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## ARTICLE

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### PRESIDENTIAL SETTLEMENTS

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*Large groups regularly turn to the White House to resolve complex disputes collectively, much like a class action. These presidential settlements go back as far as the early Republic and were particularly popular in the Progressive Era, when President Teddy Roosevelt famously brokered settlements among private groups following a rash of accidental injuries and deaths in mining, rail, and even football. More modern variants include mass compensation schemes like the Holocaust victim settlement, the Pan Am 103 settlement, and the BP oil spill settlement brokered by Presidents Bill Clinton, George W. Bush, and Barack Obama, respectively. In each case, the President helped resolve a sprawling class action–like dispute among warring parties while advancing a broader executive agenda. Just as the President has extended power over the administrative state, presidential settlements demonstrate the growth of executive authority in mass dispute resolution to provide restitution for widespread harm.*

*But this use of executive power creates problems for victims purportedly served by presidential settlements. When the President settles massive private disputes, the President resolves them like other forms of complex litigation but without the oversight, transparency, and participation thought necessary to resolve potential*

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*conflicts of interest among the victims. The President's other duties aggravate conflicts with groups who may rely entirely on the settlements for relief.*

*This Article recommends that the President adopt complex litigation principles to reduce conflicts of interest, increase transparency, and improve public participation in White House-driven settlements. Envisioning the President as the "settler-in-chief," this Article also raises new questions about how the coordinate branches of government, as well as actors inside the White House, may regulate executive settlements consistent with the separation of powers.*

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## INTRODUCTION

On June 15, 2010, President Barack Obama made his first-ever address to the American public from the Oval Office.<sup>1</sup> In an eighteen-minute speech devoted to an oil rig explosion that killed eleven people and caused a

<sup>1</sup> See Peter Baker, *On 56th Day, Call to Arms*, N.Y. TIMES, June 16, 2010, at A1.

catastrophic oil spill in the Gulf of Mexico, President Obama declared war on the “oil industry lobbyists[,] . . . corrupt regulators, foreign energy suppliers and conservative policy makers” that had sidelined his plans for energy and climate change.<sup>2</sup> “The one approach I will not accept,” said the President, “is inaction.”<sup>3</sup>

President Obama soon made good on his promise to act, calling BP’s chief executives to the West Wing to negotiate compensation for the thousands of fishermen, businesses, and coastal residents impacted by the BP oil spill.<sup>4</sup> According to participants, the negotiations mirrored the kind of eleventh-hour negotiations often seen in mass tort litigation.<sup>5</sup> Administration and BP officials haggled over the final details of the compensatory scheme in a White House meeting that stretched for hours, punctuated by tense breakout sessions where each side huddled separately to determine the size and scope of the deal.<sup>6</sup> But instead of private attorneys bargaining on the steps of a courthouse, this massive settlement culminated in a last-ditch, private, twenty-five minute session between BP’s chairman and President Obama “[u]nder the famous portrait of a charging Theodore Roosevelt on horseback.”<sup>7</sup>

The final agreement contained many features familiar to a typical sprawling class action settlement: (1) an independent \$20 billion fund, (2) an experienced special master,<sup>8</sup> and (3) a distribution scheme for thousands of

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<sup>2</sup> *Id.*

<sup>3</sup> Barack Obama, President, Remarks by the President to the Nation on the BP Oil Spill (June 15, 2010).

<sup>4</sup> See Jackie Calmes & Helene Cooper, *BP to Set Aside \$20 Billion to Help Oil Spill Victims*, N.Y. TIMES, June 17, 2010, at A1.

<sup>5</sup> Cf. PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 159-67 (1986) (describing settlement of Agent Orange litigation on the eve of trial); Austin Kilgore, *MERS Settles Avoiding Class Action Foreclosure Fee Lawsuit*, NAT’L MORTGAGE NEWS (Jan. 17, 2012, 4:11 PM), [http://www.nationalmortgagenews.com/mt\\_features/mers-settles-fee-lawsuit-1028371-1.html](http://www.nationalmortgagenews.com/mt_features/mers-settles-fee-lawsuit-1028371-1.html), archived at <http://perma.cc/KAW8-QCHQ> (describing an expected “11th-hour settlement” of a class action against national banks for inflated attorneys’ fees in foreclosure cases).

<sup>6</sup> Calmes & Cooper, *supra* note 4. According to participants familiar with the negotiations, the two sides left talks in the Roosevelt Room twice to consult privately: first, “[o]n BP’s ability to appeal decisions made by the \$20 billion fund’s independent administrator, Kenneth Feinberg,” and second, “on how far BP would go to meet [President] Obama’s request that it also aid workers hurt by the drilling moratorium.” Jonathan Weisman, *BP Blunted U.S. Demand*, WALL ST. J., June 21, 2010, at A1.

<sup>7</sup> Calmes & Cooper, *supra* note 4.

<sup>8</sup> The *Wall Street Journal* once dubbed Kenneth R. Feinberg, the administrator originally appointed to oversee the Gulf Coast Claims Facility, the “Special Master of America” for his near-ubiquitous role overseeing class action, legislative, charitable, and other compensation funds. Ashby Jones, *Spotlight on Ken Feinberg: The Special Master of America*, WALL ST. J. (Jan. 14, 2010,

oil spill victims.<sup>9</sup> But unlike a class action, no court approved the overarching terms of the deal.<sup>10</sup> Nor did any process exist for victims' representatives to participate formally in discussions over the structure of the settlement.<sup>11</sup> Although the settlement was the first triumphal moment for President Obama since news broke about the BP disaster, the Gulf Coast Claims Facility materialized outside any kind of traditional court process. It was, by its terms, a presidential settlement.<sup>12</sup>

President Obama's highly publicized efforts to resolve private disputes while advancing public policy, such as the BP oil spill fund, are hardly unique. Over the course of American history, large groups have repeatedly turned to the White House to resolve private disputes collectively, much like class action litigation. Such deals date back at least as far as the early Republic and were particularly popular with President Teddy Roosevelt, who famously brokered settlements among private groups following a rash of accidental injuries and deaths in mining,<sup>13</sup> rail,<sup>14</sup> and even football.<sup>15</sup>

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11:06 AM), <http://blogs.wsj.com/law/2010/01/14/spotlight-on-ken-feinberg-the-special-master-of-america>, archived at <http://perma.cc/J4CD-ENC9>.

<sup>9</sup> See Michael Cooper, *Two Funds, Same Goal: Compensate*, N.Y. TIMES, Aug. 22, 2010, at A14.

<sup>10</sup> Although no court approved the settlement's terms, a year after BP agreed to pay claims through the Gulf Coast Claims Facility, a federal judge imposed limits on how Special Master Feinberg could communicate with potential claimants eligible to participate in a separate class action against BP. See *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, on April 20, 2010, MDL No. 2179, 2011 WL 6817982, at \*2-4 (E.D. La. Dec. 28, 2011) (describing the court's order), amended and superseded by 2012 WL 161194 (E.D. La. Jan. 18, 2012). A year later, after Feinberg distributed more than \$6 billion through the Gulf Coast Claims Facility, that same court approved a separate class action settlement for the remaining claimants. See John Schwartz, *Accord Reached Settling Lawsuit over BP Oil Spill*, N.Y. TIMES, Mar. 3, 2012, at A1.

<sup>11</sup> Negotiations on each side were led by attorneys with substantial experience in the executive branch: Robert Bauer, then-White House counsel to President Obama, and Jamie Gorelick, BP's attorney, who formerly served as a deputy attorney general in the Clinton administration. See Weisman, *supra* note 6.

<sup>12</sup> President Obama acted in response to widespread complaints about the way BP handled its own settlement process in the weeks immediately following the spill. For a discussion about the downsides of government regulations that encourage corporations, such as BP, to establish their own mass compensation programs, see generally Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 101 VA. L. REV. 129 (2015).

<sup>13</sup> See ANTHRACITE COAL STRIKE COMM'N, REPORT TO THE PRESIDENT ON THE ANTHRACITE COAL STRIKE OF MAY-OCTOBER, 1902, at 83-87 (1903) [hereinafter ANTHRACITE COAL STRIKE REPORT] (describing an executive investigation into "the strike in the anthracite region, and the causes out of which the controversy arose" (internal quotation marks omitted)).

<sup>14</sup> See THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 537-40 (1913) (describing successful administration efforts to prevent reduction in wages for railroad employees).

<sup>15</sup> See *President Discusses Football Once More*, S.F. CALL, Dec. 5, 1905, at 10 (describing President Roosevelt's efforts to communicate with "football authorities" and observing that "[u]nless brutality and danger to the lives of the players is reduced materially, . . . the sport is practically doomed"); see also *Football Rules Made at Last*, SALT LAKE HERALD, Apr. 2, 1906, at 7 (describing the new football rules).

More recent settlements include mass compensation schemes such as the Iranian–American settlements,<sup>16</sup> the Holocaust victim settlement,<sup>17</sup> and the settlement of claims arising from the 1988 bombing of Pan Am 103 over Lockerbie, Scotland,<sup>18</sup> brokered under Presidents Jimmy Carter, Bill Clinton, and George W. Bush, respectively.

In each case, the White House—and not the courthouse—was the forum for resolving sprawling, group-wide settlements. But the location of each settlement also gave the President an opportunity to advance his own policy agenda over legislative opposition or judicial inaction. Like the well-examined way the President has extended executive power over the burgeoning administrative state,<sup>19</sup> large compensation agreements represent another way that the President has expanded the boundaries of executive power.

This Article argues that this phenomenon creates problems for groups purportedly served by presidential settlements. Even though presidential settlements resolve private claims on behalf of groups in ways that resemble large class action settlements, separation-of-powers principles limit the judicial review, transparency, and plaintiff participation ordinarily thought necessary to resolve potential conflicts of interest among the victims who rely on such settlements for relief.<sup>20</sup>

Arguably, victims benefit when politically accountable actors, like the President, resolve claims with settlements that not only compensate large groups of people, but also take into account broader policy concerns, like deepwater drilling reforms or fairer foreclosure procedures.<sup>21</sup> Unlike private

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<sup>16</sup> See *infra* subsection I.C.1.

<sup>17</sup> See *infra* subsection I.C.2.

<sup>18</sup> See *infra* subsection I.C.3.

<sup>19</sup> See generally RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY* (1983) (describing attempts by the President to manage the federal bureaucracy); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Stephen Skowronek, Essay, *The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive*, 122 HARV. L. REV. 2070 (2009); Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381 (2012) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010)).

<sup>20</sup> See, e.g., *Taylor v. Sturgell*, 553 U.S. 880, 900-01 (2008) (describing rules designed to ensure fairness in class actions and other representative lawsuits); see also Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 382 (1996) (articulating a democratic theory of access to litigation).

<sup>21</sup> For that reason, the Class Action Fairness Act requires private class counsel to notify the Justice Department and all fifty state attorneys general of a putative class action and to permit government attorneys to intervene in the settlement. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 3, 119 Stat. 4, 7-8 (codified at 28 U.S.C. § 1715(b) (2012)); see also 151 CONG. REC. S450 (daily ed. Jan. 25, 2005) (statement of Sen. Herb Kohl) (observing that public attorneys

counsel, whom courts may appoint to represent victims without the victims' consent,<sup>22</sup> voters themselves choose public officials to represent their interests in democratic elections.<sup>23</sup> And while commentators observe that class action settlement schemes sometimes resemble illegitimate "private administrative agencies,"<sup>24</sup> the result of a presidential settlement ironically grows out of negotiations by the chief executive, who oversees many real life administrative agencies.<sup>25</sup> And, in some cases, the executive branch may be the only branch capable of delivering relief to groups of victims in a crisis.<sup>26</sup>

But without procedures to hear victims' concerns, address conflicts of interest, or distribute funds, presidential settlements raise many of the same kinds of concerns as do abusive forms of mass litigation. The interests of the President, after all, may conflict with the interests of victims—much like class

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provide an "extra layer of security for the plaintiffs" and can ensure that abusive settlements are not approved without "a critical review").

<sup>22</sup> See FED. R. CIV. P. 23(g) (prescribing rules for the appointment of attorneys "best able to represent the interests of the class").

<sup>23</sup> Elena Kagan, for example, famously explained how presidential oversight may provide a superior form of accountability than other models of representation, like "expertise" and "interest group" representation. Notably, courts frequently use those latter models of representation to police against abusive mass litigation. Compare Kagan, *supra* note 19, at 2250, 2257-58, 2261-69, 2331-39, with Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383, 390-92 (2007) (describing an expert-driven "administrative structure providing non-individualized resolution for mass claims").

<sup>24</sup> See Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2020 (1997) ("[C]ourt-supervised settlements that establish systems for processing individual claims create temporary administrative agencies without proceeding through the legislative or executive branches."); Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 939, 944-52 (1996) (describing and proposing solutions for "agency cost problems that may arise with respect to mass tort settlements").

<sup>25</sup> Putting aside the debate over the appropriate role of the President in the modern administrative state, most commentators agree that the President appropriately oversees some aspects of its function. See, e.g., STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008) (arguing for a strong, unitary executive); Skowronek, *supra* note 19, at 2095 ("The new construction [by modern unitary-executive theorists] . . . seeks . . . to press forward the case for presidential government without reference to latter-day [*i.e.*, non-originalist] elaboration of its foundations."); Peter L. Strauss, *Foreword: Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 731-32 (2007) (arguing that the president's role is that of "overseer," not "decider").

<sup>26</sup> An individual harmed by a foreign government in violation of international law generally has no capacity to bring a claim. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 212 (1965). Instead, the injury to the individual is considered injury to his or her government, which makes a claim against the injuring state. The injured state espouses the claim of its national, pressing diplomatically for compensation for the injury. Cf. WALLACE MCCLURE, *INTERNATIONAL EXECUTIVE AGREEMENTS: DEMOCRATIC PROCEDURE UNDER THE CONSTITUTION OF THE UNITED STATES* 53 (1941).

action attorneys working on a contingency fee.<sup>27</sup> Presidential administrations may seek quick deals to promote their own agendas, respond to national emergencies, or hide their own embarrassing missteps.<sup>28</sup> Like other executive branch settlements brokered by federal agencies, prosecutors, and state attorneys general,<sup>29</sup> presidential settlements may share the same size and complexity as class actions, but without similar procedural safeguards for the victims they purport to serve.

Presidential settlements also raise unique concerns. First, presidents can use the “bully pulpit” to raise the national profile of a dispute, creating unique political pressure on parties to settle disputes out of court.<sup>30</sup> Second, presidents have far more discretion when negotiating settlements than other public officials, who must abide by rules designed to ensure they hear from affected parties or explain their decisionmaking, such as victims’ rights

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<sup>27</sup> See John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 411 (2000) (“[W]hen class counsel is in effect financing the action by advancing litigation expenses and accepting a contingent fee, its economic stake in the litigation may dwarf that of the class representatives.”); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 370 (“[L]awyers without a significant investment in the case may offer defendants a cheap settlement in exchange for any attorneys’ fees that they may garner.”).

<sup>28</sup> President Nixon, for example, infamously tried to settle an antitrust suit against International Telephone and Telegraph, after IT&T contributed \$400,000 to the Republican Party. See Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 629 n.215. But see RICHARD NIXON, THE MEMOIRS OF RICHARD NIXON 581 (1978) (explaining the desirability of settlement because the Justice Department’s original lawsuits “were a clear violation of my anti-trust policy”). Partly as a result of the IT&T scandal, the Justice Department now must secure federal court approval for any antitrust settlement. See Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 2, 88 Stat. 1706, 1706-08 (1974) (codified as amended at 15 U.S.C. § 16 (2012)). No similar federal court approval requirement exists, however, for many of the presidential settlements described here.

<sup>29</sup> See, e.g., Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 493-98 (2012) (describing suits by state attorneys general designed to compensate large groups of victims); Jack B. Weinstein, *Compensation for Mass Private Delicts: Evolving Roles of Administrative, Criminal, and Tort Law*, 2001 U. ILL. L. REV. 947, 956-60 (explaining that three different branches of law all attempt to serve similar compensatory functions); Adam S. Zimmerman & David M. Jaros, *The Criminal Class Action*, 159 U. PA. L. REV. 1385, 1401-06 (2011) (tracing the rise of massive criminal restitution funds in deferred and non-prosecution agreements); Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 527-39 (2011) (tracing the rise of federal agency-based settlement funds, which collected over \$10 billion over the past two decades).

<sup>30</sup> See, e.g., Dan Fitzpatrick, Nick Timiraos & Evan Perez, *Pact Followed Months of Bargaining*, WALL ST. J., Feb. 10, 2012, at A2 (describing President Obama’s efforts to win over banks, state attorneys general, and other parties through White House invitations and select appointments to presidential task forces in the hopes of reaching a \$25 billion mortgage foreclosure settlement before his 2012 State of the Union address); see also *infra* Section I.B (describing similar high profile efforts by Presidents Teddy Roosevelt, Woodrow Wilson, and Franklin Delano Roosevelt to broker large disputes).

laws,<sup>31</sup> the Administrative Procedure Act,<sup>32</sup> and sunshine-in-government rules.<sup>33</sup> No similar rules constrain the President when the President brokers settlements on behalf of private parties.<sup>34</sup> Third, presidential settlements have constitutional consequences. When presidents step in to shape policies without objection from Congress, courts may defer to that historical practice as a constitutional “gloss” on what the President can do without congressional approval—generating new obstacles to transparency and judicial review.<sup>35</sup> Over the course of U.S. history, presidential settlements have generated some of the greatest opportunities for testing—and expanding—the limits of executive power.<sup>36</sup>

Many scholars have evaluated specific kinds of presidential settlements from other perspectives—including their influence on modern debates about separation of powers,<sup>37</sup> labor relations,<sup>38</sup> and international relations.<sup>39</sup>

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<sup>31</sup> The Crime Victims’ Rights Act, for example, grants crime victims a “reasonable right to confer” with prosecutors and a “right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.” 18 U.S.C. § 3771(a)(4)-(5) (2012).

<sup>32</sup> 5 U.S.C. §§ 551–559, 701–706 (2012).

<sup>33</sup> The Freedom of Information Act, 5 U.S.C. § 552 (2012), which applies to federal agencies, exempts “the President’s immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.” See *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (quoting H.R. REP. NO. 93-1380, at 15 (1974) (Conf. Rep.)).

<sup>34</sup> The closest is Federal Advisory Committee Act (FACA), which requires that special advisory committees used by the President open their meetings to the public and make their minutes, records, and reports publicly available, subject only to several statutory exceptions. See 5 U.S.C. app. § 10 (2012). As discussed in Part IV, however, the Supreme Court and the D.C. Circuit have sharply limited FACA in light of the separation-of-powers concerns raised when applied to the President.

<sup>35</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring) (“[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on executive Power . . . .” (internal quotation marks omitted)); see also Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 447-61 (2012) (contending that historical practice can be a valid tool for interpreting separation of powers). *But see* Richard H. Fallon, Jr., *Interpreting Presidential Powers*, 63 DUKE L.J. 347, 351 (2013) (arguing that “strong precedential authority” should only apply to past presidential actions that are “adequately justified under the appropriately applicable rules” and not to “extraordinary cases”).

<sup>36</sup> See *infra* Sections I.B-C.

<sup>37</sup> Compare, e.g., Bradley & Morrison, *supra* note 35, at 449 (“Similarly, there may be cases where a legislative enactment clearly implies congressional approval of an executive practice. Executive settlement of the claims of U.S. citizens against foreign governments may be a good example.”), with Bradford R. Clark, *Domesticating Sole Executive Agreements*, 93 VA. L. REV. 1573, 1630-33 (2007) (arguing that executive settlements raise heightened separation-of-powers concerns after the passage of the Foreign Sovereign Immunity Act).

<sup>38</sup> See, e.g., JOHN L. BLACKMAN, JR., PRESIDENTIAL SEIZURE IN LABOR DISPUTES 7-8 (1967) (highlighting the rise of a federal policy that refused to allow labor disputes or strikes to disrupt essential operations or the production of certain goods or services); Michael H. LeRoy &

But few have examined what presidential settlements, as a whole, have meant for the parties who depend on them for monetary relief.<sup>40</sup> Focusing on the ways that presidential settlements provide relief to private parties not only sheds light on what practices may best resolve massive disputes for private compensation, but also illustrates how mass compensation schemes—when undertaken by ambitious members of the executive branch—may correlate with an expansion of executive power. When those same officials focus on the institutional interests of the executive office, they may lose sight of the victims they hope to serve.

But rather than limit presidential settlements, which, in some cases, may offer the only source of relief to victims of mass harm, this Article proposes reforms to remedy their characteristic flaws—borrowing principles from complex litigation to separate functions, inform independent review, and improve interest group representation. These solutions offer the most promising balance of transparency, participation, and oversight, without constraining the chief executive's role in resolving national disputes that impact the public interest. Just as scholars of complex litigation once turned to administrative law principles to improve large private settlements,<sup>41</sup> it seems fitting that administrative law scholars who study presidential power turn to complex litigation to improve oversight, citizen participation, and distributive justice in presidential settlements.

This Article proceeds in four parts. Part I illustrates how presidents have repeatedly settled massive disputes while promoting the expansion of

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John H. Johnson IV, *Death by Lethal Injunction: National Emergency Strikes Under the Taft–Hartley Act and the Moribund Right to Strike*, 43 ARIZ. L. REV. 63, 68–70 (2001) (arguing that the Taft–Hartley Act's labor controls greatly undermined the right to strike).

<sup>39</sup> See, e.g., Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 925–28 (2004) (arguing that *Garamendi* allows the President to overturn an undesirable state law in the realm of foreign affairs); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 160–71 (1998) (suggesting the original understanding of executive agreements involved the participation of the legislative branch to integrate the agreements domestically).

<sup>40</sup> One notable exception is the work of Richard Lillich. See generally, e.g., RICHARD B. LILLICH, *INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS* (1962).

<sup>41</sup> See, e.g., Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 74 (2003) (“[T]he inclusion of deliberative process, accountability and responsiveness, to claimants and the public, in class action governance is justified for the same reasons notice and comment provisions are integral to administrative and regulatory law.”); Minow, *supra* note 24, at 2020 (“Functionally, court-supervised settlements that establish systems for processing individual claims create temporary administrative agencies without proceeding through the legislative or executive branches.”); Nagareda, *supra* note 24 at 899–900 (highlighting the “visionary . . . substance” of two 1994 settlement agreements because they sought “to replace traditional tort litigation with a private administrative framework”).

executive power in foreign relations and labor law. In so doing, presidents confront the same structural challenges as modern class actions—conflicts of interest, poor transparency, and inconsistent participation by stakeholders—but without similar procedural safeguards for those who depend on the President’s lawyers and diplomats for relief. Part I then shows how modern presidential settlements continue to struggle to provide fair and efficient compensation by examining three recent case studies: the Iranian–American settlement, the Holocaust victim settlement, and the Pan Am 103 settlement.

Part II describes the inadequate congressional responses to the rise of presidential settlements. In labor disputes, Congress gave the President tremendous flexibility to hear from different interest groups, but otherwise left out procedural safeguards to ensure that settlements accurately compensated individual victims for past harm. In international claim disputes, Congress arguably went too far in the other direction—building strong procedural safeguards to protect individual interests in compensation, but without a process for the President to hear from large groups with divergent interests in the overarching settlement agreement.

Part III recommends that presidential settlements borrow complex litigation principles to separate functions, inform judicial review, and improve representation for large groups. Complex litigation offers a combination of political and adjudicative processes to balance individual interests against those of the group, including procedures to facilitate interest group representation and dissent, separated functions to avoid conflicts of interest, and bellwether trials and statistical aggregation as management techniques. Presidents need not, of course, rigidly adhere to rules created in complex litigation to resolve mass compensation claims. But by adopting similar procedures as guidelines for presidential settlements, presidents can take steps to improve participation, legitimacy, and fairness for victims who depend on the executive branch for relief.

Part IV explores how presidents may honor complex litigation principles while taking into account modern debates over the scope and management of executive power. Although separation-of-powers concerns limit Congress’s ability to regulate presidential settlement negotiations, those same principles may require presidents to avoid agreeing to massive deals that interfere with Congress’s “power of the purse.” But by adopting complex litigation principles as internal guidelines, the executive branch may allow the public, Congress, and other officials to evaluate, and, when possible, hold the President accountable for, large settlements.

## I. THE RISE OF PRESIDENTIAL SETTLEMENTS

### A. *Defining Characteristics of Presidential Settlements*

In a presidential settlement, the White House obtains redress for a large group of people from another party. Presidents frequently use what presidential scholar Richard Neustadt once classically described as the “power to persuade”—informal tools and subtle negotiation—to push for change, both at home and abroad.<sup>42</sup> Accordingly, many different White House practices, in the abstract, could qualify as presidential settlements. Presidents “jawbone” administrative agencies to consider regulations’ costs and benefits on private entities;<sup>43</sup> they arm-twist government bodies to buy stakes in private business and then require the businesses to adopt new best practices;<sup>44</sup> and they even lecture the Supreme Court to yield when judicial decisions implicate national politics.<sup>45</sup> The presidential settlements described here, however, represent a different phenomenon because they all involve presidential actions to resolve disputes by claimants who seek compensation from others.

For years, private lawsuits in the United States have been thought of as the primary tool to ensure people pay damages to those they harm.<sup>46</sup> When

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<sup>42</sup> RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN* 11 (1st paperback ed. 10th prtg. Free Press 1990); *see also* WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* 11 (2003) (“Scholars continue to equate presidential power with an ability to bargain, negotiate, change minds, turn votes, and drive legislative agendas . . .”).

<sup>43</sup> *See, e.g.*, Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 944-47 (1980) (examining presidential involvement in agency policymaking when agencies attempted to regulate cotton dust, ozone, and strip mining under President Carter); *cf.* John D. Graham, *Saving Lives Through Administrative Law and Economics*, 157 U. PA. L. REV. 395, 460-63 (2008) (describing OIRA’s use of “prompt letters” in the George W. Bush administration to expedite and encourage certain regulatory policies).

<sup>44</sup> *See* Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government’s Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 466-69 (2009) (outlining “regulation by deal” as the process of striking deals with—and taking stakes in—individual firms to influence the firms’ behavior).

<sup>45</sup> *See, e.g.*, Barack Obama, President, State of the Union Address (Jan. 27, 2010) (“With all due deference to separation of powers, last week, the Supreme Court reversed a century of law that I believe will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections.”); Franklin Delano Roosevelt, President, A “Fireside Chat” Discussing the Plan for Reorganization of the Judiciary (Mar. 9, 1937) (“The Courts, however, have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions.”), *in* 1937 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 122, 123 (Samuel I. Rosenman ed., 1941).

<sup>46</sup> *See* G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 14-15 (1980) (explaining that, prior to the 1870s, tort cases focused on “whether something about the

many people are hurt, special collective procedures—like class actions, multidistrict litigation, and bankruptcy proceedings—exist for defendants to compensate victims comprehensively.<sup>47</sup> The presidential settlements described below involve a range of disputes, varying combinations of structural reforms and monetary relief, and different kinds of presidential authority—from international disputes to labor to law enforcement efforts—but they share several important features of complex private litigation.

First, White House intervention provides the economies of scale of a class action—resolving disputes among hundreds or thousands of claimants who, acting by themselves, would lack resources to obtain compensation or other forms of relief. Like class actions, presidential settlements attempt to overcome barriers where large groups of individuals seeking relief or mass compensation may lack the power or coordination to provoke the legislature to respond.<sup>48</sup> In this way, presidential settlements represent a variant of what some commentators have dubbed “structural class actions” or “executive branch” class actions.<sup>49</sup> Structural class actions do not rely on court procedures to collect and coordinate common claims. Rather, a single institution, such as a government agency, health insurer, or labor union, brings a single lawsuit predicated on harm to many different people.<sup>50</sup>

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circumstances of the plaintiff's injury compelled the defendant to pay the plaintiff damages”); *see also* 1 FRANCIS HILLIARD, *THE LAW OF TORTS OR PRIVATE WRONGS* 82 (1859) (“[T]he liability to make reparation for an injury rests upon *an original moral duty*, enjoined upon every person, so to conduct himself or exercise his own rights as not to injure another.”).

<sup>47</sup> Many procedures in complex litigation and bankruptcy evolved from the same core of equitable court doctrines that tried to bring together all persons whose rights were affected by “any particular litigation and to render a complete decree.” CHARLES W. BACON & FRANKLYN S. MORSE, *THE REASONABLENESS OF THE LAW: THE ADAPTABILITY OF LEGAL SANCTIONS TO THE NEEDS OF SOCIETY* 204 (1924).

<sup>48</sup> Compare Mark A. Peterson, *The Presidency and Organized Interests: White House Patterns of Interest Group Liaison*, 86 AM. POL. SCI. REV. 612, 615 (1992) (describing ways that modern presidents have adopted an “interest group liaison” model, in which groups “that are otherwise ignored have an opportunity to be heard”), with Samuel Issacharoff, *Class Actions and State Authority*, 44 LOY. U. CHI. L.J. 369, 375 (2012) (“Viewed in this fashion, the Rule 23(b)(2) class action is a claim of political disregard by the majority for the particularized interests of the minority.”).

<sup>49</sup> Cf. *In re Zyprexa Prods. Liab. Litig.*, 671 F. Supp. 2d 397, 433 (E.D.N.Y. 2009) (describing “structural class actions” as when a single entity, such as a government actor, insurer, or labor union “brings claims for reimbursements it provided . . . founded upon large numbers of individual . . . costs”).

<sup>50</sup> See, e.g., *In re Zyprexa Prods. Liab. Litig.*, 253 F.R.D. 69, 201 (E.D.N.Y. 2008) (considering certification of a class of third-party payors, like labor unions and other institutional plaintiffs, in an action against Eli Lilly for consumers who purchased Zyprexa); Lemos, *supra* note 29, at 493-98 (collecting suits by state attorneys general designed to compensate large groups of victims).

Second, as occurs in complex litigation in which large committees of plaintiffs' lawyers often work towards a common purpose, presidents themselves do not always directly forge presidential settlements. Many commentators have noted that the presidency represents a collection of people, not simply an individual office—a “they,’ not an ‘it.’”<sup>51</sup> Accordingly, the President’s cabinet members, counsel, or other designated White House staff members may settle claims in lieu of a pending litigation.<sup>52</sup>

Third, presidents may seek a combination of prospective reforms, private compensation, and specialized claim handling often seen in class action settlements. In presidential settlements, the White House will demand that the putative “wrongdoer” agree to a number of conditions—including structural reforms, prospective relief, and, on occasion, a large restitution fund that shares many features of a class action settlement. Because of the overwhelming volume of evidence, claims, and money, presidential settlements often rely on arbitrators, independent commissions, or the same sophisticated claims administrators often used in resolving civil litigation to develop distribution plans for potential victims.<sup>53</sup>

As presidential settlements provide relief similar to multimillion—or more recently, multibillion—dollar class action settlements, presidential administrations confront obstacles similar to those often found in ordinary mass litigation: they must (1) fairly represent victims’ interests, (2) distribute funds fairly and consistently, and (3) police conflicts of interest between and among the victims. First, presidential administrations often struggle to obtain input from victims likely to benefit from the settlement.<sup>54</sup> For example, as discussed in more detail below, Presidents Bill Clinton and George W. Bush informally relied on input from lawyers, non-profit foundations, and family members of victims of the Holocaust and the

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<sup>51</sup> Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 49 (2006).

<sup>52</sup> Commentators and political scientists have also noted that, even though the President and the President’s staff follow varying agendas, “the most senior level of the [White House] bureaucracy is relatively cabined and controlled.” Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1040 (2013); see also Terry M. Moe, *Presidents, Institutions, and Theory* (contrasting the President’s ability to control cabinet secretaries with the difficulty of controlling the bureaucracy as a whole), in RESEARCHING THE PRESIDENCY: VITAL QUESTIONS, NEW APPROACHES 337, 368-69 (George C. Edwards III, John H. Kessel & Bert A. Rockman eds., 1993).

<sup>53</sup> See *infra* Sections I.B-C (describing examples of independent commissions).

<sup>54</sup> In response to this problem, the White House created an Office of Public Liaison to interact with interest groups. See Heath Brown, *Interest Groups and Presidential Transitions*, 38 CONGRESS & PRESIDENCY 152, 154 (2011). The result in some cases, however, “is not equal access for all voices across the political spectrum, but differential access for favored voices.” Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 62 (2013).

Lockerbie bombing. In each case, the presidential settlement sought participation from victims in the final settlement, but that input often understandably fell short of the individualized representation that exists in one-on-one litigation.<sup>55</sup>

Second, presidential settlement schemes struggle to distribute funds according to an identifiable standard of fairness. On one hand, presidential settlements try to compensate direct victims based on some legally cognizable or protected interest. On the other hand, presidential settlements must balance those interests against others—such as foreign or domestic policy, administrative efficiency, and compensating indirect victims of the same harm. Although line-drawing can seem arbitrary, presidential settlements, like other large settlements, must wrestle over “who gets what,”<sup>56</sup> dividing money among victim groups with different entitlements to relief.

Finally, presidential settlements fight to overcome conflicts of interest between and among groups who stand to benefit from the outcome. For example, in a recent mortgage foreclosure settlement brokered by President Obama, federal agencies, and the attorneys general of forty-nine states and the District of Columbia,<sup>57</sup> banks set aside over \$20 billion to compensate victims of improper foreclosure practices and keep underwater mortgagors in their homes.<sup>58</sup> Another \$3 billion, though, attempted to do the opposite—providing financial incentives to move people out of their homes more quickly to stabilize the housing market.<sup>59</sup>

But beyond conflicts among direct victims and other stakeholders, presidential settlements provoke conflict between victims and the President himself. Presidential settlements have the potential to enlarge executive

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<sup>55</sup> See *infra* Section I.C.

<sup>56</sup> KENNETH R. FEINBERG, WHO GETS WHAT: FAIR COMPENSATION AFTER TRAGEDY AND FINANCIAL UPHEAVAL, at xx (2012) (“Who should be deemed eligible to receive public or private compensation in such limited circumstances? And finally, what amount of compensation is deemed appropriate?”).

<sup>57</sup> See OFFICE OF MORTG. SETTLEMENT OVERSIGHT, FIRST TAKE: PROGRESS REPORT FROM THE MONITOR OF THE NATIONAL MORTGAGE SETTLEMENT 2-3 (2012), available at [https://www.jasmithmonitoring.com/omso/wp-content/uploads/sites/4/2014/05/OMSO\\_Monitors\\_Report\\_8.29.12.pdf](https://www.jasmithmonitoring.com/omso/wp-content/uploads/sites/4/2014/05/OMSO_Monitors_Report_8.29.12.pdf). (describing coordinated efforts of the President, federal agencies, and state attorneys general)

<sup>58</sup> See Gretchen Morgenson, *The Deal Is Done, But Hold the Applause*, N.Y. TIMES, Feb. 12, 2012, § 3 (Sunday Business), at 1 (describing the plan to devote \$17 billion for principal reductions, \$3 billion for refinancing arrangements, and \$1.5 billion for improper foreclosures).

<sup>59</sup> See Sheila Dewan & Jessica Silver-Greenberg, *Foreclosure Deal Credits Banks for Routine Efforts*, N.Y. TIMES, Mar. 28, 2012, at B1 (explaining that banks can erase more than \$2 billion of their obligation under the settlement by donating or demolishing abandoned houses and that another \$1 billion may be used to help defaulted homeowners move out); see also OFFICE OF MORTG. SETTLEMENT OVERSIGHT, *supra* note 57, at 4 (highlighting the flexibility of the settlement).

power over the parties to the settlements and over the other branches of government. In such cases, the President's political goals may not align with the goal of providing fair and efficient victim compensation.

Section B illustrates how problems of participation, distribution, and conflict-of-interest in presidential settlements have been overshadowed by larger contests over executive power that date back to the earliest days of the Republic. Section C then evaluates three modern presidential settlements as case studies—the Iranian–American settlements, the Holocaust victim settlement, and the settlement of claims arising from the 1988 bombing of Pan Am 103 over Lockerbie, Scotland—to assess how the executive office has struggled to confront those challenges.

### B. *History of Presidential Settlements*

Even though early international and labor settlements differ in some significant ways from modern presidential settlements, they share many of the same structural strengths and weaknesses. In making early international and labor agreements, presidents expanded their power over Congress and the judiciary to create compensation systems overseen by independent authorities. But in many cases, presidents struggled with the same concerns that plague class actions and other forms of representative litigation—providing adequate representation for large interest groups, assuring fair compensation, and balancing conflicting interests between groups and against broader national interests served by settlement.

#### 1. Presidential International Claims Settlements

Presidents have historically used international claim settlements to resolve large volumes of claims for aggrieved United States citizens that, in turn, have indirectly expanded the scope of executive power. Beginning in the 1790s, the President and his cabinet negotiated mass compensation agreements for groups of people injured by foreign states and their private agents—including settlements for accidents at sea, restitution for excessive duties charged to United States businesses, funds for damage to property seized abroad, and compensation for false imprisonment.<sup>60</sup> These settlements represented some of the earliest forms of mass compensation in

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<sup>60</sup> See, e.g., 5 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 1075-78 (Hunter Miller ed., 1937) (providing the example of an early settlement that resolved claims relating to the seizure of the *Wilmington Packet*); Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT'L L.J. 1, 20-27 (2003) (describing early settlements).

U.S. history: large lump-sum settlements, administered by one to three independent commissioners, with broad grants of authority to devise efficient rules for determining eligible claimants, establish evidentiary rules, and set distribution standards.<sup>61</sup>

As set forth in greater detail below, over time, the President gradually assumed far-reaching control over the international settlement and distribution process from Congress and the federal judiciary—asserting executive privilege over diplomatic negotiations and securing broad power to determine rules and procedures for managing international claim settlement funds. But presidents struggled to devise consistent distribution standards, value claims, and resolve conflicts of interest in the overarching settlement.

The Jay Treaty of 1794,<sup>62</sup> one of earliest mass compensation schemes brokered by a presidential administration, precipitated some of the earliest constitutional confrontations among the branches about the proper scope of executive power. The Jay Treaty created independent arbitral commissions of American and British panelists to settle claims of American citizens for illegal captures of ships and confiscation of their cargo.<sup>63</sup> After Congress pressed for more information about the settlement discussions that gave rise to the Jay Treaty, President George Washington refused in one of the earliest assertions of executive privilege.<sup>64</sup> Private parties and government

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<sup>61</sup> To be sure, in the early days of the Republic, individuals also sought relief from Congress for tax, debt, or disaster relief. See Note, *Private Bills in Congress*, 79 HARV. L. REV. 1684, 1684-85 (1966). By the early 1820s, private bills for compensation were gradually replaced by general schemes that established broad commissions to oversee public funds for whole classes of potential victims. Early examples include congressional funds created in the wake of the Whiskey Rebellion, the Haitian “slave insurrection,” and the War of 1812. See, e.g., Act of Feb. 12, 1794, ch. 2, 6 Stat. 13 (providing for the relief of the inhabitants of St. Domingo).

<sup>62</sup> Treaty of Amity, Commerce and Navigation, U.S.–Gr. Brit., Nov. 19, 1794, 8 Stat. 116. Presidents have concluded hundreds of mass claims settlements with foreign states since the Jay Treaty. Between the end of World War II and 2000, presidents had entered into at least 208 “lump sum” agreements with foreign countries. See BURNS H. WESTON, RICHARD B. LILLICH & DAVID J. BEDERMAN, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS*, 1975–1995, at 4-5 (1999).

<sup>63</sup> The Jay Treaty also authorized mixed commissions of American and British citizens to make “conclusive” judgments on a wide variety of matters, including the northern boundary with Canada and debts owed by American citizens to British loyalists. Treaty of Amity, Commerce and Navigation, *supra* note 62, 8 Stat. at 119, 121, 125-26; see also Richard B. Lillich, *The Jay Treaty Commissions*, 37 ST. JOHN’S L. REV. 260, 265-276 (1963) (describing the history of the St. Croix River Commission and the British Debts Commission established under the treaty).

<sup>64</sup> Some members of the Senate decried the secrecy around the evolution of the Jay Treaty. The House of Representatives pressed the President to provide a letter that had been sent to the British Minister on the subject of Anglo–American relations, but that had been omitted from materials supplied to the House. 4 ANNALS OF CONG. 250-51 (1794); see also Raoul Berger, *Executive Privilege v. Congressional Inquiry*, 12 UCLA L. REV. 1043, 1089 (1965) (observing that the

officials also complained—echoing modern concerns about class action settlements and mass dispute resolution—that the commissioners threatened redress, or review by, Article III judges. One congressman argued the Jay Treaty “interferes with the authority of the Judiciary, by establishing a Court of Commissioners . . . within the United States, with powers to proceed, unknown to our laws.”<sup>65</sup>

The debate over the appropriate reach of presidential power in the Jay Commissions was the first of many debates involving international mass settlement schemes. Over the course of the nineteenth and twentieth centuries, presidents expanded power over the structure and substance of large settlement funds in three significant ways: (1) by exclusively resolving disputes through “lump sum” agreements, (2) by wresting control over the negotiation and distribution process from Congress, and (3) by barring judicial review of claim determinations.

First, presidents assumed more control over mass compensation schemes as the United States gradually moved away from “mixed-claim commissions” to “lump-sum settlements.” Mixed-claim commissions were jointly overseen by U.S. nationals, a responsible foreign country, and an independent state, who, in turn, would receive and adjudicate individual claims for compensation.<sup>66</sup> Because mixed-claim commissions frequently suffered delays and infighting,<sup>67</sup> presidents increasingly agreed to large “lump-sum settlements,” where the United States accepted a single fixed payment of money to resolve all private disputes with the foreign

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debate over the House resolution calling for information “ran on for four weeks and is reported in 334 closely printed pages”).

<sup>65</sup> 5 ANNALS OF CONG. 1099 (1796) (statement of Rep. John Page); *see also* Letter from the Citizens of Philadelphia, the Northern Liberties, and the District of Southwark, to George Washington, President (July 25, 1795) (objecting because the treaty referred “all the hopes of indemnity, for the recent spoliations committed on the commerce of the United States, to an equivocal, expensive, tedious, and uncertain process”), *in* TREATY OF AMITY, COMMERCE, AND NAVIGATION, BETWEEN HIS BRITANNIC MAJESTY, AND THE UNITED STATES OF AMERICA, CONDITIONALLY RATIFIED BY THE SENATE OF THE UNITED STATES, AT PHILADELPHIA, JUNE 24, 1795, TO WHICH IS ANNEXED A COPIOUS APPENDIX 166, 167 (2d ed. 1795); John O. McGinnis, *Medillín and the Future of International Delegation*, 118 YALE L.J. 1712, 1744 (2009) (describing the debate over the Jay Treaty and its consequences for questions of delegation under international treaties). Ultimately, the treaty was found to appropriately set up arbitral tribunals to decide claims for compensation. McGinnis, *supra*, at 1744.

<sup>66</sup> *See* LILLICH, *supra* note 40, at 6-7 (describing the early adoption of mixed-claim commissions in the United States to resolve claims by private citizens against foreign states).

<sup>67</sup> *See id.* at 7, 11 (observing that mixed-claim commissions often produced “commissioners of nonjudicious, adversary temperament.”).

government.<sup>68</sup> The White House would then appoint its own officers to oversee the settlement distribution to individual claimants.<sup>69</sup> During the nineteenth century, the lump-sum settlement became the “paramount vehicle” for the executive branch to distribute funds to victims of foreign government spoliation, unpaid creditors, or people injured by accidents on the high seas—a development that placed unique pressures on the executive to distribute funds fairly and efficiently. Those challenges continued well into the twentieth century, as presidential administrations from Harry Truman to Bill Clinton overwhelmingly chose to resolve foreign compensation claims through lump-sum settlements.<sup>70</sup>

Second, presidents increasingly secured more control over the international claim settlement process from Congress. Contrary to conventional wisdom, early congresses actually assumed an active role in the negotiation of mass settlement agreements with foreign states.<sup>71</sup> As the President increasingly dominated negotiations with foreign countries, however, executive officials also assumed more control over the information, process, and distribution of lump-sum awards. The President increasingly negotiated lump-sum awards through “executive agreements” that, unlike formal treaties, often lacked the advice and consent of the Senate. Presidents from John Quincy Adams to Abraham Lincoln would go on to negotiate fifty executive agreements without any congressional input between 1825 and the Civil War—including settlements for accidents at sea, restitution for excessive duties charged to U.S. businesses, damage to

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<sup>68</sup> The breakdown of mixed-claim commissions, for example, with Great Britain and Mexico in the 1820s and 1840s, respectively, produced lump-sum settlements with Denmark, France, Peru, Brazil, and China. *See id.* at 11.

<sup>69</sup> *See id.* at 10-15.

<sup>70</sup> WESTON, LILLICH & BEDERMAN, *supra* note 62, at 4 (“Since World War II, approximately 95 percent of international claims have been handled by the lump sum settlement-national claims commission process.”); Richard B. Lillich & Burns H. Weston, Note, *Lump Sum Agreements: Their Continuing Contribution to the Law of International Claims*, 82 AM. J. INT’L L. 69, 70 (1988) (“[I]n the last 40 years this procedural device has become, without doubt, the paramount vehicle for settling international claims.”).

<sup>71</sup> In early negotiations with Native Americans, for example, congressional delegations accompanied President Washington in resolving boundary disputes and other debts. *See* LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 226-28 (4th rev. ed. 1997) (“Far from being a ‘presidential monopoly,’ the negotiation of treaties has often been shared with the Senate in order to secure legislative understanding and support.”). President Washington also shared confidential reports on foreign negotiations with the House to resolve private claims when Algerian pirates seized American merchant ships, requesting that Congress provide whatever it considered most expedient to free the men. *See* Report Relative to the Mediterranean Trade (Dec. 28, 1790) (stating that the decision of what ransom to pay “will rest with [Congress] to limit and provide the amount”), in THE COMPLETE JEFFERSON 204-08 (Saul K. Padover ed., 1943).

property seized abroad, and false imprisonment claims.<sup>72</sup> In each case, the executive branch almost exclusively<sup>73</sup> enjoyed the power to resolve claims of American citizens in negotiations between nations.<sup>74</sup>

Third, presidents assumed greater power over mass settlement awards by insulating even very minor controversies over the division of awards from judicial review. In early decisions, courts retained jurisdiction to determine the legal “title” to settlement awards among disputing parties, only deferring to the executive branch to negotiate the total amount of funds due to victims.<sup>75</sup> The executive branch, however, ultimately assumed

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<sup>72</sup> Wuerth, *supra* note 60, at 22-26. After the Civil War, the President dramatically increased the use of executive agreements to send claims to arbitration commissions. *See id.* at 26-27; *see also*, e.g., Arbitration Convention Between United States and Salvador, U.S.–El Sal., Dec. 21, 1908, 36 Stat. 2172; Protocol of an Agreement Between the Secretary of State of the United States of America and the Plenipotentiary of the Republic of Venezuela for Submission to Arbitration of All Unsettled Claims of Citizens of the United States of America Against the Republic of Venezuela, U.S.–Venez., Feb. 17, 1903, T.S. No. 420; Protocol in Regard to the Claim of Patrick Shields Against the Government of Chile, U.S.–Chile, May 24, 1897, 30 Stat. 1596; Agreement Between the United States and Spain, for the Settlement of Certain Claims of Citizens of the United States, Made by Daniel E. Sickles, Esq., Envoy Extraordinary and Minister Plenipotentiary of the United States at Madrid, and His Excellency Señor Don Cristino Martos, Minister of State of Spain, U.S.–Spain, Feb. 12, 1871, 17 Stat. 839.

<sup>73</sup> To be sure, Congress retained some control over the distribution process. After the President entered into agreements with foreign countries, Congress often passed laws that determined eligible claimants, the structure of the commission, and the distribution of awards. *See*, e.g., Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.–Mex., art. XV, Feb. 2, 1848, 9 Stat. 922 (creating a board of commissioners to determine the validity and amount of claims of citizens arising out of the Mexican–American War); Convention Between the United States of America and Great Britain, U.S.–Gr. Brit., art. IV, Nov. 13, 1826, 8 Stat. 344 (enabling implementation of the 1826 Convention with Great Britain to compensate individual claims arising out of the War of 1812 “in such manner as the United States alone shall determine”); Convention Between the United States of America and the French Republic, U.S.–Fr., arts. III–X, Apr. 30, 1803, 8 Stat. 208 (enabling implementation of the French Convention with specific procedures for distribution of compensation). But in the twentieth century, Congress gave away even that authority by passing the International Claims Settlement Act of 1949. *See* Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 195-96 (2009). Congress’s decision to give to the President broad power to settle private citizens’ international claims bolstered what was then considered an emerging “delegation doctrine”—permitting broad grants of congressional authority to the executive branch in many different areas of law, so long as the grant was subject to some “intelligible principle.” *Id.* at 177.

<sup>74</sup> *See* WALLACE MCCLURE, INTERNATIONAL EXECUTIVE AGREEMENTS 53 (1941) (observing that presidents have entered into hundreds of agreements where “the Executive may be said to have overruled the parties complainant and to have taken the responsibility of deciding what amount should be sought in settlement of the claim.”); *see also* *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1523 (D.C. Cir. 1984) (discussing the “absolute power” and “wide-ranging discretion” that a sovereign has to dispose of the claims of its private citizens against a foreign government).

<sup>75</sup> *See, e.g.,* *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193, 212 (1828) (“But it does not necessarily or naturally follow, that this authority, so delegated, includes the authority to adjust all conflicting rights of different citizens to the fund so awarded. . . . Nor could they be presumed to possess the

more control over distribution decisions through “finality clauses,” which expressly barred judicial review of large international settlement funds. A Special Mexican Claim Commission brokered by the Coolidge administration to pay over 2800 U.S. citizens for revolutionary violence along the U.S.–Mexican border,<sup>76</sup> for example, provided that “[a]ll decisions by the Commission . . . shall constitute a full and final disposition of the cases decided.”<sup>77</sup> Decades later, when Congress broadly delegated authority to the executive branch under the International Claims Settlement Act to resolve private claims against most foreign governments, the Act not only contained an identically broad finality clause, but barred review of commission decisions by “any other official, department, agency . . . or by any court by mandamus or otherwise.”<sup>78</sup>

But even as presidents expanded executive control over international claim settlement funds, they struggled to devise consistent distribution rules, value claims, and resolve conflicts of interest in the overarching settlement. First, distribution standards for international settlements varied significantly. Some compensation funds barred restitution claims by U.S. stockholders in foreign corporations unless U.S. citizens possessed a “substantial and bona fide interest” in the corporation;<sup>79</sup> others allowed direct stockholder claims, regardless of the total American interest in the company.<sup>80</sup> Some commissions required executors and personal representatives to file claims on behalf of families, while more recent commissions have attempted to compensate family members directly based on investigations of foreign inheritance laws—with inevitably inconsistent results.<sup>81</sup> To this day, executive commissions have taken different positions

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means of exercising such a broader jurisdiction, with due justice and effect.”); *see also* *Frevall v. Bache*, 39 U.S. (14 Pet.) 95, 97 (1840) (holding that awards made under the 1831 treaty with France were not “conclusive” as to the rights of adverse claimants).

<sup>76</sup> *See* Louis W. McKernan, *Special Mexican Claims*, 32 AM. J. INT’L L. 457, 458–59 (1938).

<sup>77</sup> Act of Apr. 10, 1935, ch. 55, § 3, 49 Stat. 149, 149.

<sup>78</sup> International Claims Settlement Act of 1949, ch. 54, § 4(h), 64 Stat. 12, 16 (1950) (codified at 22 U.S.C. § 1623(h) (2012)).

<sup>79</sup> *See, e.g.*, Settlement of Mexican Claims Act of 1942, ch. 766, § 3(b), 56 Stat. 1058, 1059 (indicating that American stockholders must have a “substantial and bona fide interest” to recover for a corporation’s losses).

<sup>80</sup> LILLICH, *supra* note 40, at 91 (observing that the Yugoslav Claims Agreement of 1948, which resolved claims on behalf of nationalized businesses in the former state of Yugoslavia, compensated United States stockholders “who owned but a few shares in a Yugoslav corporation”).

<sup>81</sup> *See id.* at 97.

on how to compensate economic losses, such as insurance claims, real estate losses, and business losses.<sup>82</sup>

Second, funds also suffered from limited rules for valuing claims and resolving conflicts of interest in lump-sum agreements. Although presidents increasingly negotiated lump-sum settlements with foreign states, executive officials lacked trustworthy information<sup>83</sup> about the size and merit of the individual claims involved.<sup>84</sup> As a result, in many cases, the total settlement was simply divided in equal shares among differently situated parties.

Finally, commissioners lacked rules for resolving conflicts of interest in overarching settlement agreements. Commissioners lacked authority to compel third parties, “asserting conflicting interests, to appear and litigate” group claims before them.<sup>85</sup> Early commissioners of large settlement funds complained that, with no one to “defend the interests of claimants generally,” advocates with frivolous claims could deplete funds available to other classes of claimants.<sup>86</sup> Over the twentieth century, many people complained about the lack of procedures for resolving conflicts among parties in lump-sum awards.<sup>87</sup>

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<sup>82</sup> Compare, e.g., Edwin M. Borchard, *Opinions of the Mixed Claims Commission, United States and Germany* (pt. 2), 20 AM. J. INT’L L. 69, 69-70 (1926) (describing the American-German commission’s decision to bar economic loss claims by life insurance carriers of American citizens who perished on the *Lusitania* as too remote), with 5 INTERNATIONAL ADJUDICATIONS 393 (John Bassett Moore ed., modern series 1933) (describing the 1819 Spanish commission’s decision to recognize insurers as claimants where they paid a “total loss”).

<sup>83</sup> An early example involved President Andrew Jackson’s Secretary of State, who reportedly forwarded the following instructions to diplomats negotiating a lump-sum settlement with the government of Peru:

This Department cannot give you precise instructions as to the amount you should finally insist upon. Much must be left to your discretion, guided by as correct a view as you can take of the amount of such claims as appear to be well founded.

LILLICH, *supra* note 40, at 110.

<sup>84</sup> See *id.* at 110-11 (“The problem of evaluating claims before negotiating an agreement has plagued the Department of State for over a century.”); Dudley B. Bonsal, *International Claims: A Lawyer’s View on a Diplomat’s Nightmare*, 49 AM. SOC’Y INT’L L. PROC. 62, 71 (1955) (“[T]he diplomats have to negotiate the lump sum without adequate knowledge of the amounts involved.”).

<sup>85</sup> *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193, 212 (1828) (“They had no authority to compel parties, asserting conflicting interests, to appear and litigate before them, nor to summon witnesses to establish or repel such interests.”).

<sup>86</sup> 5 INTERNATIONAL ADJUDICATIONS, *supra* note 82, at 441-42.

<sup>87</sup> See, e.g., Rep. of the Int’l Law Comm’n, 4th Sess., June 4–Aug. 8, 1952, ¶ 11, U.N. Doc. A/2163; GAOR 7th Sess., Supp. No. 9 (1952) (“The International Law Commission, at its first session in 1949, selected arbitral procedure as one of the topics of international law for codification and gave it priority.”), reprinted in [1952] 2 Y.B. Int’l L. Comm’n 57, U.N. Doc. A/CN.4/SER.A/1952/Add.1; FRED K. NIELSEN, AMERICAN-TURKISH CLAIMS SETTLEMENT UNDER THE AGREEMENT OF DECEMBER 24, 1923, AND SUPPLEMENTAL AGREEMENTS

## 2. Presidential Labor Settlements

Over the twentieth century, presidents such as Teddy Roosevelt, Woodrow Wilson, Franklin Delano Roosevelt, and Harry Truman repeatedly intervened in disputes to settle claims by laborers. Presidential labor settlements differ from other presidential settlements, in part, because they often seek prospective relief—such as salary increases, changes in workplace conditions, or union representation—in addition to retrospective relief, such as compensation for back pay or other work-related injuries. But they remain a close cousin of many of the presidential settlements discussed here because, in such cases, the pressing need to resolve disputes also invited new opportunities for presidents to adopt policies that indirectly had the effect of expanding their authority over large compensatory settlements. Presidents also struggled to use the political process to resolve the same structural concerns that routinely surface in representative litigation—representing absent interest groups, assuring fair compensation, and balancing conflicts of interest between aggrieved groups and the broader national welfare.

President Teddy Roosevelt's unprecedented effort to resolve the Anthracite Coal Strike in 1902, without any legislative authority, represented one of the earliest examples of a domestic presidential settlement that sought to expand presidential power. The Pennsylvania coal mines, which powered most of the Northeast, represented some of the most hazardous workplaces in the modern industrialized world.<sup>88</sup> Tensions between mine operators and mine laborers reached a breaking point in 1902, when miners sought back pay, increased wages, and limited working hours for their dangerous jobs.<sup>89</sup> In October 1902, President Roosevelt attempted to settle the strike in a historic White House meeting between representatives of mine operators and laborers in the anthracite mines of Pennsylvania.<sup>90</sup>

The final settlement, which indirectly required management to absorb more of the cost of future workplace accidents, complemented the President's agenda—the push for workers' compensation.<sup>91</sup> Beyond his

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BETWEEN THE UNITED STATES AND TURKEY: OPINIONS AND REPORT 9 (1937) ("There is, therefore, no evidence in the light of which that produced by the [individual] claimants can be tested.")

<sup>88</sup> See ANTHRACITE COAL STRIKE REPORT, *supra* note 13, at 27 ("Coal mining is more hazardous than any other class of underground work . . .").

<sup>89</sup> See *id.* at 31.

<sup>90</sup> See ROOSEVELT, *supra* note 14, at 506-09.

<sup>91</sup> Roosevelt campaigned for creating workers' compensation, calling for businesses that profited off the industrial revolution to share in its risks. JOHN FABIAN WITT, THE ACCIDENTAL

immediate policy agenda, the settlement presented an opportunity for President Roosevelt to promote his expansive view of executive power. Historic moments like a coal strike, according to President Roosevelt, required presidents, as “steward[s] of the people,” to put forward dramatic reforms, unless specifically constrained by “prohibitions appearing in the Constitution or imposed by Congress.”<sup>92</sup> He later claimed that he would have deployed the Army to take over the mines if settlement talks failed.<sup>93</sup> To this day, President Roosevelt’s “stewardship theory” of the Presidency remains a paradigmatic illustration of expansive presidential power.<sup>94</sup>

Going forward, presidents would build on the precedent President Teddy Roosevelt established by asserting authority to resolve nearly one hundred labor disputes over the twentieth century while advancing their own views on industrial policy.<sup>95</sup> In World War I, President Wilson pushed to settle disputes involving railroad shopmen and coal miners, with wage agreements that reflected the government’s viewpoint on “industrial equity.”<sup>96</sup> President Franklin Delano Roosevelt similarly expanded presidential power.<sup>97</sup> FDR’s authority to set wartime price controls allowed him to sweeten deals for regulated businesses that were otherwise resistant to wage increases for labor. But when labor negotiations broke down, FDR had another arrow in his quiver—the authority to seize domestic industries as part of the war effort. In each federal mediation that failed to reach consensus—and without any formal authority beyond his settlement with

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REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 4-5 (2004). The rise of uncompensated injuries and accidental deaths in the nation’s coal fields provided a natural platform for Roosevelt to develop a compensatory solution to the dangerous work environments of the new century.

<sup>92</sup> See ROOSEVELT, *supra* note 14, at 389.

<sup>93</sup> See *id.* at 514.

<sup>94</sup> See, e.g., JEAN M. YARBROUGH, THEODORE ROOSEVELT AND THE AMERICAN POLITICAL TRADITION 178-87 (2012) (analyzing President Roosevelt’s conception of stewardship in foreign affairs); Skowronek, *supra* note 19, at 2084-87 (analyzing President Roosevelt’s theory of and approach to governance).

<sup>95</sup> See BLACKMAN, *supra* note 38, at 7-10, app. A (gathering a comprehensive collection of all presidential actions in American labor negotiations through 1968).

<sup>96</sup> See BUREAU OF INDUS. RESEARCH, HOW THE GOVERNMENT HANDLED ITS LABOR PROBLEMS DURING THE WAR 19-20 (1919) (describing President Wilson’s seizure of Smith & Wesson, Western Union, and other companies during World War I, realizing his view of “industrial equity”).

<sup>97</sup> In the days after Pearl Harbor, FDR called business and labor leaders to the White House to develop a process for resolving disputes in manufacturing and commercial enterprises related to the war effort. See Exec. Order No. 9017, 3 C.F.R. 1075 (1938-1943) (describing a presidential agreement between labor and industry “that for the duration of the war there shall be no strikes or lockouts, and that all labor disputes shall be settled by . . . the peaceful adjustment of such disputes”).

labor and business—FDR went on to seize industries and set new compensation rates for workers in shipyards<sup>98</sup> and other<sup>99</sup> manufacturing plants.<sup>100</sup> President Truman, after failing to settle the dispute between Bethlehem Steel and its unions, would cite FDR's seizures as precedent for his own seizure of the steel mills in the buildup to the Korean War.<sup>101</sup> Although the Supreme Court rejected President Truman's efforts in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>102</sup> in the end, the long dispute was settled only by another presidential settlement, accompanied by governmental price controls and inducements that fell just short of what President Truman originally desired.<sup>103</sup> President Truman's efforts represented the natural extension of both Teddy Roosevelt's and FDR's views of presidential power established through massive labor settlements.<sup>104</sup>

Even as Congress passed laws regulating how and when presidents could intervene in labor disputes,<sup>105</sup> courts routinely granted presidential injunctions to "cool off" heated labor disputes, deferring to the President's decision that the strike threatened the nation's "health or safety."<sup>106</sup> Just as importantly, presidents themselves continued to evade those same laws to personally intervene in labor disputes. President George H.W. Bush, for example, sent Elizabeth Dole to help settle a bitter 1989 strike by the United Mine Workers against Pittston Coal Company.<sup>107</sup> Similarly, several months into the 1994–1995 baseball players' strike, President Clinton

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<sup>98</sup> See, e.g., Exec. Order No. 9400, 3 C.F.R. 59 (1943) (seizing Los Angeles Shipbuilding and Drydock Corporation).

<sup>99</sup> See, e.g., Exec. Order No. 9416, 3 C.F.R. 47 (1944) (seizing York Safe & Lock Company), *relinquished* by Exec. Order No. 9527, 3 C.F.R. 55, 55-56 (1945); Exec. Order No. 9225, 3 C.F.R. 1195 (1938–1943) (seizing S.A. Woods Machine Company).

<sup>100</sup> Congress ultimately codified FDR's executive power in labor disputes in the War Labor Dispute Act, a law that would lapse in 1947. See War Labor Disputes Act, ch. 144, 57 Stat. 163 (1943), *expiration recognized* by 50 U.S.C. app. § 1510 (2012).

<sup>101</sup> 343 U.S. 579, 612-13 (1952) (Frankfurter, J., concurring) (recognizing President Truman's argument that FDR ordered twelve seizures prior to the enactment of the War Labor Disputes Act, of which only three were sanctioned by existing law).

<sup>102</sup> See *id.* at 589.

<sup>103</sup> MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER 257 (1977) (describing final agreement after the *Youngstown* decision).

<sup>104</sup> See *id.* at 259 ("Throughout his career in the federal government, Truman had witnessed the steady expansion of presidential power, a trend he wholly approved.").

<sup>105</sup> See *infra* Part IV.

<sup>106</sup> Jared S. Gross, *Yet Another Reappraisal of the Taft–Hartley Act Emergency Injunctions*, 7 U. PA. J. LAB. & EMP. L. 305, 310-11, 338 (2005) (observing that presidents almost always successfully obtain injunctions).

<sup>107</sup> See Bob Baker, *Pittston Coal Miners Ratify New Contract*, L.A. TIMES, Feb. 21, 1990, at A4.

dispatched his Secretary of Labor, Robert Reich, to mediate.<sup>108</sup> President Clinton would personally intervene to resolve disputes in shipping, airlines, and baseball.<sup>109</sup>

But as executive power expanded over the negotiation and distribution of compensation in large labor disputes, commissioners also struggled to create consistent standards for distributing awards. President Teddy Roosevelt's Anthracite Coal Commission, for example, struggled with difficult distribution questions. Although the Commission sought to compensate different categories of laborers in the mining industry for wrongful death, back pay, and future workplace accidents, few standards existed to guide the Commission in assessing fair compensation to different employees.<sup>110</sup> After comparing pay rates with other forms of employment, the Commission increased pay by ten percent across the board, largely to compensate employees for future risk of injury.<sup>111</sup> But the Commission did not account for the different hazards facing different categories of laborers in the mines; miners, firemen, engineers, and pump-men each faced unique risks. Questions about the appropriate level of back pay or other forms of retrospective compensation would continue to complicate labor settlements brokered by FDR and President Truman.<sup>112</sup>

Different interest groups also struggled to obtain adequate representation in presidential labor settlements. In President Teddy Roosevelt's settlement of the Anthracite Coal Strike, operators originally refused to accept a labor representative on the Commission, an obvious sticking point for miners.<sup>113</sup> Instead, operators limited the makeup of the commission to five men—a military engineer, a mining engineer, a Pennsylvania judge, an expert in the coal business, and an “eminent sociologist.”<sup>114</sup> President Roosevelt resolved the dispute by appointing

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<sup>108</sup> See Larry Whiteside, *Clinton Asks Arbitration on Baseball*, BOS. GLOBE, Feb. 8, 1995, at 1.

<sup>109</sup> See, e.g., Steven Greenhouse, *Clinton Pressing 2 Sides to Settle the U.P.S. Strike*, N.Y. TIMES, Aug. 18, 1997, at A1 (highlighting President Clinton's pleas for resolution of the UPS strike); David Hosansky, *President Swings and Misses at Baseball Strike*, 53 CONG. Q. 447, 447 (1995) (noting that President Clinton personally tried to mediate a settlement in February 1995 to end the baseball strike); Bruce Ingersoll & Bridget O'Brian, *Captain Speaking: Clinton's Intervention Halts the Costly Strike at American Airlines*, WALL ST. J., Nov. 23, 1993, at A1 (reporting that presidential intervention led to successful arbitration between American Airlines and striking flight attendants).

<sup>110</sup> Cf. ANTHRACITE COAL STRIKE REPORT, *supra* note 13, at 84-88 (calling for more formal processes).

<sup>111</sup> See *id.* at 80-83.

<sup>112</sup> See BLACKMAN, *supra* note 38, at 83-84, 193-96.

<sup>113</sup> DORIS KEARNS GOODWIN, *THE BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM* 318 (2013).

<sup>114</sup> *Id.* at 317-18.

labor's representative man as the "eminent sociologist."<sup>115</sup> Even as Congress attempted to regulate the structure of labor settlements—requiring independent boards of inquiry and federal mediation—critics complained that their members failed to adequately understand, represent, and resolve the complex compensation interests that arise in labor disputes.<sup>116</sup>

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Presidential settlements involving mass compensation are not limited to international and labor agreements. More recently, presidents have taken a role in providing mass compensation by coordinating "special task forces" with federal, state, and local law enforcement.<sup>117</sup> Through this process and with ever-increasing statutory authorization from Congress, presidents have expanded their informal authority as well while working with federal, state, and local officials to improve regulatory enforcement.<sup>118</sup>

President George W. Bush, for example, created a "Corporate Fraud Task Force," which coordinated efforts among the Justice Department, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Federal Energy Regulatory Commission, and others to secure millions in victim restitution from Enron, WorldCom, and others following the Enron financial debacle in 2002.<sup>119</sup> Not to be outdone, President Obama's 2012 State of the Union Address included the announcement of three new task forces, each responsible for obtaining mass

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<sup>115</sup> Roosevelt appointed Edgar E. Clark, head of the railway conductors' union, as the "eminent sociologist," *id.* at 318, a term that Roosevelt doubted Clark "had ever previously heard," ROOSEVELT, *supra* note 14, at 508.

<sup>116</sup> See H.R. REP. NO. 80-245, at 103 (1947) ("The proposed bill would in effect have what it considers to be the most important cases in the country going before a board composed of people with no background or experience in the field of industrial relations.").

<sup>117</sup> See, e.g., Exec. Order No. 13,519, 3 C.F.R. 271 (2010) (establishing President Obama's "Financial Fraud Enforcement Task Force"); Tony West, Assistant Attorney Gen., Remarks on Mortgage and Financial Fraud (Nov. 24, 2009), *available at* <http://www.justice.gov/opa/blog/mortgage-and-financial-fraud> (describing the Task Force as a "bringing together senior-level officials from no fewer than [twenty] federal agencies and regulatory bodies, as well as our partners in state and local government").

<sup>118</sup> See Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 PRESIDENTIAL STUD. Q. 850, 860 (1999) (explaining that presidents exploit conflicting, interdependent, and sometimes ambiguous grants of statutory authority to take unilateral action); see also Andrias, *supra* note 52, at 1069 (summarizing presidential attention to agency enforcement efforts, but finding presidents' efforts "comparatively informal, episodic, and opaque").

<sup>119</sup> See CORPORATE FRAUD TASK FORCE, SECOND YEAR REPORT TO THE PRESIDENT ch. 3 (2002), *available at* [http://www.justice.gov/archive/dag/cftf/2nd\\_yr\\_fraud\\_report.pdf](http://www.justice.gov/archive/dag/cftf/2nd_yr_fraud_report.pdf) (highlighting the \$161 million recovered for victims of the Enron fraud and the more than \$300 million recovered by the CFTC).

relief for large groups of victims. They included (1) a “trade enforcement unit” charged with investigating unfair trade practices in countries such as China and obtaining relief for American businesses, (2) a special unit of federal prosecutors and state attorneys general focused on the mortgage crisis, and (3) a financial crimes unit of investigators to crack down on large-scale fraud and to protect individuals’ investments.<sup>120</sup> Since then, their members have been responsible for mass settlement awards in excess of \$40 billion.<sup>121</sup> Many of these deals have been brokered with significant assistance from White House officials—or very senior officials at the Justice Department with close ties to the White House.<sup>122</sup> Again, few guidelines exist at the White House or with federal agencies and prosecutors on structuring compensation for victims of corporate wrongdoing.<sup>123</sup>

But regardless of whether presidential compensation schemes arose out of international disputes, national labor crises, or the President’s contested position as a “prosecutor-in-chief,”<sup>124</sup> presidential settlements have often coincided with a push to expand presidential power. From Washington’s refusal to turn over Jay Treaty correspondence to Teddy Roosevelt’s untested claim that he could seize control of industry in times of crisis, each settlement established precedent for new, creative extensions of executive

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<sup>120</sup> Barack Obama, President, Address Before a Joint Session of Congress on the State of the Union 3, 8 (Jan. 24, 2012), available at <http://www.gpo.gov/fdsys/pkg/DCPD-201200048/pdf/DCPD-201200048.pdf>.

<sup>121</sup> The figure includes: a \$13 billion settlement to be distributed to injured investors, state pension funds, and others; a \$2 billion settlement to be distributed to victims of Bernard Madoff’s Ponzi scheme; and a \$25 billion settlement fund for distressed homeowners. See Danielle Douglas, *JPMorgan to Pay More Than \$2 Billion in Madoff Case*, WASH. POST, Jan. 8, 2014, at A12 (describing the Madoff-related settlement); Fitzpatrick, Timiraos & Perez, *supra* note 30 (discussing the housing settlement); Ben Protess & Jessica Silver-Greenberg, *In Extracting Deal from JPMorgan, U.S. Aimed for Bottom Line*, N.Y. TIMES, Nov. 20, 2013, at A1 (describing multibillion dollar settlements with nations banks).

<sup>122</sup> See, e.g., Fitzpatrick, Timiraos & Perez, *supra* note 30 (describing White House invitations and select appointments to presidential task forces); Protess & Silver-Greenberg, *supra* note 121 (describing Associate Attorney General Tony West’s hard line with JPMorgan’s Jamie Dimon).

<sup>123</sup> See Zimmerman & Jaros, *The Criminal Class Action*, *supra* note 29, at 1405 (“DOJ provides few instructions to guide prosecutors . . . who seek to create and distribute large restitution awards.”); Zimmerman, *Distributing Justice*, *supra* note 29 (“[A]gencies do not have guidelines to make comparative judgments about the value of distributing awards.”). Cf. generally Lemos, *supra* note 29 (challenging the suitability of state attorneys general for representing classes of injured persons).

<sup>124</sup> Compare Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 528 (2005) (“[T]he [P]resident is the chief prosecutor, i.e., the constitutional prosecutor of all offenses against the United States.”), with Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 16-18, 30 (1994) (arguing that, historically, prosecutors were not necessarily answerable to the President, nor were all departments structured according to the framing Congress’s preferences).

power. This extension of power may be a result of the advantages the President enjoys in times of crisis when groups experience widespread harm. Presidents, unlike Congress, can quickly resolve disputes and compel wrongdoers to provide immediate compensation and other forms of relief.<sup>125</sup>

The development of presidential authority might also reflect a dynamic that commonly occurs when the government intervenes to provide relief following significant social upheaval. The growth of executive influence over mass dispute resolution parallels the concerns sometimes leveled against judges in complex litigation.<sup>126</sup> As courts first confronted large cases, involving thousands of citizens with common claims and presenting significant political questions, they began to rely on new docket-management techniques, appoint special settlement masters, and devise new substantive legal doctrines to secure “fair and speedy” solutions for parties that otherwise might never receive a day in court.<sup>127</sup> The fear raised by some commentators was a similar separation-of-powers concern: that judges had begun to overstep their adjudicative function—in effect, creating and managing their own administrative agencies, like a legislative and executive branch unto itself.<sup>128</sup> Perhaps, as some have argued, there is something about the nature of any large-scale relief effort that—when undertaken by

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<sup>125</sup> Cf. Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1630-31 (2009) (describing expansive delegations of power by Congress to executive agencies); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1139-40 (2009) (describing the extraordinary deference given to executive action). *But see* Pildes, *supra* note 19, at 1385-87 (arguing that presidential power is constrained).

<sup>126</sup> See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1421 (1995) (listing the problems facing courts in aligning settlement incentives in mass tort actions); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 30 (2003) (noting controversy when judges do not “structure new responsibilities so as to remain within the confines of their traditional role”). See generally Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Misplaced*, 88 NW. U. L. REV. 579, 580-85 (1994) (offering a sharp critique of non-traditional approaches to dispute resolution by judges).

<sup>127</sup> Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 476-77 (1994) (noting that “mass tort litigations often have an underlying . . . purpose which goes beyond mere transfers of wealth—the health and sense of security of many individuals and the viability of major economic institutions”); see also Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976) (outlining the distinct features of public-law litigation); Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 45 (1979) (“Th[e] transformation in the character of litigation necessarily transforms the judge’s role as well.”).

<sup>128</sup> See Nagareda, *supra* note 24, at 939, 944-52; see also George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 568 (1997) (arguing that a global asbestos settlement “more closely resembles a legislative compensation plan than a judgment in a tort case”).

courts, legislatures, or the President—strains the delicate balance of power between the branches to its limit.<sup>129</sup>

But beyond the forces that may test the boundaries of executive power during a crisis is the compelling narrative of mass compensation—making injured victims whole with the funds of the wrongdoers. This narrative of “corrective justice” found expression in early American tort law<sup>130</sup> and other legislative compensation schemes.<sup>131</sup> Tapping into what courts have recognized as the “moral obligation” that the executive owes to private citizens who otherwise lack recourse against their wrongdoers,<sup>132</sup> perhaps, has helped presidents expand their power over such settlements as well.

But whatever the connection between mass compensation and executive power, ensuing battles over the scope of that authority have diverted attention from the procedures needed to serve aggrieved groups that depend on large settlements for relief. As demonstrated below, this phenomenon continues to plague modern presidential settlements, like those involving victims of the Iranian Revolution, the Holocaust, and the Lockerbie bombing, and brokered under the Carter, Clinton, and George W. Bush administrations, respectively.

### C. Modern Presidential Settlements

The Algiers Accords, the Holocaust settlements, and the Pan Am 103 settlement represent modern, high profile efforts by the executive branch to design settlement funds to compensate victims of mass harm caused by acts of nationalization, genocide, and terrorism, respectively. Like their historical counterparts, in each case, the executive branch struggled with

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<sup>129</sup> Cf. Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. 699, 722-35 (2006) (exploring the impacts of various mass problem solving efforts on separation of powers and federalism); Hari M. Osofsky, *Multidimensional Governance and the BP Deepwater Horizon Oil Spill*, 63 FLA. L. REV. 1077, 1106 (2011) (highlighting debates over the relative strengths and weaknesses of federalism in the environmental context); Weinstein, *supra* note 127, at 483 (“What renders a mass tort case different is the degree to which all participants—judges, lawyers, and litigants—must deal with the case as an institutional problem with sociopolitical implications extending far beyond the narrow confines of the courtroom.”).

<sup>130</sup> See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 541-49 (2005) (tracing the philosophical roots of American of tort law as a tool to seek public redress for private harm).

<sup>131</sup> See Michele L. Landis, “*Let Me Next Time Be ‘Tried By Fire’*”: *Disaster Relief and the Origins of the American Welfare State 1789–1874*, 92 NW. U. L. REV. 967, 981-89 (1998) (finding that early Congress’s decisions to create compensation funds turned on sudden, catastrophic, inexplicable harm occurring to very discrete classes of thought-to-be-deserving victims).

<sup>132</sup> The Supreme Court has, for example, recognized a “moral obligation” on the part of the President to “bestow the fund received upon the individuals who had suffered losses at the hands” of Confederate forces. *Williams v. Heard*, 140 U.S. 529, 538 (1891).

classic questions of representative litigation: affording the proper balance of participation in a settlement likely also to impact the public interest, managing potential conflicts between parties with different claims to restitution, and distributing compensation fairly and efficiently.

But in each case the chief executive also experienced a conflict between the victims and the office of the presidency itself. In a crisis calling for fast action, President Carter pushed the Office of Legal Counsel (OLC) to determine whether he could negotiate a final settlement unilaterally extinguishing private claims, as Iran demanded, without congressional involvement.<sup>133</sup> President Clinton intervened to complete “unfinished business” of World War II, while unilaterally expanding presidential power to resolve private claims against private banks and insurers.<sup>134</sup> Finally, in defining his own distinct approach to foreign policy, President George W. Bush could point to his historic monetary settlement with Libya.<sup>135</sup>

Such conflicts between the branches are hardly surprising. As presidents have sought to pursue their agendas, they have pushed to expand their power at the expense of the coordinate branches of government. But as presidents have assumed greater roles in mass compensation, their political interests and obligations to the executive office stand in tension with other difficult procedural issues raised by mass compensation: How, if at all, should private parties participate in White House settlements to value them appropriately and efficiently? Who can legitimately manage conflicts between different interest groups in the final settlement? How do officials in the executive branch establish a principled method to distribute private claims?

### 1. The Algiers Accords

The Algiers Accords, originally brokered by President Jimmy Carter and then implemented by President Ronald Reagan, represents one of the most ambitious and complex settlement facilities ever created.<sup>136</sup> The

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<sup>133</sup> See *infra* subsection I.C.1.

<sup>134</sup> See *infra* subsection I.C.2; see also, e.g., Wuerth, *supra* note 60, at 14 (arguing that “[t]he deference of the courts . . . permits the Executive to achieve what it otherwise lacks the constitutional authority to do”).

<sup>135</sup> See *infra* subsection I.C.3.

<sup>136</sup> See Richard B. Lillich, *Preface* to THE IRAN-UNITED STATES CLAIMS TRIBUNAL 1981-1983, at vii (Richard B. Lillich ed., 1984) (describing the Iran-United States Claims Tribunal as “the most significant arbitral body in history”); David P. Stewart & Laura B. Sherman, *Developments at the Iran-United States Claims Tribunal: 1981-1983*, 24 VA. J. INT’L L. 1, 6 (1983) (describing the tribunal as “a unique institution, representing one of the most ambitious and complex international claims adjudication programs ever undertaken”).

tribunal, which continues to resolve claims to this day, has processed over 3900 claims.<sup>137</sup> But the claim resolution process—negotiated in the shadow of an ongoing international hostage crisis—struggles to provide adequate representation, resolve potential conflicts of interest, and identify satisfactory guidelines to distribute awards.

Shortly after Tehrani students scaled the walls of the American Embassy in November 1979 and took hostage more than sixty United States citizens,<sup>138</sup> President Carter declared a national emergency, freezing all Iranian assets within the jurisdiction of the federal courts.<sup>139</sup> The “Algiers Accords”—so named after the final settlement reached in the Republic of Algeria—sought to protect the respective interests of the hostages’ families, Iranian assets, and U.S. business concerns.<sup>140</sup> The final agreement, brokered by executive officials in the Carter administration, released American hostages, lifted the freeze on Iranian assets worth almost \$12 billion, and channeled all private litigation arising out of the crisis into an independent commission, the Iran–United States Claims Tribunal.<sup>141</sup>

The tribunal looked and operated much like a class action settlement fund. Independent arbitral panels, overseeing a centralized escrow account financed by Iranian assets, decided how to distribute awards to thousands of victims.<sup>142</sup> More than \$3 billion of the frozen Iranian assets went to retire large bank syndicated loans.<sup>143</sup> Negotiators set aside an additional lump sum of \$1.4 billion for non-syndicated banks and another \$1 billion for other kinds of commercial enterprises.<sup>144</sup> Afterwards, the Reagan administration collectively resolved over two thousand “small claims” on behalf of U.S. nationals pending before the tribunal for a fixed sum of \$50 million.<sup>145</sup>

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<sup>137</sup> IRAN–U.S. CLAIMS TRIBUNAL, <http://www.iusct.net/> (last visited Mar. 20, 2015), archived at <http://perma.cc/6B3E-5AEN>.

<sup>138</sup> See Warren Christopher & Richard M. Mosk, *The Iranian Hostage Crisis and the Iran–U.S. Claims Tribunal: Implications for International Dispute Resolution and Diplomacy*, 7 PEPP. DISP. RESOL. L.J. 165, 167 (2007).

<sup>139</sup> Exec. Order No. 12,170, 3 C.F.R. § 457 (1979).

<sup>140</sup> See Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, 20 I.L.M. 224; see also David P. Stewart & Laura B. Sherman, *Developments at the Iran–United States Claims Tribunal: 1981–1983*, in THE IRAN–UNITED STATES CLAIMS TRIBUNAL 1981–1983, *supra* note 136, at 1, 2.

<sup>141</sup> On February 24, 1981, President Reagan issued an Executive Order in which he “ratified” President Carter’s original orders. See Exec. Order No. 12,294, 3 C.F.R. § 139 (1982).

<sup>142</sup> See Stewart & Sherman, *supra* note 140, at 5–9.

<sup>143</sup> Lawrence W. Newman, *A Personal History of Claims Arising Out of the Iranian Revolution*, 27 N.Y.U. J. INT’L L. & POL. 631, 635 (1995).

<sup>144</sup> *Id.*

<sup>145</sup> See *Abraham-Youri v. United States*, 36 Fed. Cl. 482, 485 (1996) (observing that the remaining \$50 million of the total \$105 million payment by Iran did not specifically provide for allocation of the small claims).

The claim resolution process, however, struggled to offer adequate representation, resolve potential conflicts of interest, and identify satisfactory guidelines to distribute awards. Lawyers who formed the United States Iranian Claimants Committee (USICC) to represent American claimants against Iran observed that the United States undermined the claim resolution process by failing to collect input from claimants during settlement discussions.<sup>146</sup> For example, when the USICC pressed the State Department for more arbitrators after the final settlement (the tentative plan provided for only three panels of arbitrators to adjudicate more than 2800 cases), the request surprised the Reagan administration, and the administration did not have additional U.S. arbitrators vetted for the tribunal.<sup>147</sup> In the process, the United States lost a unique opportunity to provide necessary staffing and resources for the tribunal.<sup>148</sup> The tribunal also suffered when government officials in settlement discussions failed to obtain information about the size and number of claims pending against Iran. Although President Carter originally secured \$1 billion from Iran to settle foreign claims, at the time, the USICC estimated that a single business claim would easily exhaust that money.<sup>149</sup>

In addition to representation problems, the Carter and Reagan administrations struggled to overcome conflicts among disparate victim groups with different legal entitlements and rights. For instance, conflicts existed between banks that held Iranian assets and other kinds of commercial enterprises.<sup>150</sup> Under New York law, which governed many transactions involving New York banks that held Iranian assets, banks claimed the right “to set off” debts against virtually all Iranian businesses.<sup>151</sup> The banks’ legal positions threatened the non-bank claimants, who lacked the same ability to “set off” their own Iranian accounts. Conflicts also

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<sup>146</sup> Cf. Newman, *supra* note 143, at 639.

<sup>147</sup> See *id.* (describing concerns by chairman of USICC that “decades would pass before the three chambers would be able to dispose of all of these cases”).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 639-40. To be clear, I do not argue that the \$1 billion allotment was wrong—especially given the many other delicate and complex trade-offs President Carter and the State Department had to consider during the hostage crisis. My more modest claim is that there may be other ways to gather information efficiently in large compensation agreements to avoid inadvertently undercompensating victims, without sacrificing other important diplomatic goals. See *infra* Section III.B.

<sup>150</sup> See Warren Christopher, *Introduction* to AMERICAN HOSTAGES IN IRAN: THE CONDUCT OF A CRISIS 15 (Paul H. Kriesberg ed., 1985) (describing the chief negotiator’s observations in concluding that “[t]he aspect of the financial settlement that has received the most comment is the notion that the banks were treated better than other potential claimants”).

<sup>151</sup> Cf. N.Y. DEBT. & CRED. LAW § 151(f) (McKinney 2012).

existed between large and small business ventures, as smaller businesses ultimately had to rely on government lawyers to represent them as a single undifferentiated group of claimants, while larger enterprises were permitted to retain their own counsel.<sup>152</sup> In addition, businesses that held orders to attach Iranian assets in the United States lacked the leverage of other businesses that attached Iranian assets in foreign jurisdictions.

Finally, limited guidance existed for distributing awards among different business interests. As in private litigation, larger business plaintiffs benefited from their size, which enabled them to wait out the lengthy arbitration process in hopes of a favorable award or settlement outcome. Small claimants, by contrast, lacked resources to adopt such a strategy, and instead, relied entirely on the State Department to represent them; after nine years, over 2200 small-value claims, those estimated at \$250,000 or less, remained unresolved.<sup>153</sup> After the Reagan administration renegotiated all of those small claims in a single lump-sum settlement with Iran, no process existed to hear formally from different business groups with conflicting interests in the award.<sup>154</sup> The treatment of small claims spurred a decade-long litigation between small claimants and the U.S. government.<sup>155</sup> Although the administration may have been justified in, among other things, dividing portions of those payments without regard to the size, merit, or needs of each individual business, no guidelines existed for that decision.

But the White House also experienced a conflict between the victims and the presidency itself. As President Carter closed in on a deal that would free the American hostages during a difficult reelection campaign, his lead diplomats struggled to reach a solution with Iran that would compensate American business interests lost to the Revolution, lift the freeze on Iranian assets, and end litigation in the federal courts.<sup>156</sup> Unable to wait for Congress to act during the hostage crisis, President Carter asked OLC to determine whether he could negotiate a final settlement unilaterally extinguishing private claims, as Iran demanded, without congressional

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<sup>152</sup> See *Abraham-Youri v. United States*, 36 Fed. Cl. 482, 483-84 (1996).

<sup>153</sup> *Id.* at 484.

<sup>154</sup> *Cf. id.* at 484-85.

<sup>155</sup> See *Abraham-Youri v. United States*, 139 F.3d 1462, 1464-65 (Fed. Cir. 1997) (describing the settlement processes and history of small claim litigation before the Iran-United States Claims Tribunal and against the United States government); see also David J. Bederman & John W. Borchert, *Abraham-Youri v. United States*, 92 AM. J. INT'L L. 533, 533 (1998) (summarizing the background of the Abraham-Youri case).

<sup>156</sup> See Christopher, *supra* note 150, at 5 (“To avoid adverse court rulings, we also had to take into account the legal limitations on the government’s power to dispose of the assets it had frozen. This reality, present from the beginning, dictated the shape of the final settlement.”)

involvement.<sup>157</sup> OLC did so, highlighting the inherent tension between courtroom litigants and the President in any international negotiation:

As the litigation progresses, as motions and defenses are allowed or dismissed, as evidence is developed and heard, the present uncertainty regarding rights and liabilities with respect to Iranian property subject to U.S. jurisdiction will diminish. Yet uncertainty can be valuable in international negotiation. If the President decides that uncertainty should be preserved, he may decide that the litigation should come to a halt.<sup>158</sup>

Nonetheless, the *Youngstown* decision, which expressly limited President Truman's power to seize property unilaterally during the Korean War, seemed to limit President Carter's options. Justice Jackson's famous formulation in *Youngstown* classified executive action into three categories—instances when Congress endorsed presidential action, remained silent, or prohibited presidential action.<sup>159</sup> Despite the rise of presidential settlements, Congress had never expressly given the President unilateral authority to extinguish pending claims or attachments to settle a foreign dispute.<sup>160</sup> American businesses sued for declaratory relief, arguing that the President could not unilaterally terminate their interests in litigation against Iran without an express law passed by Congress.<sup>161</sup>

The resulting litigation in *Dames & Moore v. Regan*<sup>162</sup> would ultimately extend the controversial proposition that the President, as the “sole organ” in foreign affairs, could enter executive agreements that settled pending litigation without congressional approval.<sup>163</sup> In *Dames & Moore*, the

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<sup>157</sup> See Presidential Power to Regulate Domestic Litigation Involving Iranian Assets, 4A Op. O.L.C. 236, 236, 239-40 (1980).

<sup>158</sup> *Id.* at 239.

<sup>159</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring); see also *Medellín v. Texas*, 552 U.S. 491, 524 (2008) (referring to “Justice Jackson’s familiar tripartite scheme” as “the accepted framework” for evaluating executive power).

<sup>160</sup> See Presidential Power to Regulate Domestic Litigation Involving Iranian Assets, *supra* note 157, at 239 (concluding that although “slender” statutory authority, the International Emergency Economic Powers Act existed for the President’s position and noting that “[OLC] can think of no [other] instance in which Congress has delegated to the President or any other executive officer authority to make discretionary judgments that can affect the jurisdiction of the courts or the rights of litigants in precisely this way”).

<sup>161</sup> See *Dames & Moore v. Regan*, 453 U.S. 654, 662-68 (1981) (providing the procedural history); Complaint, *Dames & Moore v. Atomic Energy Org. of Iran*, No. 79-4918 (C.D. Cal. Dec. 17, 1979) (serving as an example of litigation against Iranian interests), reprinted in Brief for Petitioner at A-25, *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

<sup>162</sup> 453 U.S. 654 (1981).

<sup>163</sup> The “sole organ” language originated in a speech by John Marshall on the floor of the House of Representatives. See 10 ANNALS OF CONG. 613 (1800) (stating that the President is the “sole organ of the nation in its external relations”). Although the phrase eventually made its way

Supreme Court recharacterized and expanded the *Youngstown* test for evaluating the scope of presidential power. Executive action, according to the Court, no longer fell in one of Justice Jackson's "three pigeonholes," but rather along an amorphous "spectrum" running from "explicit congressional authorization to explicit congressional prohibition."<sup>164</sup> The President had authority to act, even if Congress had not specifically delegated authority to the President, as long as Congress had acquiesced to the President's conduct over time.<sup>165</sup> Taking into account the historic role presidents had played in resolving international claims, and Congress's failure to stop them,<sup>166</sup> the Court found that the President could take the additional step of extinguishing pending litigation in the United States.<sup>167</sup>

## 2. The Holocaust Settlements

Revelations that banks, businesses, and insurers wrongfully appropriated Holocaust victims' assets spurred an international movement for restitution that produced two kinds of presidential settlements: those brokered with the assistance of private lawyers, inside the courts, and those crafted without private counsel, outside the courts. Afterwards, however, many observers claimed that settlements reached without the aid of private counsel were worse than those produced by the "aggressive" and "adversarial" positions taken in court—creating unwieldy settlements that struggled to compensate victims effectively and suffered from conflicts of interest.<sup>168</sup>

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into *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936), nothing in Marshall's speech suggests any power to disregard statutory directives. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 952 (2008) ("Presidents did not act or speak as if they possessed the constitutional authority to disregard attempts by Congress to impose restrictions on their powers over the military, in war or peace.").

<sup>164</sup> *Dames & Moore*, 453 U.S. at 669. To be sure, the Court in *Dames & Moore* claimed that its holding was "narrow," but its express reliance on the history of congressional acquiescence over presidential claim settlements set a precedent for more sweeping executive power over future settlements brokered by Presidents. See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 428 (2003) (finding that mere "executive conduct" in a settlement agreement reached with German banks and insurers preempted a state law); see also Denning & Ramsey, *supra* note 39, at 829 ("Giving mere executive *policy* preemptive effect, as the Court did in *Garamendi*, bypasses these constitutional processes and concentrates power in the executive branch.").

<sup>165</sup> See Harold Hongju Koh, *Remarks: Twenty-First-Century International Lawmaking*, 101 GEO. L.J. 725, 733 (2013) (referring to *Dames & Moore* as a form of "quasi-constitutional custom").

<sup>166</sup> *Dames & Moore*, 453 U.S. at 680-81.

<sup>167</sup> *Id.* at 684.

<sup>168</sup> See *infra* notes 182-88 and accompanying text.

After investigative news reports disclosed that UBS and Credit Suisse confiscated Jewish bank accounts, a revelation that sparked a global movement for mass restitution, private lawyers and, ultimately, the Clinton administration pushed for restitution from private German, Swiss, and Italian companies.<sup>169</sup> Within a year, lawyers commenced several class actions in the Eastern District of New York.<sup>170</sup> Lawyers for the Holocaust victims—including many prominent leaders of the plaintiffs' bar—sought restitution, claiming billions on behalf of more than two million claimants and alleging novel theories of unjust enrichment and tort law.<sup>171</sup>

At the same time, President Clinton pushed to settle the litigation through diplomatic channels. President Clinton sent then–Undersecretary of State Stuart Eizenstat to mediate talks between plaintiffs and the banks.<sup>172</sup> The presence of administration officials proved important to the final settlement, because deep divisions existed among plaintiffs' attorneys and other public interest organizations about how the case should proceed.<sup>173</sup> Eizenstat found common ground among the plaintiffs and shaped an outcome that promised some measure of justice for victims, while advancing U.S. interests.<sup>174</sup>

The result produced several settlement funds inside and outside the court system. Inside the courts, Swiss banks dedicated \$1.25 billion to a settlement facility overseen by a special master, who would divide claims among several categories of victims under a distribution plan.<sup>175</sup> Eizenstat later claimed that the court-centered process to settle the Swiss bank cases, while successful, proved too cumbersome for the federal judiciary. Instead, he claimed, it should have been resolved by diplomats in the executive branch.<sup>176</sup> Nevertheless, despite the size and complexity of the settlement,

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<sup>169</sup> See generally ITAMAR LEVIN, *THE LAST DEPOSIT: SWISS BANKS AND HOLOCAUST VICTIMS' ACCOUNTS* 99-104 (Natasha Dornberg trans., 1999); MICHAEL R. MARRUS, *SOME MEASURE OF JUSTICE: THE HOLOCAUST ERA RESTITUTION CAMPAIGN OF THE 1990S*, at 12-14 (2009).

<sup>170</sup> See MARRUS, *supra* note 169, at 12.

<sup>171</sup> See *In re Holocaust Victim Assets Litig.*, 424 F.3d 158, 167 (2d Cir. 2005) (rejecting challenges to structure of settlement); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 141-43, 149, 155, 166-67 (E.D.N.Y. 2000) (describing the Swiss bank litigation and upholding the fairness of the \$1.25 billion settlement).

<sup>172</sup> See *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d at 142.

<sup>173</sup> Some favored a broad-ranging suit that extended to Swiss involvement in slave labor and draconian refugee policies. Others focused more narrowly on restitution from bank accounts. Cf. MARRUS, *supra* note 169, at 6-8, 12.

<sup>174</sup> See *id.* at 165 n.87.

<sup>175</sup> See *In re Holocaust Victim Assets Litig.*, 424 F.3d at 161 (explaining the framework).

<sup>176</sup> See STUART E. EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* 341 (2003) ("U.S. courts are not the best

the Swiss bank fund was later heralded for its ability to distribute awards effectively.<sup>177</sup>

By contrast, President Clinton's separate out-of-court effort to compensate similarly situated victims of takings by large European insurers—called “the most bitter and intense negotiation of the entire saga”<sup>178</sup>—struggled to pay out awards. Diplomats, insurance commissioners, and businesses pointedly left lawyers and victim representatives out of the settlement process.<sup>179</sup> The final resolution resulted in a fund, the International Commission on Holocaust Era Insurance Claims (ICHEIC), which promised swift distribution using tremendous economies of scale and without the conflict and uncertainty of litigation.<sup>180</sup> In the end, ICHEIC provided \$306 million to more than 48,000 Holocaust survivors and their heirs.<sup>181</sup>

Observers noted, however, that ICHEIC's failure to include attorney representatives in the process harmed the claimants purportedly served by the settlement.<sup>182</sup> Claims processors struggled to identify account holders under an opaque process; they relied on rigorous evidentiary rules that often slowed down the claims handling process to a “snail's pace.”<sup>183</sup> Victims struggled to document dormant accounts—closed for over forty years. Claimants' conflicting interests in the awards also slowed payment. Those with direct evidence of lost accounts—but far removed from the immediate victims—competed for funds with more destitute victims in need of quick payouts. ICHEIC would later admit that the commission “sacrificed time efficiencies for process effectiveness,”<sup>184</sup> a choice ordinarily made with input

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places to resolve profound historical and political questions. Procedures are too cumbersome, the rules of evidence too exacting.”); MARRUS, *supra* note 169, at 133-34.

<sup>177</sup> See, e.g., Morris A. Ratner, *The Settlement of Nazi-Era Litigation Through the Executive and Judicial Branches*, 20 BERKELEY J. INT'L L. 212, 216 (2002).

<sup>178</sup> EIZENSTAT, *supra* note 176, at 266.

<sup>179</sup> See MARRUS, *supra* note 169, at 23-25.

<sup>180</sup> See *id.*; INT'L COMMISSION ON HOLOCAUST ERA INS. CLAIMS, <http://www.icheic.org> (last visited Mar. 20, 2015), *archived at* <http://perma.cc/NLL9-NDPT>.

<sup>181</sup> See MARRUS *supra* note 169, at 24-25.

<sup>182</sup> MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS 163-66 (2003); MARRUS, *supra* note 169, at 23-24 (observing that ICHEIC's design that “left the lawyers outside th[e] process” was later “blamed for the delays and for a resolution not satisfactory to many claimants”).

<sup>183</sup> MARRUS, *supra* note 169, at 24; see also Sidney Zabłudoff, *ICHEIC: Excellent Concept but Inept Implementation*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 260, 260-63 (Michael J. Bazylar & Roger P. Alford eds., 2006) [hereinafter HOLOCAUST RESTITUTION]; *Too Late, Too Slow, Too Expensive*, ECONOMIST, Aug. 2, 2003, at 14.

<sup>184</sup> INT'L COMM'N ON HOLOCAUST ERA INS. CLAIMS, LESSONS LEARNED: A REPORT ON BEST PRACTICES 2 (2007); see also Henry Weinstein, *Holocaust Insurance Claim Deadline Gets Pushed Back*, L.A. TIMES (Jan. 27, 2002), <http://articles.latimes.com/2002/jan/27/news/mn-25037>,

from claimants' legal representatives. Years after ICHEIC opened and after accumulating more than \$40 million in expenses, ICHEIC had settled only a tiny fraction of the 79,000 claims presented to the commission.<sup>185</sup> Unlike the Swiss bank settlement, which enjoyed greater success in processing claims,<sup>186</sup> more than 60% of the 79,732 eligible claims still awaited processing and only 4492 claims—5.5%—had received payment offers nine years into the ICHEIC process.<sup>187</sup> Despite his support for ICHEIC, even Stuart Eizenstat later acknowledged its “slow and costly start.”<sup>188</sup>

As European banks, insurers, and other businesses pushed for a final resolution to the litigation pending in U.S. courts, Clinton's diplomatic corps similarly grew concerned about new legislation in Congress that would give private parties more power to pursue private litigation against foreign countries and businesses—what some called “plaintiff's diplomacy.”<sup>189</sup> But it was far from clear that case law like *Dames & Moore* permitted the President to terminate private lawsuits against defendants in the Holocaust litigation. Unlike earlier cases, which involved foreign claims against foreign states, the defendants in the Holocaust litigation operated private businesses in the United States.<sup>190</sup>

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archived at <http://perma.cc/2WPG-XWGB> (describing the commission chairman's frustration with the pace of compensating claims).

<sup>185</sup> Charles E. Boyle, *Holocaust Insurance Claims Panel Faces Recriminations over Delays*, INS. J. (Feb. 11, 2002), <http://www.insurancejournal.com/magazines/features/2002/02/11/21936.htm>, archived at <http://perma.cc/SV3W-7FBS>.

<sup>186</sup> Burt Neuborne, *A Tale of Two Cities: Administering the Holocaust Settlements in Brooklyn and Berlin*, in HOLOCAUST RESTITUTION, *supra* note 183, at 60, 69-72; see also H.R. 1905, 108th Cong. § 2 (2003) (observing ICHEIC's low success rate and highlighting the need to expedite insurance payments so that “victims of the most heinous crime of the 20th Century . . . do not become victims a second time”).

<sup>187</sup> Lawrence Kill & Linda Gerstel, *Holocaust-Era Insurance Claims: Legislative, Judicial and Executive Remedies*, in HOLOCAUST RESTITUTION, *supra* note 183, at 242; see also Steven Less, *International Administration of Holocaust Compensation: The International Commission on Holocaust Era Insurance Claims (ICHEIC)*, 9 GERMAN L.J. 1651, 1657-58 (2008) (describing the “overwhelmingly negative and often demeaning response” that surviving policyholders and beneficiaries received when trying to redeem their insurance claims).

<sup>188</sup> Stuart E. Eizenstat, *The Unfinished Business of the Unfinished Business of World War II*, in HOLOCAUST RESTITUTION, *supra* note 183, at 297, 300.

<sup>189</sup> See, e.g., Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFF., Sept.–Oct. 2000, at 102, 103; see also Debra M. Strauss, *Reaching Out to the International Community: Civil Lawsuits as the Common Ground in the Battle Against Terrorism*, 19 DUKE J. COMP. & INT'L L. 307, 322 (2009) (observing that because presidents regard frozen assets as a powerful bargaining chip to induce behavior desirable to the United States, “allowing private plaintiffs to file civil lawsuits and tap into the frozen assets located in the United States may weaken the executive branch's negotiating position with other countries”).

<sup>190</sup> Wuerth, *supra* note 60, at 40 n.260 (arguing that, unlike *Dames & Moore*, which “upheld the claims settlement agreement in part because of congressional acquiescence in executive branch practice, . . . [t]here is no similar context for the resolution of claims against private parties”).

To terminate the U.S. litigation, the White House promised European defendants that the government would make appearances in U.S. courts to argue that the cases should be dismissed as “political questions” that interfered with executive power.<sup>191</sup> Even though the President, like in *Dames & Moore*, never received express authority from Congress to extinguish any claims, the Supreme Court ultimately held that state lawsuits against foreign defendants were preempted because they violated important “executive policies.”<sup>192</sup> Following the strategy’s success in the courts, one State Department official highlighted the unprecedented agreement as a model for resolving “private litigation in U.S. courts,” where the President wishes to remove “an irritant from relations with an important ally.”<sup>193</sup>

### 3. The Lockerbie Settlement

The Lockerbie settlement, like the Algiers Accords and the Holocaust settlements, raised difficult questions about conflicts of interest, appropriate representation, and distribution of awards in a presidential settlement. The Lockerbie settlement, however, proved that too much participation may raise as many problems for presidential settlements as too little. Family members received unprecedented access to bargain with a foreign nation for mass compensation, based in part on new legislation that expressly granted parties the right to sue foreign nations for supporting terrorism.<sup>194</sup> The deal’s terms, which hinged on the recognition of a foreign power, also impacted diplomatic functions traditionally thought to reside within the exclusive domain of the executive.

Pan Am 103 broke apart over Lockerbie, Scotland, after a bomb exploded in its forward cargo hold, killing all 259 people aboard and eleven

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<sup>191</sup> See Ronald J. Bettauer, *Keynote Address: The Role of the United States Government in Recent Holocaust Claims Resolution*, 20 BERKELEY J. INT’L L. 1, 7-8 (2002); see also *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 483-89 (D.N.J. 1999) (discussing the role of the political question doctrine); *Burger-Fischer v. DeGussa AG*, 65 F. Supp. 2d 248, 281-85 (D.N.J. 1999) (same).

<sup>192</sup> See, e.g., *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 428 (2003) (finding that “executive conduct” in a settlement agreement reached with German banks and insurers preempted state law); see also *Denning & Ramsey*, *supra* note 39, at 829 (“Giving mere executive policy preemptive effect, as the Court did in *Garamendi*, bypasses these constitutional processes and concentrates power in the executive branch.”).

<sup>193</sup> Bettauer, *supra* note 191, at 10.

<sup>194</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241-43 (codified as amended at 28 U.S.C. § 1605A (2012)) (lifting the immunity of foreign states for state-sponsored acts of terrorism); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 12-14 (D.D.C. 1998) (describing the history of the Flatow Amendment, which retroactively permitted punitive damage awards in lawsuits against state sponsors of terrorism).

people on the ground.<sup>195</sup> Libya ultimately claimed responsibility for the attack as a response to the 1986 U.S. airstrikes against terrorism-linked targets in Tripoli.

Efforts to obtain compensation through U.S. courts, Congress, and the United Nations all foundered. Victims could not successfully sue Libya for its involvement because, at the time, the Foreign Sovereign Immunities Act barred claims against foreign nations for human rights violations or acts of terrorism.<sup>196</sup> In response, Congress passed Civil Liability for Acts of State-Sponsored Terrorism (known as the “Flatow Amendment”) to permit families to sue foreign nations that provided material support to terrorism.<sup>197</sup> But even plaintiffs who brought suits under this new “terrorist exception” to foreign sovereign immunity were often unable to collect the money awarded to them without help from diplomats in the executive branch.<sup>198</sup>

At the same time, families sought justice through the executive branch, pushing successive administrations to bring the Libyan agents charged with the terrorist attack to justice.<sup>199</sup> Even as victims groups, the United States, and the United Kingdom pushed to hold the agents criminally accountable for the bombing,<sup>200</sup> the problem of compensation complicated diplomatic

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<sup>195</sup> For a sample of the extensive literature about the Pan Am 103 bombing, *see generally, e.g.*, SUSAN & DANIEL COHEN, PAN AM 103: THE BOMBING, THE BETRAYALS, AND A BEREAVED FAMILY’S SEARCH FOR JUSTICE (2000) (offering the firsthand perspective of two parents who lost their daughter on Pan Am 103); MATTHEW COX & TOM FOSTER, THEIR DARKEST DAY: THE TRAGEDY OF PAN AM 103 AND ITS LEGACY OF HOPE (1992) (reflecting investigative journalism); ALLAN GERSON & JERRY ADLER, THE PRICE OF TERROR (2001) (providing an account of the victims’ families’ quest for justice).

<sup>196</sup> *See* Argentine Republic v. Amerasia Shipping Corp., 488 U.S. 428, 439 (1989); Smith v. Socialist People’s Libyan Arab Jamahiriya, 886 F. Supp. 306, 315 (E.D.N.Y. 1995), *aff’d*, 101 F.3d 239 (2d Cir. 1996); William P. Hoye, *Fighting Fire with . . . Mire? Civil Remedies and the New War on State-Sponsored Terrorism*, 12 DUKE J. COMP. & INT’L L. 105, 116 (2002).

<sup>197</sup> *See* JENNIFER K. ELSEA, CONG. RESEARCH SERV., RL31258, SUITS AGAINST TERRORIST STATES BY VICTIMS OF TERRORISM 7 (2008).

<sup>198</sup> *Cf. id.* at 8-9.

<sup>199</sup> Bruce W. Jentleson & Christopher A. Whytock, *Who “Won” Libya?*, INT’L SECURITY, Winter 2005–2006, at 47, 65.

<sup>200</sup> The United States and the United Kingdom issued parallel indictments against the two Libyan suspects and pressed for their transfer for trial before a U.S. or U.K. court. At the same time, the two countries announced a series of further demands: that Libya accept responsibility for the crime, pay appropriate compensation, and cooperate in the criminal investigation. *See* Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland, Letter dated Dec. 20, 1991 from the Permanent Rep. of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General, U.N. Doc. A/46/826, Annex I & 3 (Dec. 31, 1991); Permanent Rep. of the United States of America, Letter dated Dec. 20, 1991 from the Permanent Rep. of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc. A/46/827, Annex (Dec. 31, 1991).

negotiations with Libya, presenting new conflicts of interest, creating obstacles to fair representation, and frustrating the appropriate division of awards.

First, negotiations with Libya raised conflicts of interest between parties entitled to compensation. Pan Am's liability insurer (which had paid the families nearly \$500 million),<sup>201</sup> the aircraft's hull insurer, and Pan Am's trustee in bankruptcy, for example, all pursued claims against Libya.<sup>202</sup> The United States and British governments also expended enormous resources in the investigation and trial of the bombers. No one knew what proportion of the families might support any settlement terms worked out privately or publicly with Libya.

Second, officials in the Clinton and Bush administrations struggled to determine how to involve victims in negotiations over compensation. Some State Department officials originally speculated about a proper compensation figure without the Pan Am 103 families.<sup>203</sup> When the victims' families objected, the United States and the United Kingdom faced the key policy question of how much private parties should control the outcome of a matter of international importance.<sup>204</sup> In deference to the wishes of the families, the two countries ultimately agreed that the families' legal representatives could try to reach a settlement directly with Libya, without excluding the possibility that the governments might need to reenter the picture.<sup>205</sup> The two countries' governments were not informed about the negotiations, except to the extent that the parties chose to inform them.<sup>206</sup>

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<sup>201</sup> *Hartford Fire Ins. Co. v. Socialist People's Libyan Arab Jamahiriya*, No. 98-3096, 1999 WL 33589331, at \*2 (D.D.C. Sept. 23, 1999).

<sup>202</sup> The claims of the hull insurer and the trustee in bankruptcy were brought in a single action by Equitas, a subsidiary of Lloyd's of London, in the Scottish Court of Session in 2003. See Norman Silvester, *Lockerbie Bomber and Libya Sued by Insurers for Bust US Airline Pan Am*, SUNDAY MAIL (Glasgow, Scot.), Nov. 30, 2003, at 2.

<sup>203</sup> See *U.S. Policy Toward Libya: Hearing Before the Subcomm. on Near E. and S. Asian Affairs of the S. Comm. on Foreign Relations*, 106th Cong. 5, 18-19 (2000) (statement of Ronald E. Neumann, Deputy Assistant Secretary of State for Near Eastern Affairs, U.S. Department of State) (observing that members of the Clinton administration speculated about an amount that would "constitute adequate compensation to the families of victims of the Pan Am 103 bombing," until families asked the administration officials to respect their private push for compensation in a separate court action); see also George Joffe, *Libya: Who Blinked, and Why*, CURRENT HIST., May 2004, at 221, 224 (describing the "considerable pressure" on the Bush administration from "America's powerful oil sector, which saw itself being shut out from the rush for new concessions in the wake of the suspension of UN sanctions" in Libya).

<sup>204</sup> See Jonathan B. Schwartz, *Dealing with a "Rogue State": The Libya Precedent*, 101 AM. J. INT'L L. 553, 569 (2007).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

As a result, when the Libyan and family representatives reached agreement on a settlement structure in October 2002, the Bush administration was in for a surprise.<sup>207</sup> The proposed settlement was described by the parties as tying the families' compensation to the lifting of sanctions against Libya.<sup>208</sup> Under the settlement, each victim's estate would receive \$4 million if the U.N. sanctions were terminated.<sup>209</sup> If certain U.S. sanctions were also lifted, the estates would each receive an additional \$4 million.<sup>210</sup> And if the United States rescinded Libya's designation as a state sponsor of terrorism, the estates would each receive \$2 million more, for a total of \$10 million.<sup>211</sup>

Conflicts also existed among victims. Each family ordinarily would have been entitled to different economic and noneconomic losses, based on their family structure, the age of each victim, and their income.<sup>212</sup> In the end, however, victims received equal distributions based upon the scheme negotiated between private attorneys and the Libyan government.<sup>213</sup>

The push to conclude the Lockerbie settlement also justified presidential policies unrelated to the claimants' interests while promoting an expansion of the President's wartime powers. Following secret negotiations that began with Libya just weeks after the invasion of Iraq, President George W. Bush claimed that Libyan leader Muammar Qaddafi's new embrace of the international order—embodied in the Lockerbie settlement—reflected a rational response to the United States's more aggressive foreign policy.<sup>214</sup> “In word and action, we have clarified the choices left to potential adversaries,” President Bush reportedly told the media following Libya's agreement to give up its WMD program.<sup>215</sup>

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<sup>207</sup> Cf., e.g., Bradley Graham, *Libya Says It Needn't Finish Payments to Flight 103 Victims' Families*, WASH. POST, June 27, 2006, at A17 (describing parties' conflicting interpretations of the settlement).

<sup>208</sup> See *id.*

<sup>209</sup> See CHRISTOPHER M. BLANCHARD & JIM ZANOTTI, CONG. RESEARCH SERV., RL33142, LIBYA: BACKGROUND AND U.S. RELATIONS 11 (2011).

<sup>210</sup> See *id.*

<sup>211</sup> See *id.*

<sup>212</sup> Cf. Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 543-52 (2005) (contrasting the individualistic approach to valuing the loss of human life in tort law with the more categorical approach in administrative law).

<sup>213</sup> See BLANCHARD & ZANOTTI, *supra* note 209, at 11.

<sup>214</sup> See David E. Sanger & Judith Miller, *Libya to Give Up Arms Programs, Bush Announces*, N.Y. TIMES, Dec. 20, 2003, at A1 (reporting that administration officials touted “the Libyan move as vindication for the decision to go to war against Iraq—where no unconventional weapons have been found—because of the message it sent”); see also Jentleson & Whytock, *supra* note 199, at 48 (describing President Bush and Vice President Cheney's invocation of the Libyan settlement in the 2004 presidential and vice presidential debates, respectively).

<sup>215</sup> Sanger & Miller, *supra* note 214.

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We may never know whether the limitations of the presidential settlements discussed above exist because of the difficult tradeoffs that a president must make during any diplomatic, military, or economic crisis or because of a common problem in class actions—the lack of incentives for parties, after reaching a massive settlement, to ensure the settlement serves those who depend on the litigation for relief.<sup>216</sup> This is, in part, because of Supreme Court decisions holding that settlement power can sometimes rest exclusively in the executive branch. But without guidelines for the President's conduct in large settlements, it remains impossible to evaluate whether more effective compensation was sacrificed for a larger national interest, for the President's own political interests, or due to the disinterest that follows the announcement of a large settlement.

## II. CONGRESSIONAL RESPONSES

Congress has attempted to place limits on presidential settlements, but those constraints remain incomplete responses to the structural and distributional problems raised by presidential settlements. Shortly after World War II, Congress passed the International Claims Settlement Act of 1949<sup>217</sup> and the Taft–Hartley Act of 1947,<sup>218</sup> which created new regulatory regimes for presidential settlements in international law—with the creation of a predecessor to the Foreign Claims Settlement Commission (FCSC)—and labor law—with the establishment of the national emergency provisions. Despite the procedural safeguards set by these laws, congressional responses to the rise of presidential settlements in international and labor disputes have failed to provide the needed balance of representation, oversight, and evaluation necessary to resolve group claims for restitution.

### A. *International Claims*

The International Claims Settlement Act created a separate forum within the executive branch, which has since been replaced by the FCSC.<sup>219</sup>

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<sup>216</sup> See, e.g., *SEC v. Bear, Stearns & Co.*, 626 F. Supp. 2d 402, 412 (S.D.N.Y. 2009) (observing that “a common class action phenomenon—the loss of interest by the parties in the litigation after reaching a settlement—can make that task nearly impossible and lead to ever-larger residual funds that cannot be distributed”).

<sup>217</sup> Ch. 54, 64 Stat. 12 (1950) (codified as amended at 22 U.S.C. §§ 1621–1645o (2012)).

<sup>218</sup> Ch. 120, §§ 206–210, 61 Stat. 136, 155–56 (codified at 29 U.S.C. §§ 176–180 (2012)).

<sup>219</sup> See 22 U.S.C. §§ 1622–1622g (2012).

The FCSC offers a formal process for hearing claims against foreign states.<sup>220</sup> But the FCSC process takes time and may fail to afford groups with conflicting interests a voice after the President reaches a lump-sum settlement.

Congress responded to the growth in lump-sum settlement agreements after World War II by establishing two formal settlement commissions within the executive branch: the War Claims Commission in 1948 and the International Claims Settlement Commission (ICSC) in 1950.<sup>221</sup> After the war, President Truman agreed to settle U.S. citizens' claims against Yugoslavia for expropriated property for a lump sum of \$17 million.<sup>222</sup> Although President Truman concluded the agreement with Yugoslavia as part of an executive agreement, Congress' new ICSC set the ground rules for dividing the award. Five years later, the ICSC was reorganized into a permanent agency and renamed the Foreign Claim Settlement Commission (FCSC) in 1954.<sup>223</sup> Today, the FCSC hears a wide variety of claims, including claims for physical injury, property damage, expropriated oil, commercial losses, captured military personnel, and state-sponsored terrorism.<sup>224</sup> The FCSC has processed claims for over forty-five lump-sum settlements, heard more than 740,000 claims, and granted awards in excess of \$3.5 billion.<sup>225</sup>

The FCSC observes formal requirements to assess claims against foreign governments. Individuals present documentary and testimonial evidence to an adjudicator, who assesses each citizen's claim. The FCSC then works closely with the State Department and other members of the President's cabinet to settle claims collectively in a lump sum. The FCSC then distributes the lump-sum settlement to victims.<sup>226</sup>

No process, however, exists for the FCSC to hear from victims to determine how that lump sum should be distributed. When a lump-sum settlement does not cover all of the claims,<sup>227</sup> the commission may divide

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<sup>220</sup> See U.S. DEP'T OF JUSTICE, FOREIGN CLAIMS SETTLEMENT COMM'N, 2011 ANNUAL REPORT 1 (2012) [hereinafter FCSC 2011 ANNUAL REPORT] (explaining that the FCSC operates as an "independent, quasi-judicial federal agency," designed to "receive, examine, adjudicate, and render final decisions with respect to claims of U.S. nationals against foreign governments").

<sup>221</sup> See War Claims Act of 1948, ch. 826, 62 Stat. 1240; see also International Claims Settlement Act of 1949, ch. 54, 64 Stat. 12 (1950).

<sup>222</sup> Agreement Regarding Pecuniary Claims of the United States and Its Nationals, U.S.–Yugoslavia, art. 1, July 19, 1948, 62 Stat. 2658.

<sup>223</sup> See Reorganization Plan No. 1 of 1954, 68 Stat. 1279; see also 22 U.S.C. §§ 1622–1622g (2012).

<sup>224</sup> FCSC 2011 ANNUAL REPORT, *supra* note 220, at 2.

<sup>225</sup> *Id.*

<sup>226</sup> See *id.* at 2–3.

<sup>227</sup> See LILLICH, *supra* note 40, at 112–15 (discussing the issue of inadequate settlements because of inadequate evidence); see also, e.g., Henry J. Clay, *Recent Developments in the Protection of*

awards without hearing from representatives of different stakeholders, who may be entitled to more or less of the funds based on their size, need, or legal claims to relief.<sup>228</sup> Parties also cannot appeal final decisions made by the agency, limiting the role that courts once played in the nineteenth century to hear cases and divide sums among people with competing interests in settlement awards.<sup>229</sup> Instead, the FCSC ordinarily distributes funds pro-rata, regardless of the comparative merit—or need—of different categories of claimants.<sup>230</sup>

For this very reason, a process exists in complex litigation for subclassing claims. Representatives of different subclasses offer perspectives about whether a lump sum of money should be divided differently. Representatives may also provide information from the “bottom up”<sup>231</sup> about the kinds of evidentiary and procedural problems that may exist for discrete categories of claims. This is why some critics have challenged the FCSC’s failure to adopt procedures that would police conflicts of interest that exist between claimants to lump-sum awards.<sup>232</sup>

#### B. Labor-Related Settlements

The Taft–Hartley Act limits presidential intervention in labor negotiations to those situations where strikes threaten “national health or safety.”<sup>233</sup> Unlike the FCSC, Taft–Hartley created a separate forum for settlement—federal mediation—that offers representation for different subgroups and interests in a labor dispute. While these procedures help

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*American Shareholders’ Interests in Foreign Corporations*, 45 GEO. L.J. 1, 12 (1956) (observing shortly after the creation of the FCSC that “[t]he goal of achieving full restitution for injury has virtually been abandoned in a realistic recognition that ‘half a loaf is better than none’”).

<sup>228</sup> Without someone to defend or challenge categories of weak claims, the FCSC risks depleting limited settlement funds at the expense of parties with stronger claims. See LILLICH, *supra* note 40, at 115 (“Vesting [FCSC] staff members with the power to oppose claims would give the commission a better basis for a decision and serve to protect the interests of the other claimants.”).

<sup>229</sup> See *supra* note 75 and accompanying text. To be sure, even that power was usually limited to families or business interests with competing claims to a single award.

<sup>230</sup> FCSC 2011 ANNUAL REPORT, *supra* note 220, at 6 (“In most programs, the amount of funds available to pay the Commission’s awards is limited, often resulting in *pro rata* payment of awards by the Department of the Treasury.”).

<sup>231</sup> Jack B. Weinstein, Keynote Address, *Compensating Large Numbers of People for Inflicted Harms*, 11 DUKE J. COMP. & INT’L L. 165, 177 (2001) (contrasting the United States’ “bottom up” approach to mass compensation procedures with the “top down” approach in Europe).

<sup>232</sup> See LILLICH, *supra* note 40, at 112–15; see also NIELSEN, *supra* note 87, at 9 (“There is, therefore, no evidence in the light of which that produced by the [individual] claimants can be tested.”).

<sup>233</sup> 29 U.S.C. § 176 (2012).

resolve prospective claims, they do little to help representatives fairly represent the interests of laborers entitled to compensation for past harms, particularly when no process exists to gather information about individualized harms or losses. Moreover, presidents have exploited the broad language of Taft–Hartley to intervene in labor disputes with no guidelines to evaluate claims.<sup>234</sup>

Congress passed the Taft–Hartley Act in 1947 to regulate disputes between labor and management.<sup>235</sup> Taft–Hartley amended New Deal legislation to promote private dispute resolution through collective bargaining without the interference of the state.<sup>236</sup> Recognizing the President’s modern role in settlements, though, Taft–Hartley specifies when and how the President may intervene to broker labor disputes.

The national emergency provisions in the Taft–Hartley Act provide that when labor disputes in a major industry will “imperil the national health or safety,” the President may appoint a board of inquiry to investigate.<sup>237</sup> The board then “ascertain[s] the facts with respect to the causes and circumstances of the dispute.”<sup>238</sup> Upon receiving the board’s report, the President may ask the Attorney General to petition a federal district court to enjoin a work stoppage.<sup>239</sup> During this “cooling off” period, the parties attempt to reach a settlement with the aid of an independent government body, the Federal Mediation and Conciliation Service.<sup>240</sup> If the dispute lasts for more than sixty days after issuance of an injunction, the board of inquiry reports to the President information including the “current position of the parties and the efforts which have been made for settlement.”<sup>241</sup> If no settlement subsequently occurs, the President must report to Congress and may recommend a legislative resolution.<sup>242</sup>

Congress designed Taft–Hartley’s national emergency provisions to offer a narrow exception to the rule that labor and management negotiations

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<sup>234</sup> See LeRoy & Johnson, *supra* note 38, at 123-27 (arguing that Taft–Hartley injunctions have contributed to the general decline of the right-to-strike).

<sup>235</sup> See *supra* note 218 and accompanying text.

<sup>236</sup> See 79 CONG. REC. 7660 (1935) (statement of Sen. Walsh) (“[A]ll the [Wagner Act] proposes to do is to escort [employee representatives] to the door of their employer . . . . What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.”); Gross, *supra* note 106, at 309 (“Congress expressly acknowledged its preference for private settlement of labor disputes . . .”).

<sup>237</sup> 29 U.S.C. § 176 (2012).

<sup>238</sup> *Id.* § 177(a). The board of inquiry has broad powers to subpoena witnesses and documents to prepare its report. *Id.* § 177(c).

<sup>239</sup> *Id.* § 178(a).

<sup>240</sup> *Id.* § 179(a).

<sup>241</sup> *Id.* § 179(b).

<sup>242</sup> *Id.* § 180.

should take place privately through collective bargaining.<sup>243</sup> But over time, the President has interpreted those provisions broadly and exerted a heavy hand in a wide variety of labor disputes.<sup>244</sup> Even though Taft–Hartley imagined independent boards of inquiry—in which mediators, courts, and executive branch officers shared overlapping roles in controlling workplace disputes—nothing in Taft–Hartley prevented presidents from informally reaching out to labor and management to broker disputes.<sup>245</sup> Presidents also took advantage of the open-ended standards to obtain injunctions through Taft–Hartley. In the sixty years since Congress passed Taft–Hartley, presidents have successfully obtained injunctions on all but two occasions.<sup>246</sup> Finally, the mandatory “cooling off” period rarely resulted in an independent mediation.<sup>247</sup> Rather, those periods provided the opportunity for a presidential administration to encourage settlement informally.<sup>248</sup>

The broad power that Taft–Hartley gave to the executive branch does have some advantages. Taft–Hartley created a structure for presidential administrations to hear from rival labor and business interest groups impacted by a strike or industry lockout. And because Taft–Hartley guaranteed representation for different unions and management before independent boards of inquiry and mediators, the process accounts for group-wide interests in ways that international claims settlements do not.

But few guidelines existed to resolve conflicts of interest between different kinds of laborers. Although Congress created a process for gathering information from representative stakeholders, premature presidential involvement in labor disputes undercut Taft–Hartley’s

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<sup>243</sup> Cf. H.R. REP. NO. 80-245, at 114 (1947) (reporting the minority view of then-Congressman John F. Kennedy that the statutory language about danger to “health and safety” should be more narrow and precise).

<sup>244</sup> See, e.g., LeRoy & Johnson, *supra* note 38, at 110-16 (surveying presidential injunctions and suggesting that some were based on exaggerated or unwarranted claims that national health was endangered); see also U.S. DEP’T OF LABOR, COLLECTIVE BARGAINING IN THE BASIC STEEL INDUSTRY: A STUDY OF THE PUBLIC INTEREST AND THE ROLE OF GOVERNMENT 215-22 (1961) (criticizing the Taft–Hartley factfinding process); U.S. DEP’T OF LABOR, IMPACT OF LONGSHORE STRIKES ON THE NATIONAL ECONOMY 4 (1970) (suggesting that the longshore strikes did not have a significant economic impact).

<sup>245</sup> During debates over the passage of Taft–Hartley, Democratic leaders in the House recognized that the President could exploit the fluid language in the statute in just this way. See H.R. REP. NO. 80-245, at 102 (1947) (“There is no rule, or yardstick, provided for the President to guide him in his determination as to whether or not a ‘substantial curtailment’ of interstate or foreign commerce has occurred or is about to occur.”).

<sup>246</sup> See Gross, *supra* note 106, at 311.

<sup>247</sup> Cf. *id.* at 316.

<sup>248</sup> Cf. *id.* at 311, 337.

provisions for gathering information about the dispute. Investigations grew more challenging when parties sought more than prospective relief, such as new union recognition or improvements in workplace conditions. Compensation for past misconduct varied widely. Unlike the FCSC, few rules ensured that representative bargaining produced settlements that reflected actual losses of wages or for workplace accidents.<sup>249</sup> The result may also fail to insulate individuals seeking compensation from a powerful executive interested in achieving favorable news headlines.<sup>250</sup>

In sum, both the FCSC and Taft–Hartley offer helpful—but only partial—models for reform. The FCSC is a separate forum within the executive branch for parties to assert claims against foreign states and offers a formal process for valuing each individual claim. But this process takes time and may fail to afford groups with different interests a voice after the President reaches a lump-sum settlement. Taft–Hartley creates a separate forum for settlement—federal mediation—and offers representation for different subgroups and interests in a labor dispute. While those procedures help resolve prospective claims, they do little to help representatives advance the interests of laborers entitled to compensation for past harms, particularly when no process exists to gather information about individualized harms or losses. Presidential settlements need guidelines that permit the government to evaluate individual claims methodically, afford real opportunities for stakeholders to be heard, and create sufficient independence from the President to manage potential conflicts of interest.

### III. APPLYING COMPLEX LITIGATION PRINCIPLES

This Part applies principles from complex litigation designed to enhance independence, participation, and accuracy in presidential settlements—including procedures for (1) function separating, (2) interest-group representation, and (3) statistical aggregation. First, as set forth in more detail below, presidents may improve the legitimacy of a final settlement by referring settlement proceeds to a court to be distributed according to complex litigation rules or—when judicial review is not available—through independent institutions within the executive branch. Second, presidents may more faithfully represent victims’ interests by soliciting input from

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<sup>249</sup> Cf. BLACKMAN, *supra* note 38, at 154–56 (observing that the most frequent issues that arose in labor disputes brokered by presidential intervention involved wages, union recognition, and inter-union disputes).

<sup>250</sup> See S. REP. NO. 80-105, at 15 (1947) (“In most instances the force of public opinion should make itself sufficiently felt in [the] 80-day period [during which the strike is enjoined] to bring about a peaceful termination of the controversy.”).

counsel and other representatives of stakeholders likely to be affected by a major settlement. Third, presidents may evaluate claim values more accurately and consistently by relying on courts, agencies, budget offices, or arbitrators to conduct sampling and bellwether trials for different categories of claimants.

Just as presidential settlements and complex litigation offer many of the same potential benefits to groups of injured parties, they experience many of the same challenges with conflicts of interest, independence, and claim valuation. To address those challenges, class actions invoke a blend of political and adjudicative processes—separating functions, relying on controlled factfinding, and providing tools to represent the interests of discrete interest groups to promote deliberative, accurate, and “bottom-up” decisionmaking.<sup>251</sup> Of course, class actions do not always strike this balance.<sup>252</sup> But we currently lack a theory about how presidential settlements should strike a balance between open political processes that permit input from different constituencies, such as those in Taft–Hartley, and adjudicative processes, like that of the FCSC, which offer formal procedures to evaluate the merits of different parties’ legal rights to relief.

This Part offers a possible path for presidential settlements to strike this balance. Section A describes the shared challenges faced by presidents and by parties in complex litigation involving large settlements. Section B then explores three kinds of solutions borrowed from complex litigation that courts, practitioners, and theorists could advance in response to those challenges.

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<sup>251</sup> See *infra* Section III.B.

<sup>252</sup> Some attack plaintiffs’ class counsel for forging collusive settlements for their own financial benefit. See, e.g., *Weinberger v. Kendrick*, 698 F.2d 61, 81 (2d Cir. 1982) (upholding a class settlement despite allegations that the plaintiff class was expanded to increase the settlement amount); Robin J. Efron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of Twombly and Iqbal*, 51 WM. & MARY L. REV. 1997, 2033 (2010) (discussing class actions where plaintiffs’ lawyers earn hefty fees but plaintiffs recoup little). Others question whether expensive adjudicative procedures, such as personalized notice, are always justified—particularly when the settlement offers the class only very small awards or coupons. See, e.g., AM. LAW INST., PRINCIPLES OF THE LAW: AGGREGATE LITIGATION § 3.04 (2010) [hereinafter PRINCIPLES OF THE LAW] (recommending courts weigh the “cost of notice and the likely recovery involved” to determine whether individual notice is necessary); Kenneth W. Dam, *Class Action Notice: Who Needs It?*, 1974 SUP. CT. REV. 97, 107-09 (criticizing the individual notice requirement in class actions).

### A. *The Costs and Benefits of Aggregate Litigation*

Like presidential settlements, aggregate procedures in complex litigation seek to provide greater legal relief to claimants,<sup>253</sup> efficiency,<sup>254</sup> and consistency<sup>255</sup> than individualized litigation.<sup>256</sup> At least theoretically, they also serve a democratic function,<sup>257</sup> allowing groups of individuals to petition collectively and redress widespread harm from the bottom up.<sup>258</sup>

Nevertheless, large cases introduce new risks. The sheer volume of claims in aggregate litigation threatens legal access, efficiency, and consistency by (1) replacing individual hearings with a potentially faceless and unresponsive bureaucracy; (2) relying on representatives tempted by the promise of large fees, power, or other interests; and (3) increasing the consequence of error in high stakes litigation.<sup>259</sup> Like many administrative

<sup>253</sup> See David Rosenberg, *Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit*, 2003 U. CHI. LEGAL F. 19, 27-30 (arguing for aggregative procedures to allow plaintiffs' counsel to make an optimal investment in the litigation); David Rosenberg, *Essay, Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 397-400 (2000) (explaining how aggregating classable claims can allow plaintiffs to litigate).

<sup>254</sup> See generally JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 135-36 (1995) (noting that economies of scale in class actions reduce discovery costs and expert fees); William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 837-38 (1995) (explaining that class actions are an attempt to reduce duplicative litigation activity).

<sup>255</sup> See FED. R. CIV. P. 23(b)(1)(B) ("A class action may be maintained if Rule 23(a) is satisfied and if adjudications with respect to individual class members . . . would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests . . . ."); Arthur R. Miller, *An Overview of Federal Class Actions: Past, Present, and Future*, 4 JUST. SYS. J. 197, 211 (1978) (noting that a system of individual actions creates a risk of inconsistent adjudications when there are multiple claims to a limited fund).

<sup>256</sup> See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997))); Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105, 1115-17 (2010) (describing different goals of class actions).

<sup>257</sup> See Resnik, Curtis & Hensler, *supra* note 20, at 382.

<sup>258</sup> See Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 2022 (2012) ("[A]ggregation involves a 'bottom-up' remedy, where groups of people actually involved . . . play a role in crafting discrete, retrospective forms of relief.")

<sup>259</sup> See, e.g., PRINCIPLES OF THE LAW, *supra* note 252, § 1.03 cmt. a (observing that aggregation can "respect[] the institutional position of courts"); *id.* § 1.03 cmt. c (explaining that proceedings should "facilitate binding resolutions"); *id.* § 1.05 cmt. b ("Lawyers' interests never match clients' interests exactly, and lawyers always have some freedom to manage lawsuits as they think best, if only because clients cannot supervise their every move."); Lahav, *supra* note 23, at 429 ("Courts should foster a form of administration that allows access to justice, and at the same time is humanizing, thoughtful and deliberative.")

systems within the executive branch, aggregate litigation struggles to govern different constituencies with legitimacy, loyalty, and accuracy.

To summarize, aggregate litigation seeks the same fundamental goals—access, efficiency, and accuracy—as many presidential settlements that offer mass compensation. But like many of the presidential settlements discussed here, mass dispute resolution threatens legitimacy from individualized access to government, risks creating new conflicts of interest, and increases the importance of accurate outcomes. Best practices in aggregate litigation—like those discussed below—attempt to realize the benefits of aggregation while minimizing the potential dangers.

### B. *Best Practices from Complex Litigation*

#### 1. Legitimate Decisionmaking

Given the threat that enormous cases place on the legitimacy of judicial resolutions, judges have long sought to adopt practices that improve impartiality and increase input in mass adjudications. Judges may appoint magistrates or special masters to handle settlement discussions to avoid becoming overly invested in the parties' proposed resolution.<sup>260</sup> When judges actively participate in settlement negotiations, they may invite a second judge to review the propriety of the final award or settlement. Finally, judges themselves are reviewed for any abuse of discretion on interlocutory appeal.<sup>261</sup> This “separation of functions” approach to the way judges handle large cases has deep roots in administrative law—imposing more deliberation and restraint on the exercise of executive power.<sup>262</sup>

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<sup>260</sup> See, e.g., *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 265-66 (E.D. Pa. 1994) (highlighting negotiations between plaintiffs' and defendants' steering committees in asbestos-related litigation); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.62 (2004) (describing the process for appointing lead counsel or committees of counsel) [hereinafter MANUAL FOR COMPLEX LITIGATION]; *id.* § 22.91 (“Although some judges participate actively in settlement negotiations, others insulate themselves from the negotiations, leaving this activity to a magistrate judge, a special master, or a settlement judge.” (footnote omitted)).

<sup>261</sup> See FED. R. CIV. P. 23(f) (providing for interlocutory review of a court's decision to certify a class); see also *Amchem Prods.*, 521 U.S. at 620 (calling for “undiluted, even heightened, attention” in class certification in the settlement context); MANUAL FOR COMPLEX LITIGATION, *supra* note 260, § 21.612 & n.965 (collecting cases where courts apply “closer judicial scrutiny” for potential conflicts of interest because there has been “little or no discovery” to test the strengths and weaknesses of the parties' positions).

<sup>262</sup> See *Withrow v. Larkin*, 421 U.S. 35, 51 (1975) (observing that separation-of-functions solutions are “not new, and legislators and others concerned with the operations of administrative agencies have given much attention to whether and to what extent distinctive administrative functions should be performed by the same persons”). See generally Michael Asimow, *When the*

By contrast, many presidential settlements lack meaningful judicial review and, in many cases, any independent review at all of conflicts of interest.<sup>263</sup> This may aggravate conflicts between individuals, like heirs with disparate legal entitlements in the Holocaust victim litigation, and between sophisticated business interests, like the distinct banking, petroleum, and business concerns in the Iranian–American settlement.

Moreover, Congress has expressly foreclosed judicial review of many international claims settlements. In those rare occasions where federal courts have reviewed settlement plans brokered by presidential administrations, they have done so with great deference to the executive branch.<sup>264</sup> Settlement funds that are the product of non-prosecution agreements brokered by federal prosecutors or agencies in presidential task forces receive almost no judicial scrutiny.<sup>265</sup>

Many of the procedures that do exist to ensure some independent claims assessment do not protect groups with discrete legal claims or claims that arrive too late in the claims process. The White House, for example, has been able to work around the provisions of the Federal Advisory Committee Act, which was expressly designed to limit how the President interacts with interest groups.<sup>266</sup> Presidents do so through a carve-out in the Act that allows the President to avoid triggering more participation and oversight.<sup>267</sup> The Taft–Hartley Act allows stakeholders in labor disputes to present their positions to the Federal Mediation and Conciliation Service, an office independent of the White House, but presidents have evaded those provisions by refusing to invoke the Act and bargaining with parties directly. Because White House negotiations enjoy privileged positions of secrecy, few checks exist to ensure that the White House hears from relevant interest groups implicated by a large settlement.<sup>268</sup> Agencies like

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*Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759 (1981) (discussing separation of functions in administrative agencies).

<sup>263</sup> See, e.g., *supra* Section I.C.

<sup>264</sup> See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413-17 (2003) (offering reasons for deference); *Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981) (explaining that the President acted pursuant to specific congressional authorization); *United States v. Pink*, 315 U.S. 203, 230 (1942) (“We would usurp the executive function if we held that the decision was not final . . .”).

<sup>265</sup> Cf. Memorandum from Craig S. Morford, Acting Deputy Attorney Gen., to Heads of Dep’t Components & U.S. Attorneys 1 n.2 (Mar. 7, 2008) (“Non-prosecution agreement[s] . . . [are] maintained by the parties rather than being filed with a court.”).

<sup>266</sup> See 5 U.S.C. app. § 2 (2012); see also *infra* notes 297-99 and accompanying text.

<sup>267</sup> *In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005) (holding FACA does not apply as long as the President gives “no one other than a federal official a vote in or, if the committee acts by consensus, a veto over the committee’s decisions”).

<sup>268</sup> Cf. John Orman, *The President and Interest Group Access*, 18 PRESIDENTIAL STUD. Q. 787, 788-91 (1988) (evaluating interest group access to the White House); Peterson, *supra* note 48, at

the Foreign Claims Settlement Commission enjoy true independence from the White House, but they lack formal power to hear groupwide claims about eligibility, procedures, or standards for distributing awards.

There may be good reasons for presidential settlements to follow different rules. Unlike private attorneys in class actions, presidents do not have independent financial stakes in the outcomes. Courts owe presidents deference to the extent a large national settlement reflects an executive decision to balance competing interests under Article II of the Constitution.<sup>269</sup> In contrast with purely private actions, which ordinarily implicate only private interests, presidential settlements involve important public functions—such as saving hostages, repairing international relations, and ensuring industrial production. Judicial review of presidential settlements also raises weighty constitutional and policy concerns, particularly when courts intervene in decisions that impact recognition of foreign nations or other foreign affairs.<sup>270</sup>

As illustrated above, however, presidential intervention in large settlements for mass compensation presents different kinds of conflicts between the President and the victim groups the President purports to serve. And all of these conditions raise obstacles to the fairness of any presidential settlement. Accordingly, some form of independent review may be necessary to ensure the entire settlement appropriately balances different interests.

The independent review may take place in court, or, when judicial review is unavailable, through other independent institutions within the executive branch. In cases where parties have already commenced class actions or complex litigation, like in the Holocaust and BP litigation, the President could require that proceeds from any negotiated settlement pass through a court-approved process.<sup>271</sup> In cases where no court process exists,

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617-18 (finding that twenty-eight percent of national membership organizations with very conservative views on the provision of federal services had frequent access to the Reagan White House, compared with only four percent of national membership groups with very liberal views).

<sup>269</sup> See *infra* Part IV.

<sup>270</sup> *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003) (dismissing state law action that interfered with executive action in foreign affairs); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 281-85 (D.N.J. 1999) (dismissing claims in Holocaust litigation as presenting nonjusticiable political questions).

<sup>271</sup> This already occurs in some settlements brokered by federal agencies and prosecutors. See, e.g., Zimmerman, *Distributing Justice*, *supra* note 29, at 535. Had the Clinton administration taken such a course of action to resolve Holocaust insurance claims, an independent, court-supervised process may have created more legitimacy than the private restitution process adopted in ICHEIC. See *supra* subsection I.C.2; cf. *In re Assicurazioni Generali S.P.A. Holocaust Ins. Litig.*, 228 F. Supp. 2d 348, 355-58 (S.D.N.Y. 2002) (refusing to dismiss litigation in favor of a

the President could refer settlement negotiations to independent “Article I courts” inside the executive branch to assess individual claims and hear groupwide concerns.<sup>272</sup> Those institutions have other drawbacks—perhaps creating an illusion of legitimacy where no true independence really exists.<sup>273</sup> But they may provide more transparency and regularity than a settlement brokered entirely inside the White House.

Finally, where Congress cannot anticipate the kind of emergency that forces immediate presidential action to settle a dispute, the President may rely on departments closely affiliated with the White House, such as OLC, the State Department, and the Office of Management and Budget, to resolve difficult legal, diplomatic, or economic questions raised in a massive settlement. This final option is discussed in greater detail in Part IV.

## 2. Loyal Decisionmaking

Courts seek to make aggregate litigation loyal to absent class members through subclassing, internal monitoring, opt-out rights, and independent review. First, judges may encourage private lawyers to divide classes of people into specific interest groups—called “subclasses”—represented by separate counsel who can police each other.<sup>274</sup> Or, they may appoint class representatives with more power to monitor attorneys—such as government actors, public interest organizations, or institutional investors.<sup>275</sup> Second, judges offer parties a chance to be heard within the practical limits of mass adjudication by holding “fairness hearings,” which are designed to solicit

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private insurance process to compensate Holocaust victims for stolen policies because it lacked independence from the defendant insurers, commenting that “it is in a sense the company store”).

<sup>272</sup> Administrative courts like the Foreign Claims Settlement Commission can, consistent with their adjudicative function, hear and resolve classwide claims for relief, like an Article III court, while also processing individual claims for relief. *See* Sant’Ambrogio & Zimmerman, *supra* note 258, at 1998-99.

<sup>273</sup> *Cf.* David A. Skeel, Jr., *Institutional Choice in an Economic Crisis*, 2013 WIS. L. REV. 629, 644-46 (critiquing President Obama’s rescue of Chrysler and General Motors); *see also* Jaime Dodge, *Reconceptualizing Non-Article III Tribunals*, 99 MINN. L. REV. 905, 908 (2015) (“Moreover, because consent is typically a feature of these systems, they hold not only the promise of increased legitimacy but must also appear superior ex ante to traditional litigation to every participating plaintiff and defendant.”).

<sup>274</sup> *See* FED. R. CIV. P. 23(c)(5) (“When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.”); MANUAL FOR COMPLEX LITIGATION, *supra* note 260, § 21.23 (discussing the role of subclasses).

<sup>275</sup> *See* PRINCIPLES OF THE LAW, *supra* note 252, § 1.05(c) (suggesting that judges should grant named plaintiffs with “sizable stakes” control over the litigation); *see also* Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2095 (1995) (arguing that institutional investors are “more capable than typical figurehead plaintiffs” at monitoring litigation).

objections and produce other evidence about the fairness of class certification or settlement.<sup>276</sup> Finally, courts and special masters also review settlement decisions, as well as attorney fee arrangements, to promote loyal representation among class members.<sup>277</sup>

Judges may also require counsel, mediators, or experts involved in the settlement to offer detailed explanations for their decisions to police against possible collusion.<sup>278</sup> Judges also evaluate conflicts within the class, scrutinizing outcomes that award more to some class members at the expense of others.<sup>279</sup>

Presidential settlements, by contrast, do not offer groups similar chances to participate in the overall structure of the negotiated settlement. The Foreign Claims Settlement Commission offers sophisticated adjudicative procedures to hear evidence from individual victims, but has no rules ensuring groups can participate in the overarching deal. To be sure, there have been many opportunities to do so. Two years before the Carter and Reagan administrations negotiated the Algiers Accords, lawyers representing businesses formed a committee to coordinate claims.<sup>280</sup> The committee could have provided information about potential claim values and numbers, suggested procedures, and supplied staff to consider the 2800 claims resolved by Presidents Carter and Reagan. Similarly, the Holocaust settlement fund originally grew out of complex litigation, before Clinton administration officials and nonprofit groups squeezed out attorney representation for different victims of the insurance settlements.<sup>281</sup> Avoiding the use of class counsel in negotiating the settlement arguably made the final resolution of claims more cumbersome, as the administration underestimated complex distribution issues, the volume and variety of

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<sup>276</sup> See FED. R. CIV. P. 23(c); FED. R. CIV. P. 23(e)(2).

<sup>277</sup> See MANUAL FOR COMPLEX LITIGATION, *supra* note 260, § 22.91 (observing that judges may appoint magistrate judges, special masters, or settlement judges to oversee and facilitate settlement negotiations); see also Memorandum for Discussion Purposes, *In re* Simon II Litig., No. 00-5332, 2002 WL 862553, at \*1 (E.D.N.Y. Apr. 23, 2002) (describing efforts by a special master to reach a negotiated global tobacco settlement).

<sup>278</sup> See, e.g., *Isby v. Bayh*, 75 F.3d 1191, 1200 (7th Cir. 1996) (upholding approval of a settlement and noting that “there is no reason in the record to suspect that the settlement is tainted by collusion”); see also *supra* note 261 and accompanying text.

<sup>279</sup> See, e.g., *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 785 (7th Cir. 2004) (rejecting a settlement in a class action where claims of some plaintiffs would have received no consideration but other plaintiffs would have received payments); see also, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997) (explaining that “whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives” is a “dominant concern” that “persists when settlement, rather than trial, is proposed”).

<sup>280</sup> See *supra* notes 146-49 and accompanying text.

<sup>281</sup> See *supra* notes 169-79 and accompanying text.

claims, and the challenging evidentiary problems associated with identifying documents executed before World War II.

Presidential administrations should adopt procedures to solicit input from counsel or other representatives to represent fairly the interests of people likely to be affected by a major settlement. When necessary, administrations could use subclassing, with separate counsel for each subgroup, to police some conflicts of interest. As in civil litigation, executive branch officers could appoint lead “representatives”—sophisticated entities with large stakes in the litigation, such as state pension funds, business concerns, or nonprofit organizations—to ensure that counselors remain loyal to their respective clients’ interests at the bargaining table.<sup>282</sup> Presidential administrations could also require mediators, arbitrators, or experts in the litigation to explain their decisions about the structure of the overarching settlement, devoting particular attention to mass settlements that award more to some groups at the expense of others.<sup>283</sup>

Requiring representatives from different interest groups to participate in agency decisionmaking is not uncommon in the executive branch and adopting such a rule in administrative proceedings is not unusual or unfamiliar.<sup>284</sup> The Taft–Hartley Act illustrates one way that the executive branch has used interest group representation to curb excessive interference—channeling group-wide claims to a separate mediation service, which, in turn, reports on the status of negotiations to the President over a defined period of time. More recently, the Government Accountability Office recommended that another large settlement brokered with White House input, the Independent Foreclosure Review, use focus groups to develop outreach materials to enhance access to the settlement.<sup>285</sup>

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<sup>282</sup> See *supra* note 275 and accompanying text; see also James D. Cox & Randall S. Thomas with Dana Kiku, *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 106 COLUM. L. REV. 1587, 1597 (2006) (“[A]s more experienced and sophisticated clients, [institutional investors] would be better able to select competent class counsel.”).

<sup>283</sup> See, e.g., *Amchem Prods.*, 521 U.S. at 625 (explaining that mass accident cases are often not appropriate for class treatment); *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653–54 (7th Cir. 2006) (vacating approval of a settlement agreement in part because it was more advantageous to some class members than others).

<sup>284</sup> The Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561–570a (2012), and the Administrative Dispute Resolution Act, *id.* §§ 571–584, authorize agencies to involve stakeholders in the decisionmaking process directly. Agencies, like EPA, allow such collaborative approaches. See Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 31, 33–40 (1997) (offering examples of interest group participation while recommending a “collaborative model” to involve interest groups in agency decisionmaking).

<sup>285</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-277, FORECLOSURE REVIEW: LESSONS LEARNED COULD ENHANCE CONTINUING REVIEWS AND ACTIVITIES UNDER

Unfortunately, Presidents have regularly avoided guidelines that call for more input from different interest groups without drawing scrutiny from Congress or the courts, such as the triggering provisions in Taft–Hartley. Moreover, as discussed in Part II, while Taft–Hartley creates an effective political process for resolving group-wide claims, it may be less effective without a more formal process to test individual claims for relief.

### 3. Accurate Decisionmaking

Courts have long adopted rules to ensure the final resolution in aggregate litigation accurately reflects the strengths and weaknesses of groups' different legal claims. In a large proceeding, any settlement should at least guarantee that more-deserving claimants receive more than less-deserving claimants and that like claimants receive similar awards.

Mass adjudication already arguably promotes accuracy through the aggregation process itself. Under the law of large numbers, assessments of similar complaints improve as the sample of any given population increases.<sup>286</sup> Moreover, as attorneys pool resources, large proceedings provide adjudicators with more information about the best ways to craft final relief. Large cases, however, may increase the magnitude of an error, particularly for cases that exist at the margins.

For that reason, courts have long relied on statistical aggregation and bellwether trials to improve accuracy in decisionmaking. Many courts rely on sampling<sup>287</sup> or bellwether trials to assess the merits of different

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AMENDED CONSENT ORDERS 15-20 (2013) (recommending regulators use “tests or focus groups, to assess the readability of the outreach materials” and “solicit input from consumer groups when reviewing initial communication materials”).

<sup>286</sup> See Laurens Walker & John Monahan, Essay, *Sampling Liability*, 85 VA. L. REV. 329, 345-50 (1999) (arguing that the use of statistical evidence is a reliable and practical method for mass trial); see also Edward K. Cheng, Essay, *When 10 Trials Are Better Than 1000: An Evidentiary Perspective on Trial Sampling*, 160 U. PA. L. REV. 955, 957 (2012) (“Given the right conditions, sampling can actually produce more accurate outcomes than individualized adjudication.”); Jonathan J. Koehler & Daniel N. Shaviro, *Veridical Verdicts: Increasing Verdict Accuracy Through the Use of Overtly Probabilistic Evidence and Methods*, 75 CORNELL L. REV. 247, 248 (1990) (“[R]ules of probability theory such as Bayes’ theorem can improve the accuracy with which juries evaluate evidence in particular cases . . . .”); Jay Tidmarsh, *Resurrecting Trial by Statistics*, 99 MINN. L. REV. (forthcoming 2015) (manuscript at 11) (“[T]rial by statistics can smooth out aberrational jury awards in individual cases.”).

<sup>287</sup> Sampling means using a subset of individuals from within a population to yield some knowledge about the whole population. Researchers rarely survey an entire population for two reasons commonly associated with complex litigation: high costs and unwieldy, changing populations. See generally Walker & Monahan, *supra* note 286 (discussing probabilistic evidence and law).

categories of claims and class-wide resolutions of declaratory relief.<sup>288</sup> Statistical sampling lowers costs, speeds data collection, and, because the sample surveyed is smaller, ensures greater quality and consistency of information. Judges may rely on sampling in different areas of mass adjudication to identify the strengths and weaknesses of high volume cases.<sup>289</sup>

Finally, in a bellwether trial procedure, parties try a random sample of cases large enough to yield reliable results. A judge, jury, or participating lawyers use the resulting verdicts as a basis for resolving the remaining cases. Many judges currently use bellwether trials informally in mass tort litigation to assist in valuing cases and to encourage settlement.<sup>290</sup>

By using sampling and bellwether trials for different categories of claimants, presidential settlements may establish presumptive ways to measure claims accurately and consistently—and without unduly sacrificing participation by parties directly impacted. As set forth above, presidential settlements routinely fail to test the nature and number of claims before agreeing to international lump-sum settlements. In the Iranian–American

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<sup>288</sup> See MANUAL FOR COMPLEX LITIGATION, *supra* note 260, § 22.314-15 (suggesting ways to obtain information about common issues and case values and describing test cases); see also *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019-20 (5th Cir. 1997) (describing the function of bellwether trials).

<sup>289</sup> See MANUAL FOR COMPLEX LITIGATION, *supra* note 260, § 11.493 (“Acceptable sampling techniques, in lieu of discovery and presentation of voluminous data from the entire population, can save substantial time and expense . . .”).

<sup>290</sup> See, e.g., Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2325 (2008) (cataloging the informational benefits of bellwether trials); cf., e.g., *In re Vioxx Prods. Liab. Litig.*, 360 F. Supp. 2d 1352, 1354-55 (J.P.M.L. 2005) (consolidating and transferring cases); *In re Propulsid Prods. Liab. Litig.*, No. 1355, 2000 WL 35621417, at \*2 (J.P.M.L. Aug. 7, 2000) (same). Even though statistical sampling remains critical to resolving many mass actions, the Supreme Court’s decision in *Wal-Mart v. Dukes* sharply limited federal courts’ use of statistical sampling in class actions certified under Rule 23 of the Federal Rules of Civil Procedure. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (“Because the Rules Enabling Act forbids interpreting Rule 23 to ‘abridge, enlarge or modify any substantive right,’ a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims.” (citations omitted)). Notably, Rule 23 and the Rules Enabling Act do not apply to executive officials who chose to use similar tools in a large settlement. Cf. 28 U.S.C. § 2072(a) (2012) (authorizing rulemaking for “cases in the United States district courts . . . and courts of appeals”). Moreover, even as the Supreme Court has frowned on statistical sampling in court, it has expressly endorsed such formulation by executive branch agencies to avoid “relitigating” recurring issues in agency adjudication. See *Heckler v. Campbell*, 461 U.S. 458, 467 (1983) (“The Court has recognized that even where an agency’s enabling statute expressly requires it to hold a hearing, the agency may rely on its rulemaking authority to determine issues that do not require case-by-case consideration.”); *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (“Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption.”).

settlement, for example, the failure to do so meant that the U.S. government originally failed to set aside sufficient funds for more than a handful of claims.<sup>291</sup>

The executive branch's use of adjudicative procedures to test and value claims for widespread harm is not unusual either. In fact, scholars and executive agencies have recommended similar "randomized law" approaches to improve other kinds of policymaking,<sup>292</sup> and the FCSC itself now routinely permits parties to submit claims well in advance of a national lump-sum settlement. There may not, however, always be time or resources to validate every independent claim for relief before the President. Randomized trials used in combination with individual assessment may improve the accuracy and legitimacy of executive decisionmaking in a presidential settlement.

To be sure, an accurate valuation alone does not ensure that a presidential administration will obtain that amount in a negotiation. But by adopting such procedures in presidential settlements, administrations can take steps to avoid inadvertently undercompensating victims while also buttressing the legitimacy of large lump-sum agreements.

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Presidents should not have to adhere rigidly to rules created in complex litigation to resolve mass compensation claims. Settlements brokered by executive branch officials vary substantially and should be afforded more latitude based on three factors: (a) the value of individual claims covered by the settlement; (b) the diversity of interests in the settlement; and (c) the extent to which the settlement forecloses private litigation.<sup>293</sup> The variety,

<sup>291</sup> See *supra* note 149 and accompanying text.

<sup>292</sup> See, e.g., Michael Abramowicz, Ian Ayres & Yair Listokin, *Randomizing Law*, 159 U. PA. L. REV. 929, 937-38 (2011) (arguing that policymakers and governments should test laws and regulations with randomized trials); cf., e.g., D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118, 2175 (2012) (calling for randomized control trials to provide credible answers to legal aid policy questions). More recently, after facing a backlog of hundreds of thousands of claims, the Office of Medicare Hearings and Appeals launched a new pilot program, the Statistical Sampling Initiative. See U.S. DEP'T OF HEALTH & HUMAN SERVS., *Statistical Sampling Initiative*, HHS.GOV, [http://www.hhs.gov/omha/OMHA%20Statistical%20Sampling/statistical\\_sampling\\_initiative.html](http://www.hhs.gov/omha/OMHA%20Statistical%20Sampling/statistical_sampling_initiative.html) (last visited Mar. 20, 2015), archived at <http://perma.cc/LD6X-XHQA>. The program allows hospitals, medical services, and other contractors with large groups of claims for reimbursement to use statistical sampling in Medicare hearings. After meeting with an "experienced statistical expert," the claimant would draw a random sample from a universe of common claims, try them before an administrative law judge, and extrapolate the sample's results to the entire universe of their claims. *Id.*

<sup>293</sup> Adam S. Zimmerman, *The Corrective Justice State*, 5 J. TORT L. 189, 219-20 (2012).

value, and preclusive impact of a presidential settlement should similarly dictate how executive officers provide “interest group” representation, police against conflicts of interest, and evaluate claims.<sup>294</sup> When presidential settlements seek largely injunctive and prospective reforms, like settlements involving labor disputes, they need not include stakeholders or evaluate claim values with the same rigor as those that primarily seek damages retrospectively, such as settlements compensating for lost insurance policies, wrongful foreclosure, personal injury, or death. Presidents also deserve more flexibility and discretion in mass settlements as claim values shrink, injuries become uniform, and when other forms of relief like private class actions can protect absent parties’ interests.

Unlike class representatives who resolve absent parties’ lawsuits without their express consent, presidents deserve more latitude to structure settlements as elected representatives who derive their powers from the “consent of the governed”<sup>295</sup>—that is, they win democratic elections to resolve nationwide problems. But democratic elections alone will not ensure that executive officials adequately balance the public interest against the needs of individual victims of mass harm. As discussed below, however, best practices from complex litigation can improve the way that executive officials compensate large groups of people, while ensuring a public process to hold the President accountable.

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<sup>294</sup> Drawing distinctions based on value, variability, and preclusion is consistent with existing principles of complex litigation. *See, e.g.*, PRINCIPLES OF THE LAW, *supra* note 252, § 2.04(c) (suggesting courts “authorize aggregate treatment of common issues concerning an indivisible remedy . . . even though additional divisible remedies are also available that warrant individual treatment or aggregate treatment with the opportunity of claimants to exclude themselves”); Elizabeth Chamblee Burch, *Adequately Representing Groups*, 81 FORDHAM L. REV. 3043, 3044 (2013) (“When the underlying right arises from an aggregate harm—a harm that affects a group of people equally and collectively—and demands an indivisible remedy, courts should tolerate greater conflicts among group members when evaluating a subsequent claim of inadequate representation.”); Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 TEX. INT’L L.J. 135, 149 (1999) (describing consumer class actions as “providing an indispensable mechanism for aggregating claims when the individual stake is low and the similarity of the challenged conduct is high”); Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1065 (2002) (describing the opt-out right for class members as “a recognition of at least a formal right to litigant autonomy in cases that could plausibly be cast as stand-alone claims for recompense”).

<sup>295</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see also* Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 988 (1997) (noting that scholars and the judiciary have looked to the President to “supply the elusive essence of democratic legitimation”).

#### IV. THE PRESIDENT AS “SETTLER-IN-CHIEF”

Over time, presidents have used the “bully pulpit,” foreign diplomacy, and special task forces to assume an increasingly prominent role in settling massive claims to compensate large groups of people. In so doing, presidents have struggled with many of the same structural concerns as class actions—balancing individual and group interests in participation, addressing potential conflicts of interest, and gathering information about the value of the settlement. But reimagining the President as a “settler-in-chief,” subject to complicated rules developed in litigation, raises thorny questions for those interested in the management of presidential power. How far may Congress regulate presidential settlements without violating the separation of powers? When the coordinate branches cannot play a role, is it possible that a political office like the presidency can itself adopt ad hoc rules developed by courts to resolve “cases and controversies?”

Although Congress cannot regulate the President’s deliberations and conversations in crafting a massive settlement, countervailing separation-of-powers concerns require some kind of regulation to preserve Congress’s traditional “power of the purse” to spend and distribute money.<sup>296</sup> And even when Congress and the courts lack the ability to intervene, presidents may still want to constrain themselves when implementing large settlements to increase consistency, efficiency, and public confidence in their operation. For these reasons, complex litigation principles offer much needed guidance on how to settle disputes fairly. Adopting such guidelines may also impose an important political constraint—providing a guide to assess the chief executive’s execution of high-profile mass settlements in the court of public opinion.

##### A. *Can Congress Regulate the Settler-in-Chief?*

Any attempt by Congress or the courts to regulate the design of presidential compensation agreements raises deep separation-of-powers concerns. Those concerns may be aggravated by the different kinds of conflicts the President may experience with claimants who depend on the chief executive for relief. In all of the presidential settlements discussed here—from the Jay Treaty to the Pan Am settlement—one could argue that the President could have justifiably ignored claimants’ interests in victim compensation to serve a much more important national goal. In some cases,

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<sup>296</sup> See *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) (observing that Congress’s Appropriations Clause power of the purse “was intended as a restriction upon the disbursing authority of the Executive department . . .”).

it may be entirely appropriate for presidential administrations to settle for less than claimants deserve, to overlook potential conflicts of interest, or to agree to a payment process that fails to recognize important differences between claims. That is to say, there will be times when the President should be allowed to place the national interest over the interests of private groups of claimants in negotiations with foreign states and organizations.

Moreover, Congress may not be able to pass laws that constrain the type of internal executive decisionmaking that leads to some settlements. Congress ordinarily cannot regulate the way that the President consults with advisors, interest groups, and parties to forge a large settlement without raising fundamental separation-of-powers concerns. The Federal Advisory Committee Act (FACA),<sup>297</sup> for example, was designed to regulate presidential meetings with different stakeholders and contains many of the same rules used in complex litigation described above. Among other things, FACA requires that special advisory committees used by the President open their meetings, hear from interest groups with contrasting views, and release minutes, records, and reports to the public.<sup>298</sup> The Supreme Court and the D.C. Circuit, however, have sharply limited the Act's application to the President and Vice President in light of separation-of-powers concerns.<sup>299</sup>

But there is reason to question whether the Constitution actually grants the executive branch unfettered discretion over large monetary settlements.<sup>300</sup> While the initial decisions to settle diplomatic claims, resolve labor disputes in national emergencies, or charge a party for violating the law are arguably tied to the President's duty to "take Care that the Laws be faithfully executed,"<sup>301</sup> one can certainly dispute whether the goal of mass compensation falls under the "special province of the

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<sup>297</sup> 5 U.S.C. app. §§ 2-16 (2012).

<sup>298</sup> *Id.* § 10.

<sup>299</sup> *In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005) (noting the "severe separation-of-powers problems"); *Freedom Watch, Inc. v. Obama*, 807 F. Supp. 2d 28, 36 (D.D.C. 2011) ("[T]he Supreme Court and D.C. Circuit have both suggested that applying the FACA to allow a plaintiff to obtain communications between the President and his advisors may be unconstitutional."); *see also* *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466 (1989) (worrying about "formidable constitutional difficulties" surrounding FACA).

<sup>300</sup> *See In re Sealed Case*, 838 F.2d 476, 524 n.19 (D.C. Cir. 1988) (Ginsburg, J., dissenting) ("[I]t is far from evident that the duty to 'take Care' was intended to establish unbridled authority in the President and his men. More plausibly, the words were meant to import a limitation . . ."). *But see* William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 484 (1989) (asserting that Article II, section 3, clause 4 "gave the President sole possession of the prosecutorial function").

<sup>301</sup> U.S. CONST. art. II, § 3, cl. 4.

Executive Branch.”<sup>302</sup> Because Congress traditionally controls the “power of the purse,” federal laws often require executive agencies to avoid spending funds without congressional approval and to deposit any fines or other monies “collected” into the general Treasury account.<sup>303</sup> Thus, notwithstanding the long history of presidential settlements, one could argue that Congress does indeed have the power to regulate larger questions involving how to distribute victim compensation in a large presidential settlement.

As a practical matter, however, Congress likely could not design laws that anticipate every settlement forged by a future President. Even when Congress has attempted to do so in specific laws—such as through Taft–Hartley’s requirement that the Federal Mediation and Conciliation Service hear labor disputes that “imperil the national health or safety”<sup>304</sup>—history shows that presidents can sidestep those laws when new unanticipated national crises arise. Perhaps this phenomenon reflects a problem with settlements generally—all of which operate in the “shadow of the law.”<sup>305</sup> Presidential settlements raise vexing executive-powers concerns precisely because they, almost by definition, sit in what Justice Jackson famously called the “zone of twilight”—because Congress rarely has the foresight to authorize or bar expressly the President’s creative resolution of a massive dispute.<sup>306</sup>

This is not to say that these separation-of-powers problems are insurmountable. First, Congress can ratify, reject, or modify presidential

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<sup>302</sup> Heckler v. Chaney, 470 U.S. 821, 832 (1985).

<sup>303</sup> See 31 U.S.C. § 1341(a) (2012) (limiting spending); *id.* § 3302(b) (requiring deposit). Notably, such laws do not specifically cover occasions, like those described here, in which the President or a federal agency orchestrates a settlement with a defendant. See, e.g., Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 BYU L. REV. 327, 342-47 (describing the executive branch’s “sweeping” authority to settle cases). But to the extent that restitution serves to punish large corporate defendants, such as BP, as a fine, it is traditionally Congress’s prerogative to decide penalties for criminal violations. See *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (“The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.”).

<sup>304</sup> Labor Management Relations Act, 1947, ch. 120, § 206, 61 Stat. 136, 155 (codified at 29 U.S.C. § 176 (2012)).

<sup>305</sup> Cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968-69 (1979) (explaining that legal rules facilitate bargaining by giving each party information about what would happen if bargaining failed); see also Robert Cooter & Stephen Marks with Robert Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 228-29 (1982) (explaining bargaining in the shadow of the law).

<sup>306</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

agreements after the fact. Congress has done just that in analogous settlements involving claims of government discrimination against African-American farmers—passing spending legislation that gave effect to a multibillion dollar settlement reached by the Obama administration in federal court, while modifying provisions for attorneys' fees.<sup>307</sup> Such a practice would mark a return, of sorts, to Congress's more active involvement in the implementation of international claim settlements.<sup>308</sup> But those measures are still limited because the most important negotiations over the structure, value, and implementation of the settlement will occur outside the halls of Congress, in the White House.

Second, Congress or the President could deposit the proceeds of any presidential settlement in an Article III or Article I court, which would then manage and oversee the distribution process, as discussed in Part III. I have argued that other executive actors should resist settling large cases involving money when other civil tools exist to distribute funds because of similar separation-of-powers concerns.<sup>309</sup> Similarly, presidential involvement may be less desirable when class actions can perform the same salutary role as a presidential settlement, but are subject to more court oversight to hear claimants, police conflicts of interest, and evaluate individual claims.<sup>310</sup> Of course, such a remedy assumes that parties have begun, or can quickly begin, a class action, bankruptcy, or other proceeding capable of formally handling the distribution process, which will not always be the case.<sup>311</sup>

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<sup>307</sup> See Claims Resolution Act of 2010, Pub. L. No. 111-291, § 201, 124 Stat. 3064, 3070 (providing \$1.15 billion to fund the settlement of *In re Black Farmers Discrimination Litigation*).

<sup>308</sup> See *supra* notes 71-73 and accompanying text.

<sup>309</sup> See Zimmerman & Jaros, *supra* note 29, at 1434-36; Zimmerman, *supra* note 29, at 557.

<sup>310</sup> See, e.g., FED. R. CIV. P. 23(g)(1)(A) (articulating the factors that a court must consider when appointing class counsel). Courts can also play a role in policing the boundaries of presidential settlements by limiting the precedential impact of large settlements brokered with presidential involvement. Some have suggested courts did just that in the massive bankruptcy cases involving Lehman Brothers and Chrysler. See Skeel, *supra* note 273, at 645-46 ("As these cases make clear, even when courts accede to the executive's wishes during a crisis, the manner in which they do so is profoundly important.").

<sup>311</sup> For example, when many different state laws apply to a business that commits nationwide fraud, attorneys may not be able to certify a class action. See, e.g., *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1018 (7th Cir. 2002) ("Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable."); *Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 311 (5th Cir. 2000) (explaining that if the law of fifty-one jurisdictions applies, then the variations in the jurisdictional law "may swamp any common issues and defeat predominance" (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996))). By contrast, the President may be able to coordinate compensation for many different people under a uniform, federal regulatory scheme, like the Oil Pollution Act of 1990. See Pub. L. No. 101-380, § 1013, 104 Stat. 484, 501 (codified as amended at 33 U.S.C. § 2713 (2012)) (providing such a claims procedure).

Accordingly, there will be times, particularly in foreign crises, national emergencies, and coordinated federal and state enforcement efforts, when the President is the only actor capable of resolving mass disputes regarding compensation. But all is not lost. In such cases, presidents may adopt complex litigation principles as “internal guidelines” and “best practices.” While these measures present their own problems, as described in the next Section, they may provide a framework for the executive, the coordinate branches of government, and the public to evaluate the design and fairness of future presidential settlements.

### B. *Can the Settler-in-Chief Regulate Himself?*

If Congress cannot always constrain the President, the next question is whether the President can voluntarily limit his own power as settler-in-chief. At first blush, the executive branch seems like a challenging place to implement procedures developed over the years by courts to resolve mass disputes. In an idealized court setting, neutral, life-tenured judges decide “cases and controversies” by applying existing rules to facts developed through an adversarial system to produce a binding judgment.<sup>312</sup> By contrast, the President and the people that surround that office seek broad policy goals through political influence, without the constraints of a factual record or binding precedent, with an eye toward the next election cycle.<sup>313</sup> Some have even provocatively argued that legal restraints on the modern American presidency have been so ineffective that the President is completely “unbound” by law.<sup>314</sup> If we could convince the President to adopt rules to constrain his power as settler-in-chief, would they have any force, or would he abandon them at the first sign of another crisis?

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<sup>312</sup> See STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM* 38 (1984) (discussing zealous advocacy); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 383 (1978) (describing how the adversarial system ensures the integrity of the adjudicative process). *But see* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1313-14 (1976) (arguing that litigation is increasingly less about individual cases between parties and more about applying public policy to a particular situation).

<sup>313</sup> Neil Scott Cole, *Pursuing the President: White House Access and Organized Interests*, 37 SOC. SCI. J. 285, 290-91 (2000) (examining the impact of elite interest groups on presidential power and criticizing the influence of interest groups as undemocratic); Orman, *supra* note 268, at 787 (endorsing the idea that “[i]nterest group activity to lobby the President has become a virtually permanent feature of the modern presidency since Franklin Roosevelt” (internal quotation marks omitted)).

<sup>314</sup> *Cf.* ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 5 (2010) (critiquing the view of legal liberals that the President is “unbound” by law).

Although the President makes political judgments that impact how the White House sets and implements policy, the President has often voluntarily decided to follow a number of internal checks and balances.<sup>315</sup> The President consults with separate internal divisions whose task is to interpret law.<sup>316</sup> The President develops sophisticated projections for new policies through peer review.<sup>317</sup> Budget projections and policy decisions are often divided among specialized departments.<sup>318</sup> The modern presidency has access to, and may be constrained by, rules, norms, and resources, much like judges in large settlements, who rely on special masters, court-appointed experts, and other government entities to evaluate sprawling deals that impact the public interest.<sup>319</sup>

And those kinds of bureaucratic constraints may be desirable, even in a crisis. Many observe that agencies in the executive branch make more accountable decisions when, in addition to political constraints, they are given independence, expert advice, and representative input.<sup>320</sup> Those

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<sup>315</sup> Other commentators have made similar arguments. See, e.g., Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 U. CHI. L. REV. 777, 795-99 (2012) (reviewing POSNER & VERMEULE, *supra* note 314) (suggesting that the President is constrained even in the national security context); see also Pildes, *supra* note 19, at 1407 (describing reasons for the executive to comply with the law); Saikrishna B. Prakash & Michael D. Ramsey, *The Goldilocks Executive*, 90 TEX. L. REV. 973, 985-95 (2012) (reviewing POSNER & VERMEULE, *supra* note 314) (examining constraints on the President, including the Constitution, Congress, the courts, public opinion, party politics, and the President's belief that the President is constrained by law).

<sup>316</sup> The President relies on OLC to provide legal interpretations of statutes, precedent, and practice to guide the President on constitutional issues that rarely find their way to a federal courthouse. Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1498 (2010) (describing how OLC's legal decisions create a "body of executive power precedents"); see also Koh, *supra* note 165, at 734 (arguing that government bureaucracies adopt "standard operating procedures" that foster default patterns of "habitual compliance" with international legal rules when the President enters into international agreements).

<sup>317</sup> For example, the Office of Management and Budget has implemented the Information Quality Act, Pub. L. No. 106-554 app. C, § 515, 114 Stat. 2763, 2763A-153 to -154 (2000), providing for review of information produced by the executive branch. See Proposed Bulletin on Peer Review and Information Quality, 68 Fed. Reg. 54,023, 54,024 (proposed Sept. 15, 2003) (requesting comments on an Office of Management and Budget proposal to issue new guidelines that will realize the "benefits of meaningful peer review of the most important science disseminated by the Federal Government regarding regulatory topics").

<sup>318</sup> Cf., e.g., Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2321-22 (2006) (recommending internal checks on the unitary executive to constrain the executive).

<sup>319</sup> See *supra* note 277 and accompanying text.

<sup>320</sup> See Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2076-83 (2005) (observing that frequent elections do not necessarily provide agency accountability); Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 613-22 (1989) (discussing originalist perspectives on presidential accountability); Matthew C. Stephenson, *Optimal Political Control of*

arguments apply with particular force to one-off “agencies for the situation,” like large settlement agreements brokered by presidents. This is because voters’ “unbundled” preferences in a distant election likely will not make the President pay a high political price for a single bad settlement fund or program.<sup>321</sup> Political solutions, while effective, cannot alone ensure that government actors make decisions that are accountable to the narrow and discrete constituencies involved in a mass disaster or a mass settlement.<sup>322</sup>

As explained in Part I, the problem with the settler-in-chief is not that the White House is a *poor* place to resolve disputes or that the presidency lacks *constraints* on how it settles cases. The problem is that presidential settlements have yet to strike the appropriate balance between open political processes and adjudicative processes that offer formal procedures to evaluate the merits of different parties’ claims for relief. By contrast, complex litigation has long attempted to offer a combination of political processes (notice, interest group representation, fairness hearings) and traditional adjudicative processes (controlled fact-finding, adversarial procedures, and expert testimony) that balance interests in fair and efficient groupwide compensation against broader regulatory concerns.<sup>323</sup>

Presidents may actually prefer traditional complex litigation techniques for political reasons. Randomized trials, sampling, and formal procedures to improve participation may lend legitimacy to difficult political and distribution decisions raised in any mass settlement. Those same complex litigation principles may also provide the White House with more information about how to value and structure a massive settlement. Most important, perhaps, the President may prefer to shift blame for any

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*the Bureaucracy*, 107 MICH. L. REV. 53, 56-58 (2008) (noting that some scholars believe that bureaucratic autonomy is necessary to preserve expertise and accountability).

<sup>321</sup> See Farina, *supra* note 295, at 997-98 (arguing that voters experience a “bundling problem” because they must accept or reject all of the President’s policies when they vote); Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1160 (2010) (explaining that it is difficult to hold the President accountable given low-information voters, infrequent elections, and broad issue agendas).

<sup>322</sup> Cf. Issacharoff, *supra* note 48, at 375 (arguing that Rule 23(b)(2) class actions protect minority interests in a democracy from the “political disregard” of the majority); Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 FORDHAM L. REV. 3165, 3183 (2013) [hereinafter Issacharoff, *The Governance Problem*] (“Presumably class counsel selected on the basis of an economic commitment to maximize financial returns to the class will be especially likely to succumb to the cross-cutting incentives in any principle-agent relationship.”).

<sup>323</sup> See, e.g., David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953-1980*, 90 WASH. U. L. REV. 587, 591 (2013) (arguing that framers of the modern class action rules “used a pragmatic balancing strategy” to promote optimal regulation without undermining the “federal judiciary’s institutional integrity” to resolve mass disputes).

problems with the settlement process to an independent adjudicator or arbitrator.<sup>324</sup>

Complex litigation procedures may also offer one final, side-benefit—providing a guide to assess the chief executive’s execution of high profile mass settlements in the court of public opinion. Political accountability alone will not ensure that a settlement works well. But “sunlight,” in combination with the other procedures described in this Article, may impact the growth of executive power that often accompanies large restitution programs. At a minimum, acknowledging that mass executive settlements raise the same challenges as mass litigation may discourage the President from entering into settlements without assistance—and political cover—from the coordinate branches.<sup>325</sup>

The rise of executive branch class actions requires that scholars rethink the consequences of mass settlements on our separation of powers. As the Supreme Court cuts back on class actions and other court-based tools to join similar legal claims, many commentators—including myself—have looked to harness executive power to compensate large groups of people through state attorneys general actions, agency restitution settlements, and criminal restitution agreements.<sup>326</sup> The history of presidential compensation programs, however, illustrates that many of those same programs have paralleled an expansion of executive power. The result has been that executive officers in the White House are sometimes placed in the unique position of providing mass compensation without even the very basic

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<sup>324</sup> For a thoughtful discussion about the political incentives that may lead the President to limit, and thus, legitimize the President’s power to delegate control over risky initiatives, see Jacob E. Gersen & Adriane Vermeule, Essay, *Delegating to Enemies*, 112 COLUM. L. REV. 2193, 2210-11 (2012), which describes the phenomenon of “blame-shifting.” Kenneth Feinberg pointedly observed that the Bush administration’s decision to appoint him, a former chief-of-staff to a political adversary, Senator Ted Kennedy, to oversee the September 11th Victim Compensation Fund reflected an effort by the President to distance himself from the political risks involved in the distribution process. KENNETH R. FEINBERG, WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11, at 27 (2005) (“The last thing you want is a buddy of the president’s in that job.” (quoting then-Senator Chuck Hagel)).

<sup>325</sup> Cf. Bradley & Morrison, *supra* note 35, at 415 (noting that when judicial review is not a realistic option, “interactions between the political branches will, as a practical matter, determine the separation of powers”).

<sup>326</sup> Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 630 (2012) (recommending that state attorneys general “make broad use of their *parens patriae* authority . . . to represent the interests of their citizens in the very consumer, antitrust, wage-and-hour, and other cases that have long provided the staple of class action practice”); Zimmerman, *supra* note 29, at 505 (“[P]ublic agencies can and should compensate victims of widespread harm.”); see also Zimmerman & Jaros, *supra* note 29, at 1419 (comparing criminal restitution funds to class actions and finding that they have some advantages when “there are legal or practical obstacles to a civil class action”).

procedural safeguards that exist in complex litigation to ensure that they get it right. While we may never know the precise causal link between presidential compensation settlements and the expansion of executive power, the two appear closely correlated, and we should take care to ensure victims are not caught in the crossfire of larger institutional battles over the proper boundaries of executive authority.

#### CONCLUSION

Many have complained that courts overseeing large mass settlements have stretched the boundaries of their competence, ignored important conflicts of interest, and overstepped their judicial power.<sup>327</sup> But perhaps it should come as no surprise those problems surface when other public actors must balance individual, collective, and state interests in a just outcome.<sup>328</sup> Just as critics complain about “activist” judges in mass disputes, officials in the executive branch open themselves to an analogous complaint when they press against the boundaries of executive authority by adjudicating claims of mass harm. This dynamic does not mean that the government should abandon efforts to respond to large crises that impact public and private interests. But it may mean that more attuned procedures are required to encourage the coordinate branches to police each other, while protecting individual complainants who depend on the government for relief from mass harm.<sup>329</sup> It may also require greater attentiveness to the separation-of-powers issues created by this unique—but increasingly commonplace—exercise of executive power.

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<sup>327</sup> See, e.g., Donald G. Gifford, *The Constitutional Bounding of Adjudication: A Fuller(ian) Explanation for the Supreme Court's Mass Tort Jurisprudence*, 44 ARIZ. ST. L.J. 1109, 1154-56 (2012) (describing how recent court decisions on regulatory issues have impacted the separation of powers between the branches); James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 HOFSTRA L. REV. 329, 338 (2005) (“In exercising these extraordinary powers, courts arguably exceed the legitimate limits of both their authority and their competence.”).

<sup>328</sup> See WEINSTEIN, *supra* note 254, at 3 (“How can each person obtain [in a mass litigation] the respect that his or her individuality and personal needs should command in an egalitarian democracy such as ours?”).

<sup>329</sup> Cf. Issacharoff, *The Governance Problem*, *supra* note 322, at 3183 (discussing agency costs and stating that the solution “should not be a rejection of the need for representative actions altogether, but greater attention to the management and diminution of agency cost in class representation”).