REWARDING TERRORISM

> Medieval international law abounds with picturesque incidents culminating in treaties which were concluded under duress and disregarded if possible at the earliest opportunity on the excuse of duress.
>
> Georg Schwarzenberger, 1955[1]

The Hostage Accords with Iran were entered into by the Carter Administration in its closing days. In exchange for the transfer of the 52 American hostages, the United States agreed to freeze the property of the former Shah, to revoke all trade sanctions with Iran, to withdraw its case from the World Court, to transfer the frozen Iranian assets out of the country, to terminate claims against Iran pending in U.S. courts, to transfer all such claims to an international arbitral tribunal (whose decisions would be funded by an escrow account), and to terminate various claims of all hostages and related parties against Iran.

The accords, international executive agreements, were implemented by executive orders and Treasury regulations. The Reagan Administration reviewed the Accords and, without determining their legality under international law, refused to renounce them. The Supreme Court in *Dames & Moore*, where a commercial claimant challenged the legality of the Accords, upheld them under constitutional law. It held that the President had (1) sufficient authority delegated to him by the Congress to nullify existing court attachments and to transfer the Iranian assets out of the United States, and (2) to "suspend" commercial claims in U.S. courts and transfer them and other claims to the international arbitral tribunal in the Hague.

The Hostage Accords, their negotiation and implementation, raise questions concerning international law, constitutional law, and foreign policy.[2] Specifically, questions arise, among others, concerning the validity of the accords under international and constitutional law, of foreign policy relating to the authority of the President, and of renouncing the Accords as a

matter of foreign policy. We have had both an Administrative review and a Supreme Court decision; yet, these three questions have not been satisfactorily assessed, let alone answered.

The Hostage Accords and International Law

Article 52 of the 1969 Vienna Convention on the Law of Treaties declares that, "A treaty is void if its conclusion had been procured by the threat or use of force in violation of the principles of law embodied in the Charter of the United Nations."[3] The "Final Act" of the 1969 Vienna Conference, attached to the text of the convention, "Condemns the threat or use of pressure in any form, whether military, political or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent."

While many states question whether the use of nonmilitary force in the treaty-making process vitiates the validity of a treaty, there is unanimous agreement that the use of military force to coerce the conclusion of a treaty voids the treaty. But what constitutes "military force?"

In 1974, subsequent to the completion of the Vienna Convention, the General Assembly of the United Nations adopted the historical resolution on defining aggression[4] after generations of efforts, including those efforts in the old League of Nations during the interwar period. The resolution declares "aggression" to be the use of armed force. In particular, the resolution defines aggression as the use of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state, as well as the use of any weapons against the territory of another state, or an attack on the Marines or armed forces of a state. The language of the resolution declares further that the enumeration of acts in it is not exhaustive.

The use of Iranian irregulars to attack U.S. diplomatic territory, American diplomats, and military personnel falls squarely within the proscribed behavior. Such behavior also amounts to the violation of one of the oldest recognized principles of traditional international law governing diplomatic relations, as embodied in the Vienna Convention on Diplomatic Relations.[5] The conclusion of illegality is buttressed further by the pronouncements made by the Security Council[6] and of the International Court of Justice[7] concerning the hostages during their captivity.

While technical international legal arguments and other considerations undoubtedly may be raised challenging the conclusions of illegality under international law, they ought not to obscure the gross violation of a core principle of treaty law by Iran.

The traditional doctrine prior to World War II declared that the validity of a treaty is not affected by the fact that it was brought about by the threat or use of military force.[8] This was so, even though the law of war, as it had developed by that time, generally outlawed the aggressive use of military force. There

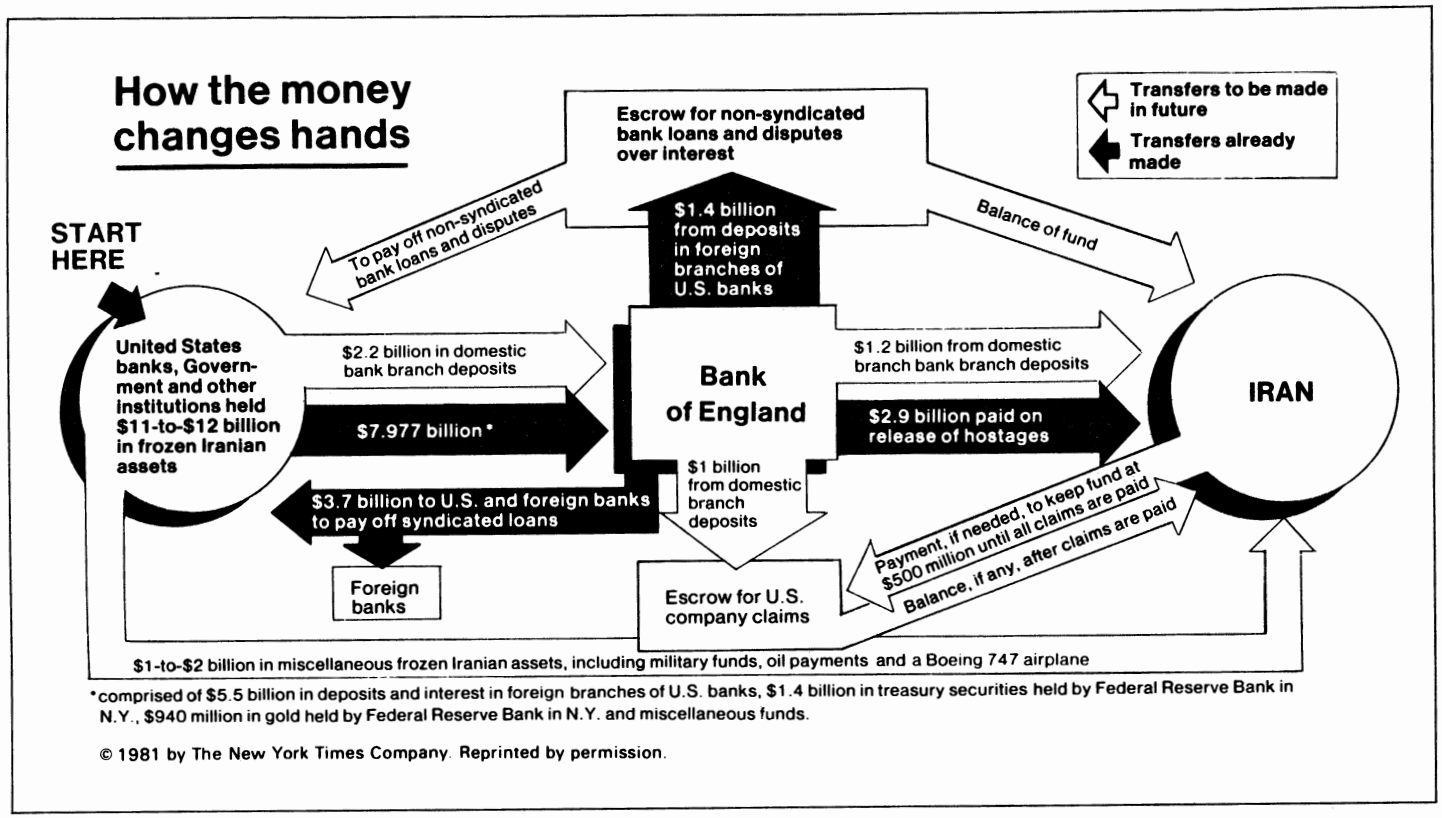
How the money changes hands
Transfers to be made in future
Transfers already made
Escrow for non-syndicated bank loans and disputes over interest
To pay off non-syndicated bank loans and disputes
$1.4 billion from deposits in foreign branches of U.S. banks
Balance of fund
START HERE
United States banks, Government and other institutions held $11-to-$12 billion in frozen Iranian assets
$2.2 billion in domestic bank branch deposits
$7.977 billion*
Bank of England
$1.2 billion from domestic branch bank branch deposits
$2.9 billion paid on release of hostages
IRAN
$1 billion from domestic branch deposits
$3.7 billion to U.S. and foreign banks to pay off syndicated loans
Foreign banks
Escrow for U.S. company claims
Payment, if needed, to keep fund at $500 million until all claims are paid
Balance, if any, after claims are paid
$1-to-$2 billion in miscellaneous frozen Iranian assets, including military funds, oil payments and a Boeing 747 airplane
*comprised of $5.5 billion in deposits and interest in foreign branches of U.S. banks, $1.4 billion in treasury securities held by Federal Reserve Bank in N.Y., $940 million in gold held by Federal Reserve Bank in N.Y. and miscellaneous funds.
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Figure 1

existed a paradox between the law of war and the law of treaties. Aggressive wars were unlawful; however, if the aggressor was successful, the resulting treaty imposed on the vanquished was valid. The treaty was to be observed under the rule *pacta sunt servanda* (treaties are to be served in good faith).

The archetype of behavior sanctioned by treaty law in the interwar era is exemplified by the morally bankrupt, but then lawful, behavior of the Western democracies in imposing a "just settlement" on Czechoslovakia. Article 52 of the Vienna Convention on the Law of Treaties, in contrast, represents a conscientious decision to reject the use of dictatorial procedures to conclude agreements. It is not that the actual terms of an imposed agreement are necessarily objectionable; they may not be. But it is the dictatorial procedures which are objectionable. Dictation of an agreement provides little respite from wars, since such dictation inevitably ferments into new hostility. The change of military balance makes war over an imposed agreement almost inevitable.[9] Iraq's renunciation, in early 1981, of its 1975 agreement with Iran as being imposed, and the immediate commencement of its border war,[10] and the similar situation between Ecuador and Peru also in 1981, offer only the most recent examples of the inherent instability of such agreements.[11] The current rule favors the proper conclusion of treaties to help ensure that they will be observed, regardless of changing military fortunes of a particular state, by removing a pretext for not observing them.

Article 52 of the 1969 Vienna Convention must be read in conjunction with Article 75, which states, the convention is "without prejudice to any obligation in relation to a treaty which may arise from an aggressor state in consequences of measures taken in conformity with the Charter of the United Nations *with reference to that State's aggression*." (Emphasis added.) A treaty may not be imposed by an aggressor on a victim of aggression; however, a victim of aggression may impose an agreement with reference to that state's aggression. That is, if a state is illegally attacked, but it is successful in defeating the attacking state, and it imposes a peace treaty on that state, it is a valid treaty. But, if the attacking state is successful, and it imposes a peace treaty on the victim, that peace treaty is void. Articles 52 and 75 void agreements resulting from the aggressive use of force.

Thus, treaty law, as now developed, is complementary to the law of war as proclaimed in the U.N. Charter — Articles 2 (4) and 51. This is precisely the result that the United States desired in the 1968-1969 Vienna Convention. It removes the anomaly between treaty law and the law of war as it existed in the interwar period. Now, the aggressive use of force in both the law of war *and* treaty law is illegal. The 1969 Vienna Convention makes explicit the rule of treaty law only implicit in the U.N. Charter of 1945. That is, the Charter expressly prohibits the use of military force except for individual and collective self-defense, but there is no explicit formulation of a corresponding rule of treaty law concerning the use of military force. An express statement of such a rule was only accepted by the international community in 1969 in Articles 52 and 75.

Articles 52 and 75 remove the inconsistence between the rules of treaty law and domestic law, common sense and morality concerning the illegal use of force and the resulting validity of agreements. Almost all, if not all, domestic legal systems worldwide invalidate contracts brought about by the threat or use of physical coercion. Treaty law is more consistent now with basic precepts of all developed legal systems.

The rule of law against the use of force in treaty law is based upon the principle of sovereign equality, its derivative rule of state consent and the prohibition against the use of force. The rule requires actual state consent and refuses generally to recognize a legal fiction as a basis of valid treaty obligation, that is, a victim of aggressive military force consents to a treaty imposed upon it. The rule against the use of force in the treaty-making process exists independent of the language in Article 52. The International Court of Justice expressly recognized this rule in the *Fisheries Jurisdiction Case* in 1973. It states, "There can be little doubt, as *implied* in the Charter of the United Nations and *recognized* in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary law *an agreement concluded under the threat or use of force is void.*"[12] (Emphasis added.)

The U.S. Memorial to the World Court, filed in 1979, states:

> The Government of Iran, or persons acting with its support and approval, are holding United States citizens as hostages . . . in order to coerce the United States into taking actions which the United States has no international legal obligation to take. This exercise of coercion is in violation of Iran's obligation under the Charter of the United Nations, particularly Article 2, paragraphs 3 and 4, and Article 33.[13]

Immediately after President Reagan's inauguration, the State Department conducted a review of the accords to determine U.S. obligations under international law, in light of the "extraordinary conditions under which they were negotiated." However, the State Department did not consider questions of relevance to future policy, which had "no practical bearing" on implementing the agreements. The purpose of this article is to so consider such questions of policy as they bear upon the continued implementation of the agreements. In fact, the State Department's announcement of nonrenunciation of February 1981 declares that: "We do not find it necessary to reach a conclusion as to the legally binding law."[14] Thus, perhaps the question was left to be answered at a later date by the Reagan Administration, when political events[15] may portend a legal position more akin to legal objectivity, proper policy and that implied in the U.S. submission to the World Courts.

Both Warren Christopher and Lloyd Cutler, former Carter Administration officials, in the *Wall Street Journal*, and Lloyd Cutler, again, in the *American Bar Association Journal*,[16] contend it was the United States which repelled the Iranian aggression by economic, political, and legal measures and, therefore, the Accords are lawful under international law. Unfortunately for Christopher and Cutler, memory of what actually occurred is too fresh for such astonishing

sophistry to be accepted. Their central assertion that the Accords are valid under international law is patently ridiculous. They assert that the Iranian aggression was "repelled by defensive counterforce allowed by the U.N. Charter," and the United States coerced Iran "into signing an agreement requiring . . . [it] to surrender the fruits of aggression." While such an assertion would probably not be made even by revisionist historians long after this event, it is incredible that it is proffered currently by two lawyers of some repute. It is clear to all, except, perhaps, a few former Carter officials, that the Hostage Agreements would not have been entered into by the U.S. had it not been for the illegal seizure of the American Embassy and hostages. After all, it was American aircraft and dead servicemen which were left on the desert floor. It was the United States Embassy, American diplomatic personnel, and U.S. Marine guards that were held captive during the negotiations leading to the signing of the Hostage Agreements. Warren Christopher's and the State Department's own legal adviser, Roberts Owen, argued before the World Court that the government of Iran was attempting "to coerce the United States" into taking actions, which it had no international obligation to take, and such exercise of coercion was in violation of the U.N. Charter.

Neither Christopher nor Cutler, nor the former legal adviser, were trained or had substantial experience in either foreign affairs or international law prior to their appointments. Perhaps the general tendency of administrations appointing corporate lawyers to high positions in the foreign policy field will now be reassessed in light of these totally unfounded and self-serving assertions. International law, foreign policy and an appreciation of national security interests are simply not subject to quick mastery, even by the most astute individuals, be they lawyers or otherwise. The interplay of law (constitutional and international) and foreign policy as an area of expertise is as far removed from the daily world of the Wall Street bond or securities lawyer, as is the world of the Wall Street Brahman from the small-town practitioner. One, therefore, may explain away Christopher's and Cutler's failure to understand the legal and foreign policy issues involved. Less excusable is the casuistry which allowed them to describe Iranian aggression as American coercion, thus converting an illegal agreement into a lawful one.

The Hostage Accords and Constitutional Law

The Supreme Court, in its decision on the Iranian hostage agreements, *Dames & Moore v. Regan* (1981), failed to treat the central question of the validity of the hostage agreements under international law and, consequently, validated the proposed transfer of billions of dollars out of the United States. It failed totally even to identify this issue, let alone analyze it.[17] The Court spent all of its efforts assessing only whether the implementing orders and Treasury regulations were properly within the President's delegated authority, despite the fact that the Chief Justice raised the issue of duress under general international law, not once, but twice during oral arguments.

Only in passing did the Supreme Court even implicitly acknowledge the genesis of the litigation, by merely stating: ". . . [that] the Iranian hostage-taking violated international law and common decency. . . ." The Court did not pass upon the question of whether the agreements violated international law or constitutional law or on the significance of the subsequent announcement by the State Department in not renouncing the Accords. The Court held only that the executive orders and regulations implementing the international executive orders were constitutionally valid, without considering the *raison d'etre* of the orders and regulations to effectuate the international executive agreements with Iran. The Court held that Congress had, in fact, delegated sufficient authority to the Executive, explicitly and implicitly by congressional acquiescence, to support his nullification of post-freeze attachments (and transfer of assets out of the United States) and the suspension of judicial claims and judgments (and transfer of claims to the U.S.-Iranian Claims Commission).[18] The delegation of authority was found primarily in the plain language of the 1977 International Emergency Economic Powers Act[19] (amending the 1917 Trading With the Enemy Act) and congressional acquiescence to presidential claims-settlements by executive agreements. It did not address other issues, such as barring of claims by the former hostages.

While there is language in the opinion to indicate that the Court considers that the President's claims-settlements authority may be "inherent" in some situations, rather than delegated from the Congress (this is evidenced by the Court citing *U.S. v. Pink*),[20] it was not necessary, and the Court did not conclude, that the President had such inherent authority, generally, or in the particular situation before it. The Court states that the "failure of Congress specifically to delegate authority does not imply 'Congressional disapproval' " (citing *Haig v. Agee*, 1981), that such authority is found in prior congressional acquiescence to executive settlements, which were often made pursuant to specific legislative enactments.

The Supreme Court concluded, in an inexplicable fashion, that the executive orders and regulations issued by Presidents Carter and Reagan created a new rule of law that needed to be applied. That is, it created a substantive rule allowing claims to be processed by a different forum — an international claims tribunal instead of the federal courts.

The Court further concluded that the transfer of claims from the federal courts to the international arbitral tribunal was not a "termination" and, therefore, not a taking of property in violation of the Fifth Amendment right which requires compensation for government taking of private property. The Court stated that if there is a subsequent denial of a claim by the international tribunal, such an action might be available in the Court of Claims. Thus, this leads to the prospect that U.S. taxpayers will pay, in part, the cost of freeing the hostages. Such a possibility has been heightened by the enactment of the Hostage Relief Act and the recent recommendations of the Hostage Compensation Commission. The Court also concluded that there was no Fifth Amendment violation concerning the nullification of the post-freeze

attachments, since no property interests existed, because the attachments were only conditionally authorized, in the first place, by the Treasury regulations.

The Supreme Court declared that its decision was not to be construed as an all-inclusive precedent supporting broad executive actions in the future. For example, the Supreme Court asserted its decision rested "on the narrowest possible ground," that it attempted "to lay down no general 'guidelines' covering other situations," and that the Justices "do not decide that the President possesses plenary power to settle claims, even as to foreign governmental entities."

Yet, the authority asserted by the Solicitor General on behalf of the President can be argued with some persuasiveness to cover other situations. For example, the petitioner contended that the freezing of Israeli government and private assets in the United States and their transfer to a Middle East claims tribunal — in order to satisfy claims arising out of the recent destruction of Iraq's reactor — might well fall within the Court's conclusion.[21]

The Supreme Court upheld the historic, and some contend anachronistic, claims-settlements authority of the President. This it did, even in light of substantial changes in international law since the conclusion of World War II and against the growth, "diversity and complexity of modern, international trade." The President now has the Court's stamp of approval to settle international commercial claims. This, in a world where international trade has increased many times during the last few decades and the likelihood of foreign political instability has increased immensely. The probable result will be more numerous and significant commercial and trade disputes with foreign governments who participate and engage more actively every day in the international marketplace and economic development programs.

U.S. constitutional law and precedent enshrine customary international law as domestic, which is to be applied as the "law of the land."[22] Certainly, rules of customary international law ought not to be overridden by presidential actions based upon vague, implicit or general delegations of authority by the Congress, when such actions do not specifically address that issue. It is simply not in U.S. public policy interests to allow the President to effectuate as domestic law, by implementing executive orders and department regulations, those international executive agreements which are invalid under customary international law.

There is a well-known rule of statutory construction under which subsequent federal legislation overrides inconsistent treaty rules if they are inexplicably inconsistent. Analogous to that rule, seemingly, ought to be a rule upholding a major rule of customary international law when it is not explicitly intended to be overridden by Congress, and, perhaps, not even then.

The issues before the Supreme Court raise significant questions concerning incorporation of customary international law into the domestic legal system of the United States, and whether such incorporation distinguishes between merely ordinary norms of behavior and *jus cogens* (rules which cannot be

U.S.-Iran "Hostage" Relations:
Chronology of Events

January 16, 1979
Departure of the Shah from Iran.

November 4, 1979
Takeover of the U.S. Embassy.

November 14, 1979
"Freeze Orders" issued by President Carter and Treasury Department.

December 4, 1979
Security Council issued its first resolution calling for immediate release of hostages.

December 14, 1979
International Court of Justice issued order requesting immediate release of hostages.

December 1979
Soviet occupation of Afghanistan.

February 1980
U.N. Secretary-General fact-finding commission established.

April 1980
Ill-fated U.S. military raid to release hostages.

May 1980
Judgment on merits of the International Court of Justice requiring reparations.

September 22, 1980
Outbreak of Iran-Iraqi war.

January 19, 1981
U.S.-Iran Hostage Accords.

January 20, 1981
Reagan's inaugural; hostages released in exchange for transfer of some Iranian assets.

February 18, 1981
"Non-Renunciation" of Accords by Reagan Administration.

July 2, 1981
U.S. Supreme Court decision in *Dames & Moore* upholding the Accords.

July 1981
Report of the House Committee on Banking examining the favored position of the bankers under the Hostage Accords.

August 18, 1981
Transfer of Iranian funds by the U.S. to an escrow account, in the Hague, as authorized by the Accords.

August 1981
U.S. refusal to unfreeze some Iranian assets pending return of U.S. Embassy.

September 21, 1981
Report of U.S. Commission on Hostage Compensation recommending $12.50/day compensation.

Figure 2

changed by agreement or practice between states). Unfortunately, these concerns were not addressed in any manner.

Foreign Policy and National Security Implications

In assessing the Accords in a juridical context, two conclusions about foreign policy become apparent: one, concerning the President's claims-settlement authority; two, concerning the merits for renouncing the Accords.

First, since the Supreme Court concluded that it was Congress that implicitly consented to the President's authority to create a new rule of law, despite the constitutional constraints that the Executive not be a law-making institution, Congress ought to create a more specific and comprehensive legislative scheme reconciling the President's claims-settlement authority and the necessity of regulating international trade and commerce, which is an exclusive prerogative of the Congress.[23]

Such an effort would attempt to synthesize the foreign affairs powers of the President and the international trade powers of Congress in an overall context of the national security concerns of the United States. Congress did not do this adequately when it enacted the Foreign Sovereign Immunities Act in 1976,[24] the International Emergency Economic Powers Act a year later, or the Export Administration Act of 1979.[25] Such legislation could be made to act totally prospectively, thus including a change of rule that the Supreme Court would have to apply to the Iranian Hostage Agreements in the next case or omit those agreements from its operation.

Greater legal certainty in the area of international trade and national security matters can be created by establishing a framework to guide Executive action in instances that, undoubtedly, will occur over the next two decades — areas with specific manifestations of which we all are aware. For example, we know there is greater significance today in international business and trade to the United States and the world because of increasing economic interdependence worldwide. We know that there is greater political instability worldwide because of the inability of many states to assimilate economic and technological development. We also know that U.S. national security interests and foreign affairs concerns of the President increasingly include problems of foreign economic development and foreign trade relations, which was not the situation, generally, at the time of drafting the Constitution in the 1780's. And we know that unnecessary tension among the three branches of government in the United States does not make for optimal or viable foreign policies in the 1980's.

The recent Supreme Court case has had a dramatic effect on laying bare, once again, in a dangerous era, the historical problems of the federal government in both foreign policy formulation and execution. The existing situation begs that at least some of these problems be treated now before the next "new challenge" must be dealt with.

The proper role of Congress and the President in matters of international commerce and foreign policy formulation, as well as the role of the judiciary in upholding the Constitution and ensuring a forum for dispute settlement, needs to be more finely tuned to the last decades of the 20th century. That is, to recognize the greater relevance of international trade to foreign affairs, and the necessity of the President to act in that area without undue congressional constraints, while balancing the rights of individuals and companies to have judicial determination of their trade disputes with foreign governments. This is necessary in order to make more palatable in the 20th century the "invitation to struggle" in foreign affairs, as proffered to us in our 18th century Constitution.

The second conclusion about foreign policy concerns renouncing the Accords. Whatever commercial, international, political, and national security reasons exist for not abrogating the Iranian Hostage Agreements, there is no international law reason for not doing so.[26] It is certain that as a matter of customary international law such agreements amount to a legal nullity. Agreements concluded without freely given state consent violate the national sovereignty of states, the integrity of the international legal system, and that of all law-abiding states. The enforcement of such agreements, which may not be even legally permissible under the Vienna Convention, constitutes a fraud on the world community, sets an abysmal legal and diplomatic precedent, and undermines the already weak fabric of a very diverse and divisive community of nations.

From a foreign policy perspective, abrogation by the Reagan Administration would be a clear and convincing act, laden with symbolism. This act could have set the tone of the Administration's foreign policies for the next few years, as well as being a ringing indictment of the Iranian conduct. It would have been a masterful act upholding the integrity of international treaties and international morality, generally, and would have signaled the current Administration's intention to act quite differently from its predecessor if a hostage situation occurs again.[27]

It is difficult to believe that among all of the other existing factors, abrogation of the agreements alone would have further "lost" Iran to the West. The West has survived the 444 days, the Iran-Iraqi war, and the current internal Iranian anarchy better than any expert might have predicted.

It is state practice, especially that of a great power, which is instrumental in ensuring the existence of international law and its development in a direction favorable to its national interests. Much in the way the United States in August 1981 challenged Libya's expansive territorial claim to the Gulf of Sidra (and Libya's reliance on a "straight baseline" to enclose the Gulf) in order to uphold generally the freedom of the seas and right of overflight above economic zones,[28] the United States should now renounce the Hostage Accords. It should also reinstitute proceedings in the World Court against Iran for full reparations.[29] These actions would help to uphold cardinal rules of treaty law and diplomatic relations and further U.S. national interests generally.

This is not a blind assertion of a rule of international law in order to dictate American foreign policy. That kind of mechanistic application, or legal purism, is not advocated. To know when to assert a legal claim, and when not to, is essential to a pragmatic foreign policy.

While some lawyers, when serving in the American foreign policy apparati, may have reacted in a too legalistic manner in the past decades, all such reliance on international law, in formulating and executing foreign policy, need not always be labeled "legalistic," and, thus, by implication, unrealistic and irrelevant. The assertion of the rule of treaty law vitiating coerced treaties, in this situation, makes sense for many reasons and is mandated by any careful balancing of national interests. Many states, including the United States, have often been too free in the use of international law to rationalize their political actions, in order to give all sorts of foreign policies mantles of legitimacy. In this case, however, should the Reagan Administration accept the advice proffered here to renounce the agreements with Iran, this would not represent such specious and callous behavior.

Conclusion

Renouncing the Hostage Accords would not represent a doctrinaire, legalistic or moralistic approach to foreign policy formulation, but a mature use of international law in the formulation and execution of foreign policy.[30] U.S. foreign policy and national security interests require a firm legal-diplomatic response to a renegade state. As Secretary of State Haig recently stated: "The United States as a leader of the free world has an obligation to be a strong advocate of adherence to accepted rules of international law and behavior."[31]

The U.S. must have an assertive foreign policy, not merely a reactive nor a passive one. Democracies must not always be defensive and *ad hoc* in their actions in foreign affairs. Anarchic actions must be answered by vigorous and broad American responses. The Sadat assassination only further underscores the dire urgency that the U.S. demonstrate immediately the strength of its causes, convictions, and policies. One such policy, undoubtedly, ought to be the prompt abrogation of the Hostage Accords; the U.S. cannot be held hostage to medieval and antimodernistic acts of fanatics and zealots because of its inherent humanity. Abrogation demonstrates American abhorrence and resolve against terrorism conducted everywhere in the name of antidemocratic ideologies.

The spurious argument advanced by former Carter Administration officials that such abrogation would show disdain for treaty and international obligations is not persuasive. To the contrary, the recognition of such agreements makes a mockery of international law and of the power of the United States. The Hostage Accords do not represent an American victory, but only an "America held hostage" and a ransoming of America.[32] They serve as tribute for government-supported acts of international terrorism and a

continuing symbol of U.S. ineptitude, impotence, and nonpolicy toward such destabilizing actions. Continued acceptance only perpetuates an American tragedy; it is a reversion to the days when columns of soldiers marched into battle with flags unfurled and drums beating. In those bygone days treaties resulting from the illegal use of force were recognized as valid under international law, even though such coerced agreements often served as a political pretext to renew the battle when military fortunes and positions changed. But today, in an era of potential warfare in space, while treaty law has changed, the lessons Georg Schwarzenberger deduced from medieval history may well stand the test of time. That is, "Treaties which were concluded under duress [are] . . . at the earliest opportunity [disregarded] on the excuse of duress." Based upon the recent American experience with the Iranian Hostage Accords, one might add "as well they should be and the sooner the better."

NOTES

1. Schwarzenberger, "The Fundamental Principles of International Law," 87 *Recueil des Cours* 193 at 265 (1955).

2. *New York Times* A5:1 (January 20, 1981); 20 *Int'l Leg. Materials* 223 (1981). The Accords actually consist of four documents. The two most significant are the "Declaration on General Principles" and the "Declaration Concerning the Settlement of Claims" (establishing the International Arbitral Tribunal concerning the transfer of commercial claims to the international tribunal). Others concern the transfer of funds and establishment of escrow funds concerning syndicated and non-syndicated bank loans. For the Treasury regulations issued by the Reagan and Carter Aministrations implementing the Accords and Executive orders *see* 31 CFR Pt. 535. The Accords allow bank creditors a somewhat privileged position in contrast to non-bank creditors, that is, commercial creditors. Under the Accords syndicated bank loans were settled immediately and non-syndicated bank loans were subject to negotiaions with escrow funds available in London. This set of procedures is in addition to the termination ("suspension") and transfer of the commercial claims to the U.S.-Iranian Claims Tribunal with its escrow account in Holland. Even with the transfer of claims to the international tribunal, a number of "Iranian" cases are still in U.S. courts, for example, those which are *not* based on post-"freeze" attachments, "letter-of-credit" cases (in which U.S. firms are seeking to preclude the transfer of funds to Iran pursuant to those instruments), actions against the Shah's estate, and actions by the former hostages, among others.

3. "Convention on the Law of Treaties," U.N. Doc. A/Conf. 39 and 27 (1969) (in force since 1980; not in force for the U.S.). The rules indicated by Articles 52 and 75 are considered by all states to have been received into customary international law from at least 1945 and, thus, binding on all states.

4. G.A. Res. 3314, 29 U.N. GAOR, at 142-143, U.N. Doc. A/9631 (1974).

5. 23 UST 3227, TIAS 7502, 500 UNTS 95 (in force for the U.S. since 1972).

6. For Resolution 461 (1979) of the Security Council and reports of the Secretary General, *see* 19 *International Leg. Materials* 250 (1980). "[I]ncreasing tension . . . [is] caused by the seizure and prolonged detention of persons of United States nationality who are being held as hostages in Iran in violation of international law. . . ." *Id.*

The Security Council rejected a U.S. resolution requiring enforcement actions against Iran under Chapter Seven.

7. "Case Concerning United States Diplomatic and Consular Staff in Tehran," 19 *Int'l Leg. Materials* 139 (January 1980). "[T]here is no more fundamental prerequisite for the conduct of relations between states than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have reciprocal obligations for that purpose. . . . [T]he institution of diplomacy with its concomitant privileges and immunities, has withstood the test of centuries and proved to be an instrument essential for effective cooperation in the international community. . . ." *Id.* at 19.

The I.C.J. issued its Order on provisional measures December 1979 and its Judgment on the Merits in May 1980 requiring reparations.

When Iran failed to appear before the I.C.J., the 1955 U.S. Treaty of Amity with Iran (a FCN treaty) provided the I.C.J. with a basis for exercising its jurisdiction. "Treaty of Amity, Economic Relations and Consular Rights, United States-Iran," 8 U.S.T. 899, TIAS No. 3853 (in force since 1957). It is also viewed by some as containing provisions waiving the defense of sovereign immunity in domestic litigation concerning trade disputes.

The I.C.J. decided that Iran was under an obligation to make reparation and, failing agreement between the parties on the form and amount, it was to be settled by the court in subsequent procedures. "International Court of Justice: Judgment in the Case Concerning United States Diplomatic and Consular Staff in Tehran," 19 *Int'l Leg. Materials* 533, 574 (May 1980). The I.C.J. left open the question of the legality of the U.S. rescue mission, termed by the U.S. as a "humanitarian mission," and the general question of the use of force to protect nationals in foreign countries. It is the view of this writer that the standard for determining the illegal use of force under Article 52 of the Vienna Convention on the Law of Treaties and under Articles 2(4) and 51 of the U.N. Charter governing the law of self-defense is the same.

8. *See generally, S. Malawer, Imposed Treaties and International Law* 154-162 (Hein, 1977), and Malawer, "Coerced Treaties and the Convention on the Law of Treaties," in *S. Malawer, Studies in International Law* 31 (Hein, 1977) (reprinted from 4 *Vanderbilt J. of Transnational Law* 1 [1970]).

9. Quincy Wright, in 1939, wrote: "It may be that settlement of Munich was in substance just. Of that no one can ever be certain because it was not arrived at by a procedure which general human experience has approved likely to yield justice." Wright, "The Munich Settlement and International Law," 33 *Amer. J. of Int'l L.* 12, 31 (1939).

He also wrote: "Until the people of the world are similarly determined to place procedure ahead of substance we may expect the world to alternate between dictates of Versailles and dictates of Munich, with little respite from wars and rumors of wars." *Id.* at 31-32.

10. House, "Iraqi War Against Iran Could Grow, Posing Threat to Oil Supplies," *Wall Street Journal* 1:1 (September 23, 1980). Maechling, "At Stake in the War," *Washington Post* 15:1 (October 14, 1980). Iran contended previously that the 1937 treaty between the parties was imposed upon it by the British. Iran renounced the 1937 treaty in 1969. The 1975 Algiers Agreement resulted from Iran's undertaking to withdraw support from insurgent forces in Iraq.

11. Schumacher, "Behind Ecuador War, Long-Smoldering Resentment," *New York Times* A2:3 (February 10, 1981). Ecuador signed a 1942 agreement concerning its border with Peru, but abrogated it subsequently, by asserting duress. Ecuador precipitated the recent border war in February 1981.

12. Fisheries Jurisdiction Case (Federal Republic of Germany v. Ireland), [1973] I.C.J. 49,59 (jurisdiction). There is also an argument for invalidity, although somewhat less strong, that can be made under Article 53 of the Vienna Convention on the Law of Treaties, which states, in part: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law . . . (which is) a norm from which no derogation is permitted. . . ." The World Court already determined that the use of force used in the seizure of the U.S. Embassy and taking of hostages constituted a grave violation of international law. However, Article 53 is considered usually as applicable only to the substantive terms of a treaty, not to the procedural means used in concluding a treaty.

13. "United States Application and Request for Interim Measures of Protection Against Iran," 18 *Int'l Leg. Materials* 1464, 1477 (November 1979).

14. "Text of Administration's Statement on Review of Hostage Accords," *New York Times* A10:3 (February 19, 1981). *See also* 20 *International Legal Materials* 554 (1981). Since the Accords are void under general international law, this announcement amounts to nothing more than a unilateral declaration by the U.S. Only a new agreement could create valid obligations for the United States; there can be no ratification of a legal nullity.

15. The rule announced recently requiring all filings with the Hague Tribunal to be in Farsi, the U.S. refusal to transfer $2 million of Iranian Embassy deposits and conflict over payment of interest on the escrow account may be an indication of such events. Pincus, "Iran's Funds Help to Swap for Embassy," *Washington Post* 1:5 (September 21, 1981).

16. Christopher and Cutler, "The Case for the Hostage Settlement," *Wall Street Journal* 26:1 (July 17, 1981). "A world committed to curbing aggression cannot accept the notion that such agreements are void." *Id.* at 26:3.
Cutler, "Negotiating the Iranian Settlement," 67 *American Bar Association Journal* 996 (August 1981). "They [the Accords] show that, in circumstances in which a military response to a particular aggressive use of force may not be practicable, it can be practicable to *repel* the aggression by economic, political, and legal measures." *Id.* (Emphasis added)

17. *Dames & Moore v. Regan*, — U.S. — (decided July 2, 1981). The decision was foreshadowed by *United States v. Agee*, — U.S. — (1981), decided several days earlier, when the court upheld certain State Department's travel restrictions and revocation of a passport, based upon analogous arguments concerning delegated authority and national security considerations. *Dames &*

Moore was argued on June 24, 1981, and decided eight days later, on July 2, 1981, by a unanimous court in short opinion of 31 pages. Unanimity was a surprise since the justices raised strong concerns during oral arguments. While the decision may be viewed as having little effect on other situations, since the specific legal issues were decided so narrowly, the Supreme Court adopted "a familiar posture in matters of national security and foreign affairs — deference." Wermiel, "Justices Uphold Pact that Ended Crisis in Iran," *Wall Street Journal* 3:1 (July 6, 1981). For significant cases decided in the 1970's, during the Watergate era, upholding executive actions concerning foreign affairs, *see Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir. 1978), *cert. denied*, 436 U.S. 907 (1978) (Taiwan Treaty); *Goldwater v. Carter*, 100 S.Ct. 533 (1979) (Panama Canal Treaty); in international trade, even though Congress has exclusive authority, *see Consumers Union of U.S. v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974), *cert. denied*, 437 U.S. 907 (1978) (upholding executive authority to enter into Voluntary Restraint Arrangements without congressional authorization), *United States v. Yoshida Int'l*, 526 F.2d 560 (C.C.P.A. 1975) (upholding import restrictions imposed by the President pursuant to statute), *FEA v. Algonquin SNG*, 426 U.S. 548 (1976) (upholding import restrictions imposed by the President pursuant to statute); in other diverse areas, such as Freedom of Information Act requests and publications of former government officials. *See generally*, "Justice Plans Suit over Colby Book," *Washington Post* A9:1 (September 21, 1981).

18. The executive orders "suspends" claims, rather than "terminate," as the Accords require. The transfer of funds was not made by the U.S. until August 1981 after the decision of the Supreme Court in *Dames & Moore*.

The operation of the language of the Accords is viewed by some as requiring transfer of various contractual disputes with Iran to Iranian local courts, rather than to the International Tribunal, because the contracts contain choice of forum clauses selecting Iranian courts.

Despite the Accords and *Dames & Moore*, various cases are still being litigated in federal court against Iran or by Iran, because they do not fall within the terms of the Accords or it is contended they do not. Tell, "Iran Litigation Simmers; Hostages' Tempers Boil," *National Law Journal* 5:1 (October 5, 1981).

19. P.L. 95-223, 91 Stat. 1625 (Title II) (1977). The court concluded that the contested actions fall within category one of Justice Jackson's framework for determining the constitutionality of executive actions, developed in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), that is, when they are authorized by Congress. However, the court did not focus sufficiently on the separation-of-powers issue concerning judicial-executive relations and the constitutional rights of firms and individuals, when there is broad assertion of executive authority in the field of foreign affairs. However, *Dames & Moore* represents an inductive approach to presidential foreign affairs powers, along the lines of *Youngstown*, rather than the broad, expansive, and deductive approach of *Curtis Wright*.

20. *United States v. Pink*, 315 U.S. 203 (1945). It is likely that if the drafters of the 1976 Foreign Sovereign Immunities Act intended to preclude the President's claims-settlement authority, the court would have upheld Court's recent decision. The right of the President to settle claims was valuable historically when litigants could not sue in domestic courts. Often, it was the litigants only means of recovery. Since the conclusion of World War II, the

notion of absolute immunity has withered in most countries and so has much of the rationale behind the diplomatic practice of "espousal" of private claims and government settlement of such. Litigation might well be viewed today as a most viable means of replacing the traditional diplomatic techniques of settling international contract and tort claims. It should be noted that unlike traditional means of settling claims by "lump-sum payments," the Accords chose international arbitration and only the possibility of future payments.

21. Reply Brief for Petitioner, filed in *Dames & Moore* at 4, n. 6 (1981).

22. *The Paquette Habana, The Lola*, 175 U.S. 677 (1900).

23. "[T]he President has certain 'inherent' powers in the conduct of foreign relations and foreign affairs. . . . It is nonetheless clear that no undelegated power to regulate commerce . . . inheres in the Presidency. . . . [There is no power] to regulate foreign commerce. . . ." *United States v. Yoshida*, 526 F.2d 560, 572, n. 13 (CCPA, 1975).

24. P.L. 94-583, 90 Stat. 2891 (1976).

25. P.L. 96-72, 93 Stat. 503 (1979).

26. Supporters of the Accords often contend, as to commercial claimants, the vagaries of domestic litigation (primarily, the defense of sovereign immunity and the act of state doctrine) have been replaced by the greater certainty of international arbitration and an escrow account. However, upon closer examination the vagaries and unknowns of a newly established, yet untested, international claims settlement mechanism, prove to inspire little confidence and great uncertainty. What if the tribunal refuses to make any determinations for any of numerous reasons? Claimants could be in a state of suspension for decades. If the tribunal eventually refuses to hear a claim then the claimant would have to return to U.S. courts, without the advantage of having attached funds. Even then, some such cases may still be barred by the Accords, if an Iranian choice-of-forum clause is applicable. The flaunting of the rule of law and disregard of the World Court are not only grave matters of concern to U.S. national interest, but to the common interest of the international community. It is most interesting to note that the *Wall Street Journal* called for renunciation, yet, it is American commercial interests, which, seemingly, have the most to lose by such action. "Renounce the Deal," *Wall Street Journal* 26:1 (January 21, 1981). "Bazaar Tribunal," *Wall Street Journal* 20:1 (January 23, 1981) and "How Much Ransom," *Wall Street Journal* 26:1 (July 10, 1981). "The U.S. has no moral obligation to live up to such an onerous deal made at the point of a gun. It's too bad that the Reagan Administration didn't take our original advice and renounce it." *Id.*

George Ball, a spokesman for the left in American foreign policy, reached a conclusion similar to that of the *Wall Street Journal.* Ball, "Hostage Deal: 'Crime Should Not Pay,'" *Washington Post* A17:5 (January 26, 1981). "I find it absurd to wrap these extorted documents [Hostage Accords] in the flag of national honor, since, under international law as expressed in Article 52 of the Vienna Convention on the Law of Treaties of 1969, they are void because they were procured by the threat of use of force." *Id.*

But see, Lowenfeld, "International Law and the Hostage Agreement," *Wall Street Journal* 30:3 (January 27, 1981). "The argument about duress, while not

implausible, is sufficiently doubtful that repudiation of the agreement by the U.S. on that ground would in my view, be ill-advised." *Id.* at 30:4.

The implementing of the Hostage Accords with Iran, as with the implementing of AWACS with Saudi Arabia, is a continuation of Carter's foreign policies by the Reagan Administration. This is probably so because of the Reagan Administration's failure to place promptly in operation its own foreign policy-national security team. This is all the more glaring in light of Reagan's campaign promises aimed at Carter's ineptitude in Iran and foreign policy-military affairs generally. The President's success in the Senate AWACS vote, in 1981, was in large measure due to the tradition of congressional deference in foreign affairs. This is sometimes attributed to bipartisanship; however, such a label often masks partisan politicization of foreign policy issues.

27. It is of interest to observe that both *The New York Times* and the *Washington Post* agree that there is no moral obligation to observe the Accords, but neither contend they are invalid under international law, nor that they ought to be renounced. "There is no moral obligation to honor an extortion or, in the bloated language of the Accords, to 'restore the financial position of Iran. . . .' The urge to tear it up is understandable. . . . Renouncing the Accord could destroy the Iranians. . . ." "The Case for the Deal," *New York Times* A22:1 (January 23, 1981). "[T]he United States can accept no moral obligation to kidnappers: if the country chose to default on the agreement, it would not have to defend itself on that score. We feel, nonetheless, that the event is more complicated than that. . . . We reserve a final judgment." "Renege on the Deal," *Washington Post* A16:1 (January 23, 1981).

28. Richardson, "Dogfight: A Lesson for U.S.," *New York Times* E17:1 (August 30, 1981).

29. Upon the request of the United States the International Court of Justice discontinued its proceedings against Iran. "International Court of Justice: Order and Discontinuance and Removal of Case Concerning United States Diplomatic and Consular Staff in Tehran," 20 *Int'l Leg. Mat.* 889 (1981). The World Court did not review the unilateral and unconditional discontinuance by the U.S. to determine the sufficiency and international legality of the underlying "agreed settlement." It is arguable that such a review should be required in order to protect the interests of the international community. Court review of many motions made in varied legal systems, is often required in order to ensure the rights of society; for example, motions of discontinuance of class action suits, required to have federal court approval in order to prevent collusive settlements at the expense of other interested parties. It is also conceivable that the American-Iranian Claims Tribunal could on its own motion raise the question of validity of the Accords, since it would relate to the tribunal's competence to hear the claims. Likewise, U.S. domestic courts and foreign courts could raise the question of duress when questions of enforcement of the international tribunal awards or other questions arise, for example, when actions are filed by disgruntled claimants.

The Algiers Accords did *not* include provisions providing reparations to the United States for damage *done to it* by the takeover of the Embassy, which has not yet been returned. To the contrary, the withdrawal of the U.S. action in the I.C.J. was required despite the court's prior judgment for reparations. A reinstituted action for damages done to the U.S. and the hostages, if it leads to a successful judgment, could be used as the basis of Security Council

enforcement actions (under Charter Article 94) or, more importantly, of judicial actions by either the U.S. or the hostages in domestic courts in the U.S. and abroad against Iran. Many common law and civil law legal systems recognize and enforce decisions of international tribunals, according to their own rules of private international law, thus, providing a basis of executing upon the defendant's property without the necessity of relitigating issues already decided.

30. See generally, Malawer, "International Law Studies and Foreign Policy," 14 *Orbis* 92 (1970); Malawer, "A Juridical Paradigm for Classifying International Law in the Foreign Policy Process," 10 *Virginia Journal of Int'l L.* 348 (1970).

31. Haig, "Declines Tough Stance on Incidents," *Washington Post* A1:1 (Aug. 19, 1981). Secretary of State Haig had also stated recently: "[L]inks between trade policy and foreign policy are clear. . . . [W]e face many issues in which security and political principles must override commercial concerns." "International Trade," *Current Policy* No. 300 (July 28, 1981) (Dept. of State, Bureau of Public Affairs) (testimony before the Subcommittee on International Trade of the Senate Finance Comm. on July 28, 1981, as to East-West trade).

Links between trade policy and foreign policy involve increasingly diverse areas, such as private missile development, nuclear technology exports, commercial mining of the seabed, high technology transfers, and foreign direct investment into various U.S. industrial and agricultural sectors. The conflict in free market and national security goals is increasing. After all, the business of American foreign policy is not business only. The conflict between objectives needs to be confronted more forcefully by the Reagan Administration, which strongly favors both intuitively, but of which there is little conceptual thinking. *See generally*, Miller, "Industry Enters a Twilight Zone," *The New York Times* L4, 2E:3 (September 13, 1981). The Reagan Administration has only begun to return to linkage between trade policy and other foreign policy considerations. Although, it has hardly created a mechanism to "handle the double-edged questions." "Corn, Cars and Foreign Policy," *Washington Post* C6:1 (April 19, 1981). Observers are troubled by the intellectual incoherence of the Reagan Administration's non-policy concerning the reconciliation of demands for exports and greater trade with broader foreign policy and national security objectives. The failure to "choose between abetting of dangerous and venal pursuit of profit and . . . professed foreign policy values and goals," mocks the advocacy of national interests, which are, of course, broader than individual or general commercial interests. George Will, "Turning the Trade Weapon Againt Ourselves," *Washington Post* A29:1 (October 15, 1981) (concerning U.S.-Soviet Trade). U.S. military strategy relies upon its technological superiority to offset the Soviet Union's quantitative advantage. Yet, illegal arms and technology transfers seriously jeopardize and undermine such strategy. These transfers have not been stemmed, in part, because of inexplicable under-staffing and incredible lack of coordination between agencies. This is especially the situation concerning the Office of Export Administration (Dept. of Commerce) and the Customs Service (Dept. of Treasury). Violations of U.S. export controls are often coupled with bribery of foreign government officials, which is not totally unexpected and is in violation of U.S. law. Edward Pound, "Evils on Technology Exports Hurry by Gaps in Enforcement," *New York Times* 1:4 (October 14, 1981) (one article in a series concerning transfer abroad of advanced technology and military equipment).

32. The U.S. government never seriously considered refusing to haggle or to deal with the Iranians. *Pierre Salinger, America Held Hostage* 310 (1981). "Did the United States learn a lesson in Iran and is it adjusting some of its concepts of foreign policy to accommodate the necessary change? The answer to that question is a loud no!" *Id.*