

MEMORANDUM FOR: THE VICE PRESIDENT

SUBJECT: IRANIAN HOSTAGE TREATY LECTURE

Iranian Hostage Treaty Lecture:

1. Open with a brief cronology of the key events that took place once the militants took over the embassy.
2. Discuss the events of the last week before the actual release of the hostages...it may be useful to point out the major role lawyers played in the negotiations all along. Specifically, the fact that WarrenChristopher, Ed Muskie, Lloyd Cuttler and you are lawyers. In addition, there was a team of the nation's top banking lawyers working around the clock in the Department of Treasury during the last week. Finally, there were several lawyers in the White House and the Department of Justice working every hour on changes to the final executive orders and agreements.
3. The Hostage Treaty Agreement itself is at the center of all the legal controversy and should be outlined next. There is no reason to get into greater detail than is outlined on the lecture talking points.
4. A brief discussion of the President's authority under both Article II of the Constitution and the International Emergency Economic Powers Act. The fact that the President had sufficient authority, constitutional and statutory is important to get across.
5. As a final point I would suggest you discuss the fact that this Agreement makes provision for all nationals to recover their legal claims from the International Tribunal as descirbed in the Agreement.
6. Finally, you should be aware that the government's case regarding the hundreds of cases pending regarding Iranian assets are generally going well. However, two problems have appeared on the horizon... the members of the International tribunal have yet to be named and a third country has yet to be found that will act as the escrow account for tribunal settlements.

1. Open with a brief account of the actions that followed the actual taking of the embassy, from the White House perspective, ie. an totally unique situation, new rules, no rules, dangerous area of the world.
2. Discuss the events of the last week before the release of the hostages. It may be useful to point out the fact that nearly all the major roles played during the hostage negotiations were played by lawyers... Warren Christopher, Ed Muskie, Lloyd Cuttler, and yourself. In addition, there was a team of lawyers representing the nation's major banks meeting in the Department of Treasury around the clock during that final week. There were also banking lawyers meeting in London and Algiers. Finally, a small army of lawyers in the White House and Justice Department met continuously for seven days to work out the final agreement language and Executive Orders.
3. The Attorney General, working with the President's lawyers monitored all decisionmaking and provided the President with his legal assessment of the hostage accord before the President signed it.
4. The Hostage Treaty itself is at the center of all the controversy. You should describe it as outlined.
5. The President's authority to commit the United States to the Agreement and issue the necessary Executive orders should also be discussed. The President's authority stems from the Constitution, Article II, and the statutory authority given the President under the International Emergency Economic Powers Act.
6. As a final point it will be helpful to point out that this agreement provides for an international tribunal to settle all outstanding claims.

MEMORANDUM TO WALTER F. MONDALE

FROM: Eric Vaughn

SUBJ: Class Materials for University of Minnesota

On April 10, your second teaching day at the University of Minnesota, you are scheduled to meet with three separate groups of students: 1) a Constitutional Law class at 10:15 a.m., 2) a Business School informal round table discussion at 12:15 p.m., and 3) a Humphrey Institute "mini-seminar" at 2:00 p.m.

Attached are the following materials for the classes you will participate in:

Constitutional Law

A lecture on the legality of the Iranian Hostage Release Agreement.

- Chronology of the Hostage Crisis
- Events of the Final Week
- The Hostage Deal - What does it provide?
- Constitutional Powers
- Statutory Authority
- Questions & Answers

We have scheduled a meeting for 3:15 p.m. on Wednesday to discuss this lecture with Mike Cardozo and Mike Hertz (DOJ).

Business School Round Table Discussion

Informal gathering of approximately fifty students, mostly mid-career and in their late 20's. These round table discussions are designed to expose students to leaders in the government and industry, and allow students to question these leaders on issues of concern to them. Talking points on the need to develop a greater degree of communication and cooperation among government bureaucrats, business leaders and politically elected officials.

Hubery H. Humphrey Institute Class

The Huphrey Institute would like the opportunity to have their own "Vice Presidential Lecture" to learn from your experiences. We have prepared a lecture on the Vice Presidency . . . its origin, development, limitations and potential. Your thoughts on the Vice Presidency and your accomplishments in that office are of key interest to these students.

Business School -- University of Minnesota
Roundtable discussion: April 10, 1981

Talking Points:

- o It is a pleasure to be here today and have this opportunity to meet with students from one of the finest business schools in the country.
- o I would like to talk with you today about government and business... one of the great love-hate relationships of all time.
- o As many of you know, the U.S. government is the biggest business on earth...it buys more typewriters, and cement, meets a bigger payroll, and handles more money than any other organization anywhere. It has a more elaborate communications system than AT&T and a greater data information network than IBM.
- o Yet for years businessmen and women have claimed that Washington does not understand big business -- and is insensitive to its demands.
- o When the government provides low interest loans or grants to a business such as Harry's Drug Store or the Chrysler Corporation... or slaps import quotas to protect struggling businesses..or subsidizes the operation of an entire industry such as the railroads and barges... then the government understands business.
- o If on the other hand government seeks to regulate an industry or impose safety and environmental standards the government is accused of interference and insensitivity.
- o We all know government/business relations are not this black and white, but at the same time, we realize something is wrong when an adversarial relationship has been allowed to cloud effective government/business cooperation. We are one of the few industrialized nations on earth where business and government relations are more often than not extremely hostile.
- o Government has come to earn a reputation as antagonistic toward business...oppressive regulations, excessive business taxes, and stiff environmental standards.
- o However, government and business need each other, today more than ever before...a perfect example is the auto industry:
 - you may recall that under Secretary of Transportation Neil Goldschmidt, a series of meetings between top government officials and leading auto industry executives were held to aid the ailing auto industry. These meetings were the first of this kind.
 - President Reagan recently announced a series of recommendations which will ease safety and regulatory requirements on the domestic auto industry as it retools to compete with foreign car manufacturers.

--Chrysler loan guarantees -- it is working. Sales are up, good, solid cars are being made.

o The atmosphere in Washington has changed from one of hostility to cooperation with business...in the last four years we put together programs to assist the coal, steel and maritime industries to name but a few.

o After 12 years in the Senate and four years in the White House I have come to have a deep respect and appreciation for the knowledge and wisdom of our business leaders. When our government officials, political leaders and business executives work together in a spirit of cooperation the results can be highly rewarding.

o As an expression of this new spirit of cooperation the Congress is considering several pieces of legislation favorable to business:

- accelerating depreciation on business investment
- promoting exports
- increasing productivity investment incentives
- stimulating capital investment formulations
- regulating reform

o While in the White House we successfully:

- deregulated the trucking, airline, banking and railroad industries
- increased agricultural exports to record levels
- and created a comprehensive pro-development energy policy

o However, while a more business-oriented climate seems to have settled over Washington, underlying problems of mistrust and suspicion between business and government continues.

o One way to address this problem is through a change in our graduate school programs...MBAs taking classes in public policy making and the legislative process and Public Administration students studying economics and marketing. The end result could be students who are more aware and sensitive to the concerns and demands of other professions.

o In addition, I would endorse the concept started under President Johnson -- an executive exchange where private industry executives and government bureaucrats exchange jobs for a year which can lead to greater cooperation between private and public officials.

o The road to revitalizing our basic industries will be long and expensive. Through cooperation and teamwork business and government together can solve our economic problems.

UNIVERSITY OF MINNESOTA LAW LECTURE:

The Iranian Hostage Treaty

Lecture Talking Points

- The seizure of the American Embassy on November 4, 1979, precipitated a crisis between Iran and the United States, which ultimately involved Iran's threat to withdraw its assets from this country, a declaration of a national emergency and the blocking of Iranian assets, the breaking of diplomatic relations, and the loss of American military lives.
- On January 19, 1981, the United States and Iran peacefully resolved many of their outstanding disputes. An overall agreement was reached for the release of the hostages, the settlement of claims and the return of blocked Iranian property.

- Specifically, that agreement provides the following:
- The basic agreement was a simple quid pro quo: Iran returned the hostages in exchange for U.S. restoration of its financial status pre-November, 1979.
 - The agreement provided that the release of the hostages and the unfreezing of Iranian assets would occur simultaneously.
- Financial Aspects
 - Provides generally for return of approximately \$12 billion in Iranian assets frozen on November 14, 1979, \$7.9 billion of Iranian assets were transferred into escrow account of the Algerian Central Bank at the Bank of England.
 - When the amount in that account reached \$7.9 billion the Iranians began procedures to release the hostages.
 - At the moment the hostages cleared Iranian airspace, the money was transferred from the Algerian account into a series of other accounts.
 - \$3.7 billion was transferred to private American banks to pay off Iranian loans.
 - \$1.4 billion was transferred to an escrow account to be used to pay future Iranian bank debts.
 - \$2.9 billion was transferred directly to Iran.
 - The agreement also provided for the transfer of about \$4 billion in frozen assets to the Bank of England in

six to nine months. Of that amount, \$.50 of every dollar transferred will go to Iran, the rest to a special security escrow account which will be used to pay arbitration awards on claims by U.S. companies and individuals. This account is supposed to grow to \$1 billion as frozen assets are released and to be replenished by Iran so that its funds do not drop below \$500 million.

- Claims Settlement Agreement

Agreement provides for claims against frozen assets to be withdrawn and to be submitted for arbitration. The agreement sets up a security account as part of a Claims Settlement Agreement. That agreement provides for the establishment of an Iran - United States Claims Tribunal. The Tribunal consists of three Iranian members, three U.S. members and three to be picked from other countries. The Claims Tribunal will serve as an arbiter of three types of claims:

- 1) Claims of U.S. nationals (individuals and corporations) against Iran and of Iranian nationals against the U.S.
- 2) Official claims between the U.S. government and Iran involving contracts of sale of goods and services.
- 3) Disputes over the meaning of the agreement itself.

What is not included are:

- Claims arising out of the seizure of the Embassy.
- Claims involving binding contracts which provided for dispute resolution in Iranian courts.

- Non-Economic Provisions

- The U.S. pledged not to intervene in Iranian internal affairs either politically or militarily.
- The U.S. agrees to revoke all trade sanctions directed against Iran since November 4, 1979.
- The U.S. agreed to withdraw claims pending against Iran before the International Court of Justice.
- The U.S. agreed to non-prosecution of its claims and to bar claims by U.S. nationals, including those arising out of the embassy seizure.
- U.S. agrees to take certain actions to help effectuate the return of the Shah's assets to Iran.

- To implement this agreement, the President
 - terminated attachments against the blocked assets.
 - nullified all attachments and judgments.
 - order the termination of claims through binding arbitration.
 - directed the transfer of assets to Iran.

(Note: There are presently pending in the U.S., 400 suits against Iran, involving several billion dollars.)

- To fulfill the U.S. commitment under this agreement, the President issued a series of Executive Orders pursuant to his authority under the International Emergency Economic Powers Act. (IEEPA).
- On February 24, 1981, President Reagan suspended all claims which may be presented to the Iran-U.S. Claims Tribunal under terms of the agreement.

Presidential Authority: (constitutional)

- While the Constitution confers certain authority to act in the field of foreign affairs on Congress as well as the President (eg. the power to declare war, to provide and regulate the armed services, to appropriate funds for defense, to ratify treaties), it has long been recognized by both the Congress and the Courts that the President is the primary actor in the conduct of this country's foreign affairs.

- To some extent, the President's leading role in the field of international affairs is molded by necessity - the area of international relations requires continued up-to-date information on what is happening abroad, it also requires consistency, and on occasion, the ability to act quickly and if necessary, secretly to carry on the foreign policy of this nation. Furthermore, the President's role as chief foreign policy spokesperson is inextricably tied to his role as Commander-In-Chief of this nation's armed forces.
- While the President's powers in the international relations area are to some extent based on practical necessity, the Constitution provides ample support for his powers in this area. First of all, Article II confers several specific powers necessary to the conduct of foreign affairs on the Presidency - the power to receive representatives of foreign governments, the power to nominate U.S. representatives to foreign governments, and the power to conclude treaties with foreign governments with the approval of the Senate.
- But where you ask, those of you who have recently looked at Article II, does the President derive the constitutional authority to execute agreements with foreign countries that are not treaties, i.e., executive agreements?

- The answer is that the Constitution does not specifically grant that power to the President but his power to make such agreements has nevertheless been recognized as an implied power of the Presidency in the few cases which have considered this issue directly. Judicial recognition of the President's power to negotiate executive agreements with foreign nations is exemplified by the Belmont and Pink cases which I asked you to read in preparation for today's lecture.
- While the Supreme Court in those opinions, does not directly state the constitutional authority from which the President's power to make such agreements derives, the Court clearly recognizes that the power exists, that it includes the power to settle claims and that negotiation of such agreements is solely within the competence of the Presidency.
- Returning to the question of the constitutional source of the President's power to negotiate executive agreements, there are several sources from which it may derive. First, there is the President's power as Commander-In-Chief of the armed forces. In that role, the President has the power to make agreements affecting peace as well as to deal with questions of war, thus he may negotiate armistices and other types of peace-keeping agreements.

Statutory Authority

- In addition to his constitutional powers in the area of foreign affairs, the President also has statutory authority to take certain types of action in the area of international economic affairs. Specifically authorized are actions with respect to property in which a foreign government has an interest and which is subject to the jurisdiction of the United States.
- A 1977 statute, the International Emergency Economic Powers Act (I.E.E.P.A.) (50 U.S.C. 1701 et. seq.) empowers the President in the face of an unusual and extraordinary threat to the national security, foreign policy, or economy of this nation to regulate transactions and transfers of property of a foreign country subject to the jurisdiction of the United States.
 - Specifically, this act allows the President to investigate, regulate, direct and compell, nullify and void, and prevent or prohibit transaction involving property of a foreign country, once he has declared a national emergency.
- As such, the statute represents a very broad delegation of power to the President in the area of regulation of international economics.

- Second, there is the President's power as Chief Executive of the nation and the powers that can be implied from that role. It is this power which is often cited as the source of the President's constitutional authority to be this nation's sole negotiator in foreign affairs. Similarly this power has been invoked to authorize the President to settle claims held by private citizens against other nations.
- In sum, Presidents have been negotiating executive agreements including agreements which settle the claims of U.S. nationals against foreign governments for years. Courts have recognized that the President has the power to make such agreements under the Constitution. And no executive agreement has ever been struck down as unconstitutional. For these reasons, I believe that there can be no doubt that the President has the power to negotiate the U.S.-Iran Hostage Agreement.

- President Carter's initial Executive Order in response to the hostage crisis, issued on November 14, 1979 which "blocked" or "froze" all Iranian assets in this country and held by U.S. banks was issued in part under the authority of I.E.E.P.A. as were the later Executive Orders which he issued as part of the U.S.-Iran hostage agreement.
- Those Executive Orders, you will know from your reading, unfroze the Iranian assets and provided for their transfer to escrow accounts and to the Iranians, as well as nullified any outstanding attachments against the assets.
- A later Executive Order issued by President Reagan in February of this year also based in part on his authority under I.E.E.P.A. directs that all claims against Iranian assets (with the exception of those excluded under terms of the agreement) be presented to the Iran-United States Claims Tribunal and suspends all actions for judicial or equitable relief in U.S. Courts until such claims are presented to the Tribunal.

- These Executive Orders, first freezing and then unfreezing Iranian assets in this country illustrate both the importance and the flexibility of the President's statutory powers under I.E.E.P.A. This does not mean, however, that the President's actions with respect to the hostage agreements will not be challenged. To the contrary, one such challenge is even now being litigated in the Second Circuit.
- However, I am convinced that challenges to the President's actions under I.E.E.P.A. in this instance will not be successful for the following reasons.
- While the Act itself is relatively new and has not been the subject of a major test, it is not a new concept, but rather a recodification of a section of a long-lived statute called the trading with the Enemy Act (T.W.E.A.).
- The powers granted to the President in Section 1702 of I.E.E.P.A. are the same powers which former Presidents have enjoyed under Section 5(b) of the T.W.E.A. and, while there have been many judicial challenges to the T.W.E.A., it nonetheless survived every attack on its constitutionality and was interpreted by the Courts as being a very broad delegation of power to the President.

- The broad construction which the Courts have given to I.E.E.P.A.'s predecessor, Section 5(b) of the T.W.E.A. is illustrated by the Custom Appeals Court opinion that the Court finds that the language of the statute - language which is virtually identical to the language of Section 1702 of I.E.E.P.A. - constitutes a very broad delegation of powers to the President.
- In fact, the Court carefully explains that Congress could not have intended otherwise because the President has to have the flexibility to deal effectively with national emergencies. Yoshida thus illustrates that one thing which Courts will focus on when reviewing a President's actions under a statute like I.E.E.P.A. is that the statute is specifically designed to cope with emergency situations - situations in which extraordinary measures may be necessary.
- You will also have noted that the Court in Yoshida focuses on the distinction between delegations of power dealing with domestic affairs versus powers for dealing with foreign affairs. On this point, the Court quotes the U.S. Supreme Court's opinion in Curtiss-Wright recognizing that legislation in the international field must often give more freedom and discretion to the President than would be appropriate in the domestic area in order to avoid embarrassment in our international relations.

- Finally, the Yoshida opinion is of interest to our consideration of President Carter's exercise of power under I.E.E.P.A. because of its detailed discussion of the standard of review applicable to tests of a President's powers under emergency legislation.
- On this subject, the Court notes that the traditional test is whether the President's actions were reasonably related to the powers delegated by the Act and to the emergency giving rise to his actions. Or, as the Court explains, it is the nature of the powers which determine what the President can do while the nature of the emergency restricts the means of execution, i.e., how he does it.
- In my opinion, application to this two-fold test to President Carter's actions in connection with the U.S. - Iran Hostage Agreement yields the inescapable conclusion that the President was acting well within his statutory authority under I.E.E.P.A.
- Clearly, the powers delegated to the President under Section 1702 specifically allow both the "blocking" and later the "unblocking" of transfers of Iranian property - since the Act specifically empowers the President to "prohibit" transfers of such property and to "nullify or void" interests in such property. Furthermore, the President's actions fall within the purpose of the statute which is to allow the President to make certain types of economic responses to an "unusual and extraordinary" threat to the U.S. National Security.

- The President's act in connection with the hostage crisis were also reasonably related to the nature of the emergency. The means used by the President, i.e., economic pressure through freezing Iranian assets and later an economic trade off for release of the hostages - related directly to the realities of the situation in Iran. I believe that economic pressure was one of the most effective and only means of bringing about the safe release of the hostages.

History:

- It might be helpful to try to put the Iran-U.S. Agreement in historical perspective.
- The Agreement with Iran is only the latest in a historical practice of claims settlements . . . People's Republic of China.
- Historically, claims settlement negotiations have culminated in a variety of dispositions, including binding arbitration.
- From the earliest days of the Republic, the Supreme Court has recognized that such agreements are binding upon the Courts (U.S. vs. Schooner Peggy).
- Typically, rather than renounce claims of American nationals, the Executive has used two primary methods to settle such claims, and has often done so through Executive Agreement:
 - first, lump sum payments in full settlement of American claims.
 - second, agreed to settle claims through the establishment of arbitration mechanisms -- and made arbitration binding, exclusive and non-reviewable.

- Further, it has been upheld in the Courts that the Executive Branch, may make such settlements of claims as it deems appropriate and allows the President to sacrifice certain claims for overriding foreign policy reasons.
- Indeed, the diplomatic ability of the U.S. to negotiate a settlement with a foreign nation would be effectively undermined if a foreign nation could not be assured that a settlement understood to be final and binding would in fact be respected by U.S. Courts.
- In times of emergency in our relations with a foreign nation these statutes give the President the necessary powers to:
 - block foreign property.
 - keep blocked property free of any interests that could present its alternate disposition.
 - marshall these assets to facilitate a claims settlement agreement.
- Note: Neither the language nor the legislation history of the Foreign Sovereign Immunities Act of 1976 (FSIA) purport to restrict the President's Constitutional authority to settle claims. Essentially, FSIA withdrew from the Executive its role in making binding immunity decisions with respect to suits against foreign governments. Withdrawing that authority is fundamentally different from limiting the President's authority to settle a broad range of claims affecting our foreign relations.

Pending Court Cases:

- When the crisis first broke out the government froze Iranian assets and issued licenses to nationals who had claims against Iran to protect them from loss.

- Treasury promulgated Iranian Assets Control Regulation which licensed claimants to institute judicial proceedings against Iran and permitted prejudgment attachment of Iranian assets but prohibited judgments and actual payments.
- These licenses were issued with the full understanding they could be modified or revoked at any time.
- To resolve the crisis, the President revoked all licenses for attachments and ordered the transfer of Iranian assets to the Federal Reserve Banks in New York - actions taken during a declared national emergency.
- The President's Constitutional authority to settle claims necessarily includes the power to dispose of attachments of foreign property which purport to secure those claims in domestic litigation (U.S. vs. Schooner Peggy).
- The right to pre-judgment attachments of another's property is not a constitutional right, but rather solely a state created right - as such, it remains subordinate to our international obligations pursuant to executive agreements.

- Termination of attachments against Iranian assets causes no compensable loss. At the time of the blocking order, claimants had no interest in assets that Iran was then threatening to withdraw from this country. The President blocked these assets, preventing Iran from removing them. As a result of that action, and Treasury's license, those assets could be attached, where such an attachment would otherwise be valid. But the license for the attachments, and thus the attachments themselves, were conditional, Orvis v. Brownell, and invocation of that condition precludes a finding that a compensable interest has been taken.

- In sum, the President's actions restored all claimants to their status as of November 14, 1979, when they had a punitive claim against Iran, but Iran had control of its own assets. To the extent that Iran may now exercise its right to withdraw its funds, that is not a taking by the United States.

Moreover, for the same reasons that suspension of claims against Iran causes no immediate loss to claimants, termination of their attachments likewise causes no immediate loss. Additionally, at whatever point in the future plaintiff establishes its claim, there may well be new Iranian assets in this country based on renewed trade between Iran and the United States. And finally, even if there are no new assets in the United States, the Agreement with Iran specifically provides United States nationals with the right to enforce awards of the Tribunal

in any country where Iranian assets can be found. In these circumstances, speculation as to future losses is an insufficient basis to restrain the transfers the President has lawfully ordered.

The Hostage Act:

- I think it is also important to point out that the President had a second statutory basis for his actions in connection with the hostage agreement, the 1868 Hostage Act. Simply put, this statute empowers the President in a situation where American citizens are unjustly deprived of their liberty by a foreign government to use such means (short of war) as are "necessary and proper" to bring about the release of the hostages. The "necessary and proper" language in the statute derives from the "necessary and proper" language in Article I of the Constitution and thus constitutes a very broad delegation of discretionary power to the President dealing with a hostage situation.

Conclusion:

- For the reasons I have just stated, while I am not an expert in either the field of international or constitutional law, I am convinced that the President had both the constitutional and the statutory power both to negotiate the U.S. - Iran Hostage Agreement he did, and to take those actions which were taken by Executive Order to effectuate the United State's share of that Agreement.

PART VI: QUESTIONS & ANSWERS ON THE LEGALITY OF THE
HOSTAGE AGREEMENT

Q: Did the President have the power to sign away the claims of the hostages and their families against the government of Iran?

A: First of all, President Carter provided for compensation of the hostages and their families by creating the Commission on Hostage Compensation so the hostages are not left without relief. In fact, they are probably better provided for than if they had to seek relief privately from the Government of Iran.

Second, President Carter did have the power both under the Constitution and under I.E.E.P.A. and the Hostage Act to settle both the claims of the United States and its nationals, including the hostages against Iran as part of his agreement with the Iranians.

Q: Did President Carter have the power to nullify attachments and other claims of American banks and corporations against the Iranian assets and to force certain creditors to go to the Iran-U.S. Claims Tribunal for relief?

A: In all fairness, I must point out that those creditors who did seek pre-judgment attachments against the frozen assets did not have a vested interest in those assets at the time of the agreement. All they had done was to take the first step in the process of protecting their interests. In fact, most of the attachments or set-offs by U.S. banks were acquired under license by the United States. As you may recall, the initial blocking order by President Carter prohibited all attachments against Iranian property within U.S. jurisdiction. Subsequent to that Executive Order the Secretary of the Treasury did license certain attachments and set-offs by U.S. banks. However, the licensing rested on the President's powers and actions under I.E.E.P.A. and thus was subject to revocation or nullification by subsequent Presidential action. Once the President revoked the license for the attachments they became unauthorized and therefore ineffectual.

In any event, U.S. banks did very well under the agreement -- their loans were repaid and other creditors are for the most part protected by the binding arbitration provision. In many cases, this arbitration will work to their advantage since they will not have to struggle with Iranian claims of sovereign immunity in U.S. courts but will instead have an international forum pledged to hear their claims and provided with the funds to pay them.

Q: Is the Hostage Agreement illegal under principles of International Law?

A: I am familiar with the argument that the U.S.-Iran Hostage Agreement is void because it violates certain principles of international law. Specifically, I believe, the argument is that the agreement is illegal because of Article 52 of the Vienna Convention on the Law of Treaties which states that "a treaty is void if its conclusion has been procured by the threat or use of force in violation of principles of international law embodied in the charter of the United Nations."

It is my understanding that the history of Article 52 indicates that its purpose was to prevent an aggressor nation from consolidating the fruits of its illegal use of force. That being so, the U.S.-Iran Hostage agreement does not fall within the intended scope of Article 52 for the simple reason that it doesn't provide Iran with any benefits from its illegal use of threats and force. Instead the agreement simply restores Iran to the position it was in before the hostages were seized.

What Iran obtained from the agreement is a promise by the U.S. not to interfere in its internal affairs, a return of its assets (but subject to the claims of U.S. nationals) and a pledge of U.S. assistance in helping Iran to claim assets of the Shah which are now subject to U.S. jurisdiction.

And the bargain with the U.S. is not one-sided. As well as the release of the hostages, Iran had to agree to pay certain loans held by U.S. banks, to put money into escrow for other loan payments, and to agree to international arbitration of claims by U.S. nationals including corporations against Iran thus foregoing its sovereign immunity defense in U.S. courts.

I therefore think that a strong argument can be made that the U.S.-Iran Hostage agreement is not the type of treaty contemplated by Article 52 and is therefore not void under principles of International Law.

Q: Did the President's waiver and/or settlement of claims as part of the agreement constitute a "taking" under the Fifth Amendment? Are claimants entitled to compensation by U.S. government?

A: This question is really premature. As of now, no one with a claim against Iran has lost any money. The banks, of course, have for the most part had their loans paid. In addition, funds specifically for payment of future bank loans and/or disputed amounts involving bank loans.

As for non-bank claimants, most of the creditors are entitled to take their claims to arbitration before the Claims Settlement Tribunal. It is too early to tell, of course, how that will work out but there's every reason to believe those creditors will do as well or even better than they would proceeding against Iran in U.S. Courts.

Finally, the hostages themselves, of course, will have some sort of settlement by the hostage commission.

What's important to remember is that no one really had a finally adjudicated claim against the Iranian assets - creditors had pre-judgment attachments, banks set-off funds for repayment of loans, but the interests of the claimants were contingent interests which still had to be adjudicated on the merits - so its hard to argue that such claims were already "property" under the Fifth Amendment - when right to compensation amount isn't even determined and, there is the underlying legal question, i.e., when the U.S. government

settles a claim as part of an international agreement, is the claimant entitled to compensation because otherwise he or she would be deprived of property without "just compensation". I am not going to get into that today. Suffice it to say, that there seems to be some disagreement about it among legal scholars - those of you who are interested may want to research the issues on your own.



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