedly, the non-personal injury trial bar believes that the personal injury bar has dominated the use of available civil trial court time. We ran some interesting

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statistics for the year 1980: Of all personal injury cases tried, 76 percent were jury and 24 percent nonjury. Of all civil cases tried (excluding personal injury), 10 percent were jury and 90 percent nonjury. Combining both personal injury and nonpersonal injury civil cases, 20 percent were jury and 80 percent nonjury. The ratio of personal injury trials to civil trials, both jury and nonjury, was 15 percent personal injury and 85 percent nonpersonal injury! This may come as a surprise to many trial lawyers. I should add, however, that no effort was made to determine what percentage of available courtroom time was devoted to the trial of personal injury jury cases.

I think these programs will work. But remember that case filing trends are on the upswing. Civil cases are more complicated and take longer to try. The number of lawyers per capita continues to grow. The long-range solution must come from providing meaningful, but evenhanded, disincentives to remain in the civil justice system beyond a reasonable point in time. There are as many patently unworthy plaintiff's cases as there are recalcitrant defendants who refuse to settle valid claims until just before assignment for trial. We in the judiciary do not believe it is our function to set the philosophical tone that governs the filing and flow of civil cases. We counsel when asked but do not generally advocate except in terms of procedural matters. If the lawyers of this state are unable or unwilling to join together and work out some kind of accommodation between preservation of traditional rights, privileges and preferences currently attendant upon civil litigation and the deep concern that all of us have for an earlier resolution of legitimate civil disputes, there can be no realistic expectation that the current trial delay problem will disappear. To the contrary, it will worsen.

—David N. Eagleson
Presiding Judge, Superior Court

The President's Report

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appeared in our June, 1981 issue and was shared with the entire membership of the L.A. County Bar Association which reproduced it in the July County Bar *Update.* Our March *Report,* (Vol. IV, No. 1), contained a plebiscite which, among other questions, asked whether the $15,000 limitation on mandatory arbitration should be raised. The overwhelming vote of the membership was in favor of raising the limit to $25,000. While I'm not certain how much credit we can take, I am pleased to report that the legislature has now adopted AB 841, which raises the dollar limit to $25,000 in Los Angeles and San Bernardino counties. In addition, the bill provides that the fee for arbitrators will be $150.00 per case or per day, whichever is greater. The bill has gone to the Governor for signature.

This issue of the *Report* continues the dialogue on court congestion and its solution with a thoughtful article by Presiding Judge David N. Eagleson of the Los Angeles Superior Court. We also present a debate by two attorneys, Steve Howard and Peter Strong, who participated in some of the more interesting pieces of litigation in recent times, the Iranian assets cases, one of which was decided by the U.S. Supreme Court in July of this year. The case dealt with fascinating issues of commercial, constitutional and international law, as well as executive prerogatives in the foreign affairs area which severely impact upon the commercial claims of U.S. businesses.

—Howard P. Miller

"Techniques of Persuasion" At 8th Annual Seminar

At press time, a few places remained available for ABTL's Eighth Annual Weekend Seminar scheduled for October 23-25 at the Canyon Hotel Racquet and Golf Resort in Palm Springs.

The seminar topic, "Techniques of Persuasion," offers an outstanding panel of speakers, including Judges Matt Byrne, Malcolm Lucas, Harry Hupp, Lester Olson, and former Justice Robert Thompson; and attorneys Joseph Austin, John Brinsley, Robert Cooper, Max Gillam, Oliver Green, Robert Holtzman, Ellis Horvitz, Irwin Spiegel Osher, Morton Rosen, Loren Rothschild, and Stephen Taylor.

ABTL members and their families and guests will also have ample time to enjoy golfing, tennis, swimming, and sunning. Social events include a wine and cheese tasting party on Friday night and a cocktail party and banquet on Saturday night.

For last minute reservations contact Ronald P. Kaplan, ABTL Seminar Chairman, at (213) 620-1780.

Los Angeles County Trial Panel of Retired Judges and Commissioners

Ed. Note: Last June's *ABTL Report* featured a "Guide to Faster Trials." Below is a current list of retired judges and commissioners who are available for hiring as private judges. Interested lawyers should contact Arnold R. Pena, Civil Courts Coordinator of the Los Angeles Superior Court, at (213) 974-5408.

Judges

Alexander Adolph	London, Robert H.
Brand, Edward R.	Loring, Charles A.
Brandler, Mark	Marshall, Arthur K.
Broady, Earl C.	McClain, Howard D.
Brown, Roy J.	Nutter, Ralph
Donnellan, John L.	O'Connor, Edward J.
Drumm, Lawrence E.	Pacht, Isaac
Egly, Paul	Rich, Elwood M.
Evans, Walter R.	Richards, Philip H.
Faries, McIntyre	Sax, Eugene E.
Fildew, Richard C.	Stillwell, Parks
Fleming, Macklin	Stratton, Charles C.
Goebel, August J.	Teran, Carlos M.
Greenfield, Samuel	Wapner, Joseph A.
Healey, James F., Jr.	Weisman, Steven S.
Irwin, Aubrey	Whyte, James G.
Kaufman, Sidney W.	Wickhem, Frank
Kennedy, William P.	Wisot, Max Z.
Koenig, Ben	Yager, Thomas C.
Landis, Benjamin	Zack, Ernest J.
Levit, William H.	

Commissioners

Barnett, Jules David	Goddard, John Leslie
Boisvert, Harold V.	Hayek, Victor J.
Dana, Franklin E.	Rodda, Clinton
Danoff, Hyman O.	Truman, Rolland
Erbsen, Philip	