

The Burger Court Opinion Writing Database

Dames & Moore v. Regan

453 U.S. 654 (1981)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



W

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 24, 1981

Re: 80-2078 - Dames & Moore v. Reagan

MEMORANDUM TO THE CONFERENCE:

To "get the show on the road" Bill Rehnquist has agreed to get an opinion in our hands by noon Sunday, next - if not before.

Regards,

WR

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 26, 1981

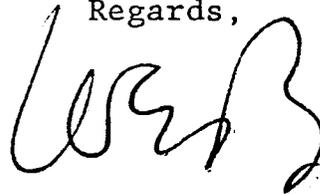
Re: No. 80-2078 - Dames and Moore v. Regan, Secretary
of the Treasury

Dear Bill:

I may possibly have a few inconsequential suggestions, but you may regard this as a "join."

I will place ten Brownie Points in your personnel file and grant you two weekends leave.

Regards,

A handwritten signature in dark ink, appearing to be 'WRB', written in a cursive style.

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

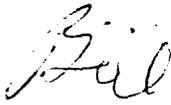
CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

May 28, 1981

MEMORANDUM TO THE CONFERENCE

RE: Iranian Hostage Agreement 80-2078

At lunch Byron, Bill, John and I discussed the Iranian Hostage Agreement. It was thought helpful to obtain a copy of the First Circuit opinion and the briefs in that case. I called Chief Judge Coffin who referred me to Judge McGowan of the D.C. Circuit where another of these cases is pending. Judge McGowan sent me the enclosed copies of the First Circuit opinions and also the copy enclosed of a judgment order entered in the D.C. case. The opinion of the D.C. Circuit is to follow in a few days. Judge Coffin is mailing the briefs in the First Circuit case today.


W.J.B. Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 29, 1981

RE: No. 80-2078 Dames & Moore v. Regan

Dear Bill:

Confirming what I said at conference this morning I am happy to join your really splendid opinion. I understand that you intend to incorporate Byron's first suggestion in his letter of June 26, and I very much favor that.

Again my thanks and congratulations upon a great job.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 29, 1981

RE: No. 80-2078 Dames & Moore v. Regan

Dear Bill:

Your proposed changes outlined in your memorandum of June 29 and enclosure are satisfactory to me.

Your responses to Harry respecting his suggestions are also satisfactory.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill", is written in dark ink.

Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

July 2, 1981

RE: No. 80-2078 Dames & Moore v. Regan

Dear Bill:

Congratulations again upon a truly splendid
job. I'm happy to join.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill", is written below the typed name "Justice Rehnquist".

Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 29, 1981

Re: 80-2078 - Dames & Moore v. Regan

Dear Bill,

I congratulate you and thank you for a fine job accomplished in a remarkably short time.

It seems to me that the first suggestion in Byron's letter to you of June 26 is correct, and I hope you will incorporate it. With this single qualification, you can count on my joining your opinion if I am still a Member of the Court, when it is announced.

Sincerely yours,

P.S.
/

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

July 2, 1981

Re: No. 80-2078, Dames & Moore v. Regan

Dear Bill,

I am glad to join your opinion for
the Court.

Sincerely yours,

A handwritten signature in dark ink, appearing to be the initials "P.S." with a horizontal line underneath.

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

June 26, 1981

CHAMBERS OF
JUSTICE BYRON R. WHITE

Re: 80-2078 - Dames & Moore v. Regan

Dear Bill,

After a quick reading of your draft, which I think is very good and which I shall study more carefully, I have the following comments:

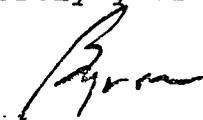
First, my own view, and I thought the view espoused in Conference, is that because of the President's authority to prevent and condition attachments and because of the orders he issued to this effect, it was not feasible for any creditor to acquire a property interest by attachment. Hence, there is no barrier to the transfer of the attached funds by the President and so no taking of a property interest giving rise to a claim for compensation. I had thought that this would decide the taking question with respect to liquidating the attachments.

Second, what we are withholding is a decision on the taking question with respect to suspending or cancelling claims rather than the attachments. That discussion, along with the matter of the Court of Claims' jurisdiction, perhaps should come after the section of the opinion dealing with claims settlement.

Third, and this is a minor matter with respect to the attachment issue, it seems to me that we should say a word in response to the argument that although the President could have forbidden attachments, he allowed them and hence permitted the acquisition of a property interest. Of course, this merely requires a construction of the licensing regulation as anticipating retroactive revocation.

Otherwise, I am quite content.

Sincerely yours,



Justice Rehnquist
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

July 2, 1981

Re: 80-2078 - Dames & Moore v. Regan

Dear Bill,

Your printed circulation incorporating various changes is satisfactory to me.

Sincerely yours,



Justice Rehnquist

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 30, 1981

Re: No. 80-2078 - Dames & Moore v. Regan

Dear Bill:

As of now, please join me.

Sincerely,

JM

T.M.

Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 29, 1981

Re: No. 80-2078 - Dames and Moore v. Regan

Dear Bill:

I am generally with you and offer the following minor suggestions for your last minute consideration:

1. As is John, I, too, am concerned about the words "crucial to our decision" in line 9 on page 36. I would go along with his "strongly supporting our decision" alternative suggestion.
2. I also agree with John's suggestion, relative to line 10 on page 47, and the omission of five words in that line.
3. At the top of page 11 reference is made to the coming deposit in a security account in the Algerian Central Bank. I thought we were now concerned with a deposit in the Bank of England. Should some explanation be made, perhaps by way of footnote, as to how this change came about?
4. This comment relates to footnote 5 on page 22. I would have preferred an explicit statement that the attachment in Orvis was valid only as a means of obtaining jurisdiction over the foreign debtor. The footnote's last sentence statement that a post-freeze attachment "may determine the relationships between the creditor and the foreign debtor" is true only in a limited number of circumstances. Since the President may override a post-freeze attachment, and since the FSIA forbids the use of attachments for the purpose of obtaining jurisdiction, it is doubtful that an attachment will be of much use in determining the rights and liabilities of the parties. It would be of use only if the President simply decided to lift the freeze without invoking any of his other powers under the Emergency Act, leaving the foreign country free to withdraw its assets unless restrained by an attachment.

The statement in Orvis that a post-freeze attachment "determined relationships between creditor and enemy debtor," 345 U.S., at 186-187, was the source of petitioner's claim in this case that the President had no power to invalidate its attachment. By repeating that statement, I think we may be creating confusion.

5. I am somewhat concerned about the material, particularly the first 2 sentences, that follow the citation of Haig v. Agee on page 33. Given your views on the delegation doctrine in general, I was a little surprised by the presence of those sentences. More importantly, however, I have no idea where such a rule could lead. As of now, I think the statement of that rule is unnecessary to the decision in this case, in view of the clear history of congressional approval of claims settlements set forth subsequently in the opinion. I would be much happier if those sentences could be deleted.

6. I am pleased that the opinion places no direct reliance on § 1732.

7. Should the opinion conclude with a statement that the mandate shall issue forthwith?

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 30, 1981

Re: No. 80-2078 - Dames and Moore v. Regan

Dear Bill:

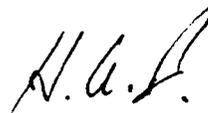
Thank you for your response to my letter of yesterday. I appreciate your considering my suggestions and your going along with at least some of them.

I shall leave entirely to you the language as to the Bank of England.

The addition suggested by the postscript to your letter is all right with me.

You thus may regard this as a joinder.

Sincerely,



Mr. Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 29, 1981

80-2078 Dames & Moore v. Regan

Dear Bill:

I share the same admiration, expressed by others, of your fine opinion and of the remarkable way in which you produced it on such short notice.

The changes you have made in response to the majority vote at Conference this morning with respect to attachments prevent, however, my joining your opinion in its entirety. Accordingly, I am circulating a brief opinion concurring and dissenting in part.

I must add, just for my own personal satisfaction, that if the honor of the United States had not been pledged, I would have had great difficulty in sustaining the validity of the Agreements of Algiers. Having been coerced by the terrorist conduct of Iran in seizing and holding American diplomats for ransom, the United States certainly was not legally bound by these agreements. They would have been voidable, I think, in the courts of any country that had a civilized legal system as well as before the International Court of Justice. Having said this, I agree that the President had authority to enter into these agreements.

We all are much indebted to you and I hope that your severe discomfort over the weekend was merely a natural reaction to the great pressure under which you have worked. The bracing air of New England should be restorative.

Sincerely,



Mr. Justice Rehnquist

lfp/ss

cc: The Conference

80-2078

Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall ✓
 Mr. Justice Blackmun
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Powell

6/29/81

Circulated: JUN 29 1981

Recirculated: _____

JUSTICE POWELL, concurring and dissenting in part.

I join the Court's opinion except its decision that the nullification of the attachments did not effect a taking of property interests giving rise to claims for just compensation. Ante, at ___, n. 6. The nullification of attachments presents a separate question from whether the suspension and proposed settlement of claims against Iran may constitute a taking. I would leave both "taking" claims open for resolution on a case-by-case basis in actions before the Court of Claims. The facts of the hundreds of claims pending against Iran are not known to this Court and may differ from the facts in this case. I therefore dissent from the Court's decision with respect to attachments. The decision may well be erroneous,¹ and

¹Even though the Executive Orders purported to make attachments conditional, there is a substantial question whether the Orders themselves may have effected a taking by making conditional the attachments that claimants against Iran otherwise could have obtained without condition. Moreover, because it is settled that an attachment entitling a creditor to resort to specific property for the satisfaction of a claim is a property

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 30, 1981

No. 80-2078 Dames & Moore v. Regan

Dear Bill:

This refers to your letter concerning the certified questions in Marschalk.

It seems to me that the proper disposition would be to dismiss the certified questions, and cite our opinion that should speak for itself. You have written a full and informative opinion. I do not think we should answer major, substantive questions in monosyllables, any more than we should write a syllabus for one of our opinions. My recollection is that we have dismissed questions in other cases: e.g., U. S. v. Will and Foley v. Carter (No. 80-444).

Sincerely,

Mr. Justice Rehnquist



LFP/lab

Copies to the Conference

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall ✓
 Mr. Justice Blackmun
 Mr. Justice Rehnquist
 Mr. Justice Stevens

6-30-81

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES ~~Supp.~~ Mr. Justice Powell

No. 80-2078

Circulated: JUL 1 1981

Recirculated: _____

Dames & Moore, Petitioner, } On Writ of Certiorari to the
 v. } United States Court of
 Donald T. Regan, Secretary of } Appeals for the Ninth
 the Treasury, et al. } Circuit.

[June —, 1981]

JUSTICE POWELL, concurring and dissenting in part.

I join the Court's opinion except its decision that the nullification of the attachments did not effect a taking of property interests giving rise to claims for just compensation. *Ante*, at —, n. 6. The nullification of attachments presents a separate question from whether the suspension and proposed settlement of claims against Iran may constitute a taking. I would leave both "taking" claims open for resolution on a case-by-case basis in actions before the Court of Claims. The facts of the hundreds of claims pending against Iran are not known to this Court and may differ from the facts in this case. I therefore dissent from the Court's decision with respect to attachments. The decision may well be erroneous,¹ and it certainly is premature.

¹ Even though the Executive Orders purported to make attachments conditional, there is a substantial question whether the Orders themselves may have effected a taking by making conditional the attachments that claimants against Iran otherwise could have obtained without condition. Moreover, because it is settled that an attachment entitling a creditor to resort to specific property for the satisfaction of a claim is a property right compensable under the Fifth Amendment, *Armstrong v. United States*, 364 U. S. 40 (1960), *Louisville Bank v. Radford*, 295 U. S. 555 (1935), there is a question whether the revocability of the license under which petitioner obtained its attachment suffices to render revocable the attachment itself. See *Marschalk Co. v. Iran National Airlines Corp.*, No. 79 Civ. 7035 (CBM) (June 11, 1981).

July 2, 1981

No. 80-2078 Dames & Moore v. Regan

Dear Bill:

I join in thanking and congratulating you - and your Chambers - on a super accomplishment, both in time and quality.

Sincerely,

Mr. Justice Rehnquist

LFP/lab

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Black
 Mr. Justice Powell
 Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 6/26/81

Recirculated: _____

No. 80-2078 Dames & Moore v. Regan, Secretary of the

Treasury

JUSTICE REHNQUIST delivered the opinion of the Court.

The questions presented by this case touch fundamentally upon the manner in which our Republic is to be governed. Throughout the nearly two centuries of our nation's existence under the Constitution, this subject has generated considerable debate. We have had the benefit of commentators such as John Jay, Alexander Hamilton, and James Madison writing in The Federalist Papers at the nation's very inception, the benefit of astute foreign observers of our system such as Alexis d'Tocqueville and James Bryce writing during the first century of the nation's existence, and the benefit of many other treatises

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 29, 1981

Re: No. 80-2078 Dames & Moore v. Regan

Dear Harry:

Thank you for your letter of June 29th, with its suggestions for possible changes in the opinion. As you might imagine, we are in something of a mad scramble right now, trying to tailor the opinion to the votes taken at Conference this morning, but my tentative views on your suggestions are as follows:

1. Since I would not necessarily reach the same result without at least implicit congressional approval, I would prefer leaving line 9 on page 36 as is.

2. I agree with your suggestion relative to line 10 on page 47, and that should appear in the next draft to be circulated.

3. I think you are quite right that we are now concerned with a deposit in the Bank of England, and I propose to change the opinion to so state. I would prefer not to elaborate any more than necessary as to how the bank funds were transferred, though if you feel strongly on the point and have language to suggest I will certainly consider it.

4. With respect to Orvis, I had thought that a "once over lightly" touch was best for the case. Orvis did not have a license, and given the sharp contrast between the decisions in Orvis and Zittman I would prefer to give as little analysis to these cases as possible, since the present case does not turn upon them. I will try to work into the last sentence of footnote 5 on page 22 some modifications along the line you suggest.

5. I think I have quite consistently maintained that the "delegation doctrine", as you refer to it, has a

different reach in foreign affairs than it does in domestic affairs. I think the Court so stated in United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-320 (1936), while at the same time making it clear that such delegation might not be upheld in a purely domestic matter. Since we have chosen to rest the "suspension of claims" neither on the delegation contained in § 1732 nor in IEEPA, but simply refer to them along with a host of similar congressional instances of acquiescence in the exercise of Presidential power in a certain area, I think the language is consistent with Jackson's statement in Youngstown, 343 U.S. at 637, cited on page 33. If you have any modifications to suggest, I would of course be happy to consider them.

6. I felt after the Conference vote that there was neither a majority to place direct reliance on § 1732 nor on IEEPA for the "suspension" of the suits, and therefore attempted to conform the opinion to the views of the Conference. I am pleased to think that you believe I succeeded.

7. The opinion will conclude with a statement that the mandate shall issue forthwith.

Sincerely,



Justice Blackmun

Copies to the Conference

P.S. On further pondering your letter, with respect to paragraph 4, I would certainly be willing to go so far as to say in the last sentence of footnote 6 on page 22:

"An attachment so obtained is in every sense subordinate to the President's powers under the IEEPA."

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 29, 1981

MEMORANDUM TO THE CONFERENCE

Re: No. 80-2078 Dames & Moore v. Regan

In light of today's conference and the various correspondence, I have the following changes to make:

I am happy to make the first and third of the changes suggested in John's letter of June 26, but prefer not to make the second.

Pages 25-26, and n. 6, are deleted. The following is added as a new footnote on page 24, line 6:

Although petitioner concedes that the President could have forbidden attachments, it nevertheless argues that once he allowed them he permitted claimants to acquire property interests in their attachments. Petitioner further argues that only the licenses to obtain the attachments were made revocable, not the attachments themselves. It is urged that the January 19, 1981, order revoking all licenses only affected petitioner's right to obtain future attachments. We disagree. As noted above, the regulations specifically provided that any attachment is null and void "unless licensed", and all licenses may be revoked at any time. Moreover, common sense defies petitioner's reading of the regulations. The President could hardly have intended petitioner and other similarly situated claimants to have the power to take control of the frozen assets out of his hands.

- 2 -

Our construction of petitioner's attachments as being "revocable," "contingent," and "in every sense subordinate to the President's power under the IEEPA," in effect answers petitioner's claim that even if the President had the authority to nullify the attachments and transfer the assets, the exercise of such would constitute an unconstitutional taking of property in violation of the Fifth Amendment absent just compensation. We conclude that because of the President's authority to prevent or condition attachments, and because of the orders he issued to this effect, petitioner did not acquire any "property" interest in its attachments of the sort that would support a constitutional claim for compensation.

I have attached new pages, essentially old pages 25-26, including a new footnote, to appear at the end of the opinion.

Sincerely,

A handwritten signature in black ink, appearing to be the initials 'W.M.' followed by a flourish.

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Stevens

RECEIVED

pg 6, 7, 14-16, 20, 21, 28, 30-31

From Mr. Justice Rehnquist

Circulated

1st PRINTED DRAFT

circulated JUL 1 1981

SUPREME COURT OF THE UNITED STATES

No. 80-2078

Dames & Moore, Petitioner, v. Donald T. Regan, Secretary of the Treasury, et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
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[June —, 1981]

JUSTICE REHNQUIST delivered the opinion of the Court.

The questions presented by this case touch fundamentally upon the manner in which our Republic is to be governed. Throughout the nearly two centuries of our Nation's existence under the Constitution, this subject has generated considerable debate. We have had the benefit of commentators such as John Jay, Alexander Hamilton, and James Madison writing in *The Federalist Papers* at the Nation's very inception, the benefit of astute foreign observers of our system such as Alexis deTocqueville and James Bryce writing during the first century of the Nation's existence, and the benefit of many other treatises as well as more than 400 volumes of reports of decisions of this Court. As these writings reveal it is doubtless both futile and perhaps dangerous to find any epigrammatical explanation of how this country has been governed. Indeed, as Justice Jackson noted, "[a] judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579, 634 (1952) (concurring opinion).

Our decision today will not dramatically alter this situation, for the Framers "did not make the judiciary the overseer of our government." *Id.*, at 594 (Frankfurter, J., concur-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 26, 1981

Re: 80-2078 - Dames & Moore v. Regan

Dear Bill:

Congratulations and thanks for putting together a first class opinion in such a short time span. I am prepared to join all of it except the two paragraphs on pages 25-26 concerning jurisdiction in the Court of Claims. I have serious doubts on the jurisdictional question and would simply not address it. I will not, however, write anything except something like the enclosed brief statement.

My other suggestions, none of which is critical, are these:

1. Page 28, line 10. Perhaps you should delete the word "unanimous" in view of Judge Breyer's separate opinion.
2. Page 36, line 9. If, instead of stating "crucial to our decision" you could merely state something like "strongly supporting our decision" I would be a little happier because I would reach the same result without the congressional approval.
3. Page 47, line 10. If you could leave out the words "are reasonable. The President has" I would be happier because I would like to avoid expressing an opinion that may be read as approving the merits of the settlement and I think your opinion will make the same point if you thereby simply combine the first two sentences of that paragraph.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 29, 1981

Re: 80-2078 - Dames & Moore v. Regan

Dear Bill:

Your changes are entirely acceptable to me and I therefore join your opinion, except for the discussion of the Court of Claims jurisdiction in Part V. I have sent the attached statement to the printer.

Respectfully,



Justice Rehnquist

Copies to the Conference

Attachment

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

80-2078 - Dames & Moore v. Regan

Circulated: JUN 29 '81

Recirculated: _____

JUSTICE STEVENS, concurring.

In my judgment the possibility that requiring this petitioner to prosecute its claim in another forum will constitute an unconstitutional "taking" is so remote that I would not address the jurisdictional question considered in Part V of the Court's opinion. However, I join the remainder of the opinion.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: JUN 7 '81

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-2078

Dames & Moore, Petitioner, } On Writ of Certiorari to the
v. } United States Court of
Donald T. Regan, Secretary of } Appeals for the Ninth
the Treasury, et al. } Circuit.

[June —, 1981]

JUSTICE STEVENS, concurring.

In my judgment the possibility that requiring this petitioner to prosecute its claim in another forum will constitute an unconstitutional "taking" is so remote that I would not address the jurisdictional question considered in Part V of the the Court's opinion. However, I join the remainder of the opinion.