



National Security Law Report

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Iraqi War Crimes Trials— A Progress Report

Last August, the American Bar Association overwhelmingly voted in favor of a resolution calling for war crimes trials of Saddam Hussein and other Iraqi war criminals. In addition, the Foreign Ministers of the European Community States have voted unanimously for such trials, and both Houses of Congress during 1991 likewise expressed overwhelming support.

Nevertheless, the Executive Branch is apparently divided on the issue. Two fundamental concerns in the State Department and at the White House seem to stand in the way:

- Conducting a fair trial without having physical custody of the accused may be difficult (although under the Nuremberg precedents trials in absentia are clearly lawful), and even a fair trial might simply produce a verdict that is unenforceable in the absence of ultimate physical custody over the accused. Arguably, such a process might ultimately reinforce the perception that international law is impotent.

- There are also some separation of powers and resource allocation considerations. Especially, at a time when budget cuts are being made, the State Department does not look favorably upon being instructed to spend money or allocate personnel to investigating charges and preparing for a trial that in the end might simply prove to many that the "law of nations" does not work very well. Under our Constitution, the primary initiative in foreign policy is properly with the Executive, and there is a traditional resistance to being "instructed" by Congress to pursue objectives that are not on the Executive's agenda.

Despite these arguments, on balance the case in favor of doing everything reasonably possible to pursue accountability for Iraqi war criminals is a very strong one:

- While certain prohibitions against "war crimes" are set forth in treaty law (e.g., the 1949 Geneva Conventions), the Nuremberg Principles remain "customary" international law and draw their legal force from State practice and evidence that States act on such matters in the belief they are complying with legal duties (*jus cogens*). If the world community fails to hold Iraqi war criminals accountable for their conduct, this failure might serve as evidence following future

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Leahy Bill Would Narrow FOIA National Security Exemptions

On November 7, 1991, Senator Patrick Leahy (D-Vt.), chairman of the Senate Judiciary Committee's Subcommittee on Technology and the Law, introduced S. 1939, "The Freedom of Information Improvement Act of 1991." This bill would significantly narrow the present legal protection from disclosure of sensitive national security information by amending FOIA Exemption One (classified information), Exemption Three (information protected by other statutes such as that protecting the CIA's sources and methods), and Exemption Seven (law enforcement information including the identity of sources in counterintelligence investigations).

Under the Leahy bill, information classified pursuant to executive order could no longer be withheld unless the government could prove that disclosure could reasonably be expected to cause "identifiable" damage to defense or foreign policy, and that such damage "outweighs the public interest in disclosure." These requirements, when coupled with existing FOIA provisions for de novo judicial review, in camera inspection, and the government's burden of proof, seem to shift

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Book Review

By the Editor

October Surprise: America's Hostages in Iran and the Election of Ronald Reagan

by Gary Sick

Random House, 1991

At the risk of being thought naive, I confess that the apprehension in the 1980 Reagan-Bush campaign over an "October Surprise" seemed to me at first utterly fanciful. That anyone should suppose that a President of the United States would manipulate negotiations for the freedom of American hostages to suit electoral convenience may reflect the paranoid atmosphere of a political campaign, but seems in the real world completely grotesque.

Accordingly, when stories first began to circulate that the Reagan campaign had itself contacted senior Iranian officials to negotiate about the hostages' release, in an attempt to avoid an October surprise, Americans were disbelieving. After reading Gary Sick's disturbing new book, it is impossible to be so certain.

The story of the hostage negotiations has always had more than its share of anomaly and coincidence. To begin with, eyebrows shot up when the Iranians finally accepted the terms of the hostage release agreement not more than five minutes after President Reagan was inaugurated on January 20, 1981. Was it possible that the radical religious leadership in Iran so hated Jimmy Carter that they were prepared to heap this final humiliation on him? Most close observers (including Gary Sick himself in his 1985 book on the Iranian hostage crisis, *All Fall Down*) felt the answer was yes, and thought little more of it.

But other peculiarities nagged. Perhaps chief among them are the events of mid-October 1980, which have never been satisfactorily explained. In the first two weeks of October, a mood of cautious optimism pervaded the Carter administration. The Iranian leadership seemed to be signaling at long last an interest in a resolution of the hostage issue, perhaps motivated by their interest in obtaining access to their purchased military equipment that had been frozen in the United States. Early October saw an upsurge of reports from Tehran and from

Leahy Bill

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predominant responsibility for protecting national security information from the executive branch to the courts, thus raising serious separation of powers questions.

The bill would also add a new requirement related to the government's invocation of Exemption Three (other statutes), by requiring the government to prove that release of the "specific information involved would cause the particular harm intended by Congress to be avoided." Under the law enforcement exemption, the bill would impose more stringent requirements for withholding information on the identity of sources, requiring the government to prove by "demonstrable facts and circumstances" that the source "clearly expected and continued to expect" confidentiality. This requirement would apply to all sources, including foreign and private institutions.

Although the prospects for further congressional action on the bill remain unclear, prompt action is unlikely in the absence of some unforeseen international development with major media and political implications. First, the imminent introduction of the bill was announced in April 1991, but actual introduction was delayed until November. Second, a companion bill introduced by Senator Leahy the same day, S. 1940 dealing with FOIA access to computerized records, was co-sponsored by Senator Hank Brown of Colorado, the ranking minority member of Leahy's subcommittee, but Senator Brown did not co-sponsor S. 1939. Third, no hearings have been scheduled on S. 1939 as of yet, nor has an identical or similar bill been introduced in the House.

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acts of aggression that the Nuremberg Principles are no longer recognized as binding law.

- The extent of the horror and criminal behavior in connection with the invasion and occupation of Kuwait was exceptional, and if the laws designed to prevent or punish such behavior are not enforced in this instance, they may lose any possible deterrent effect against future conduct of this nature.

- Even were there no chance of ever gaining physical control over Iraqi war criminals, it is important for moral reasons alone that their crimes be documented and brought to the attention of the world community. The process of "horizontal enforcement," by which individual States "punish" wrongful conduct by denying trade benefits, diplomatic courtesies, or other benefits given to States that abide by their legal privileges, might well help further to weaken Saddam Hussein if the full story is documented. Any price Saddam pays will enhance the deterrent against future misconduct of this nature.

- A fair international judicial procedure that led to the indictment and perhaps the conviction of Saddam Hussein could be used as part of a psychological warfare campaign against his regime, undermining his power base among all but the most hard-core Iraqis and other Arabs.

- Every month that goes by without a formal fact-finding process reduces the likelihood that all of the evidence will be secured and that witnesses with full recollections of details will be obtainable. Even if final sentencing or execution of judgment is delayed a few years, it is important to move quickly to collect and judge the evidence.

Under international law, Iraqi war criminals may be tried in a number of ways. One option is not, however, the International Court of Justice, the jurisdiction of which is limited to cases involving sovereign States. However, there are several clear alternatives:

- Defendants might be tried by national (domestic) courts in the States where they allegedly committed their crimes (e.g., Kuwait, Israel, Saudi Arabia). Most of the post-World War II war crimes trials took place in the countries where the alleged war crimes took place -- sometimes by municipal courts, but often by ad hoc tribunals. (Nuremberg was reserved

for those individuals accused of crimes against more than one country.)

- They might be tried in the domestic courts (or by an ad hoc tribunal) of any foreign State, since there is generally held to be universal jurisdiction over war crimes.

- The U.N. Security Council, the governments of the coalition forces, or some other international or multinational group might also set up an ad hoc tribunal to try the accused. This would be following the precedent set at Nuremberg.

- The trial could be used as a justification for creating a permanent International Court of Criminal Justice, which has been proposed from time to time for several decades.

Ultimately, it is important that the United States take the lead in calling for justice for Iraqi war criminals. Above all, the process must be fair, and there are obvious benefits to having United Nations Security Council or other multinational sponsorship. Yes, there are difficulties caused by not having the accused in custody, but ways can be found to insure fairness in the procedures despite this problem. If the world community fails to hold Iraqi war criminals accountable for their brutal behavior, the Nuremberg Principles may not survive as clear rules of customary international law. It would be sadly ironic if the war fought to uphold the rule of law and promote a new world order should instead serve to undermine a fundamental principle of the established world legal order.

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many of the administration's intermediaries. Prospects seemed to be improving.

Then, from October 15 to October 20, the world seemed to stand still. No reports were received. Diplomatic channels in Europe dried up. There was no communication, either direct or indirect, from Tehran. Those who had been in frequent touch with the administration went silent.

And then, on October 21, the Iranian negotiating position inexplicably flip-flopped. The ayatollahs were no longer interested in an early resolution of the crisis. Nor, suddenly, were they even interested in military equipment,

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despite the fact that the Iranian strategic position in the war with Iraq was very uncertain and the port city of Khorramshahr had just been taken by the Iraqis.

What was the reason for this week of silence, and what explains the 180-degree reversal of the Iranian negotiating position? It was during this period, according to a variety of reports examined by Sick, that a meeting was held in Paris between several Americans representing the Reagan campaign and Iranian officials and operatives to conclude a deal to delay the release of the hostages in return for American arms.

This is, of course, nothing less than an allegation that representatives of a domestic political campaign negotiated with representatives of a hostile foreign power, thus subverting the efforts of the administration then in office and in the end delaying the release of American citizens from detention in Iran. Reluctantly, Gary Sick has come to the conclusion that it actually happened.

How to evaluate such a horrifying possibility? First, one tries to get a sense of the heft of Gary Sick himself. He was a career naval officer who held non-political posts as an analyst of military and political affairs throughout his career. He earned a doctorate in political science from Columbia University. He held policy positions during the Nixon administration, was hired by Brent Scowcroft, national security adviser to President Ford, and remained on watch at the National Security Council throughout the Carter administration and during the early months of the Reagan administration. Those who have worked with him are full of admiration for his professionalism, level-headedness and good sense. He is no crank or light-weight, as some have recently suggested. One therefore has to look further.

What about the reports themselves? There seem to be too many of them to be the result of a giant conspiracy or another inexplicable coincidence. The stories seem independent, remarkably consistent and largely without any motive of self-aggrandizement or publicity. On the other hand, they come mostly from shadowy, sometimes unsavory figures in the world of international arms sales and political intrigue. But some of them have connections in varying degrees to both the United States and the Israeli governments. A few surfaced again during the

Iran-Contra events. One or two reports from arguably unreliable sources can be dismissed; a dozen or so such reports make it harder.

A full sifting of the evidence then requires an examination of the denials by those alleged to have been involved. At the time rumors first began to surface in earnest during the 1988 presidential campaign, attention immediately focused on George Bush's involvement. Heated denials and lack of corroboration at the time led most to dismiss the allegation. For Gary Sick, Bush's involvement is a red herring: he is willing to concede that available evidence seems to tilt against any Bush involvement. He does, however, call attention to the fact that it should be easy to produce hard evidence that the then-vice presidential candidate was not in Paris. Moreover, when investigators from the General Accounting Office sought to determine Bush's whereabouts in the final weeks of the campaign, Sick reports that significant records were kept private and investigators were not permitted to interview the Secret Service agents who were on duty during the days in question. One can only wonder why.

The case of then-campaign chief, later CIA director William Casey is a little harder to dismiss. Casey's defenders have always sworn that Casey could not have traveled abroad on the dates in question. Initial focus fell on a meeting in Madrid toward the end of July, 1980. It later emerged, however, that Casey's own records showed that he had been out of the country at just the same time to present a paper on World War II intelligence operations to the Anglo-American Conference on the History of the Second World War, held at the Imperial War Museum in London. He was abroad from July 26 to July 30, but put in appearances at the London conference only on the evening of the 28th and the morning of the 29th. The distance between London and Madrid easily permits a round trip and a meeting within the framework of a single day. Again, no clear-cut result.

The one serious effort of the United States government to rebut the allegations that Bush and Casey were in Paris on the weekend of October 17 ended in total failure. In testimony before a federal judge during a sentencing hearing, Oregon businessman and self-proclaimed CIA contract agent Richard Brenneke testified that there were meetings

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between Americans and Iranians in Paris on certain dates, and that both Casey and Bush were present. Sometime later, Brenneke was indicted for making false declarations to a federal judge and a full trial ensued. Weighing a welter of unspecific and contradictory testimony, the jury acquitted Brenneke on all counts after only five hours of deliberation. All of this scarcely means that either Bush or Casey was in Paris -- it does mean that the U.S. government, despite its best efforts, could not prove that they were not. In an age where most things we do leave either eyewitness or documentary evidence -- telephone calls, credit card purchases -- the failure of the government to provide either is striking.

An astonishing number of people seem to know something about some Paris meetings. Some were Iranian arms traders; some had connections with Israeli intelligence; others, with French intelligence. One was a former senior deputy to the director of the SDECE, the French secret service. Sick also refers to the testimony of two men, both highly respected officials in their governments, one an Israeli with first-hand knowledge of the 1980 meetings, the other a diplomat from an Arab country. Although Sick records that neither can be cited by name, both speak in total confidence that the meetings took place, that there were French and Israeli intelligence reports to that effect at the time, and that the political implications for all concerned were enormous.

Even the deposition responses of former President Reagan on the subject invite cross-examination. When asked about his knowledge of a secret hostage deal, the following colloquy ensued:

Reagan: I did some things actually the other way, to try to be of help in getting those hostages . . . out of there. And this whole thing that I would have worried about that as a campaign thing is absolute fiction. I did some things to try the other way The only efforts on my part were directed at getting them home.

Question: Did that mean contacts with Iranian government?

Reagan: Not by me. No.

Question: By your campaign perhaps?

Reagan: I can't get into details. Some of those things are still classified.

The least that can be said of that exchange is that Reagan seemed to state three times in quick succession that there were efforts on his part and by his campaign to get the hostages out of Iran. That in itself is surprising.

One wants, of course, not to believe any of this. But Gary Sick has done a careful job of assembling the reports and interviews and testimony from a wide variety of different people and of piecing them together into what begins to be the fabric of a coherent narrative. Large questions remain. Perhaps Congressman Lee Hamilton's investigation, with the power of subpoena, can perform the distinct public service of putting these nagging rumors forever behind us. We want to reassure ourselves that none of this ever happened -- in time, the truth will emerge. And yet . . . and yet.

Calendar of Events

March 19

Breakfast Meeting
University Club
Washington, D.C.
Speaker: United States District
Judge Stanley Sporkin

April 16

Breakfast Meeting
University Club
Washington, D.C.
Speaker: Assistant Secretary of
State Richard Schiffer

April 30 - May 1

Conference on Intelligence in a
Post-Cold War World
International Club
Washington, D.C.

*For further information on these
events, please contact the
Standing Committee office at
703-242-0629.*

An Independent Quebec?

By Dwight N. Mason

Canadians are seriously examining their future as a country. It is likely that the existing distribution of powers between the provinces and the central government will change in the direction of devolution toward the provinces. Quebec may well become independent.

After the conquest of Quebec by Britain in the 18th century, Britain allowed the French inhabitants of Quebec to retain their language and Roman Catholic religion -- in effect, their identity as a distinct society. French Quebecers have successfully maintained their language and their cultural distinctiveness to this day, and they are proud of this achievement. Their wish to do so in the future is the fundamental source of Quebec's drive for a different, more autonomous and perhaps independent relationship to the rest of Canada. There is a very strong consensus in Quebec on this principle.

The current crisis over Quebec's relationship to the rest of Canada is different and more serious than past ones. This is true for two reasons: first, independence is a practical possibility, and second, the rest of Canada is now willing to contemplate a future without Quebec.

An independent Quebec is a practical proposition. Quebec's population exceeds 6 million; it is increasingly well educated; and its business class is formidably entrepreneurial. Quebec's gross domestic product is about \$140 billion, ranking Quebec among the world's top twenty economies. The value of its trade with the U.S. is about the same value as our trade with France. Current U.S. direct investment in Quebec is about \$10 billion. Quebec is a key supplier of hydro-electric power to New England and New York. It is the home of world class companies, one of which may build Texas' high-speed rail system. Its government is competent and lives by free-market principles. Quebec's is one of the few governments that has conceived and successfully implemented a comprehensive economic and industrial development policy. Quebec would be well able to manage independence.

Now, for the first time, the rest of Canada is willing seriously to consider the idea of a Canada without Quebec. The origins of this new attitude are two: first, the traditional model of Canada as a country of two founding peoples is breaking down. The model was accurate in the 18th and 19th centuries but is no

longer. Now about one-third of Canadians have neither French nor English immigrant backgrounds. Thus many citizens -- particularly in the increasingly important prairie and western provinces -- no longer see the country through the prism of Canada's origins.

Second, the issue of Quebec's place in Canada and of Quebecers' claims for unique status seems less and less important and legitimate to more and more Canadians. Indeed, last year a major study by a Canadian commission to which more than 350,000 Canadians contributed their opinions -- the Citizens' Forum on Canada's Future -- discovered that Canadians outside Quebec are not willing to agree to compromising provincial and individual equality if that is what it takes to keep Quebec in the Confederation. Furthermore Canada's native peoples have now become deeply engaged in this debate, and they have made it clear that they will not accept an outcome that ignores their interests and aspirations for some form of self-government.

Whether or not independence for Quebec would be a good thing is another matter and depends upon one's point of view. From our perspective, it would create a more complicated but still manageable relationship with our northern neighbors. How it would affect Canada is unclear, although there would be economic and political costs for Quebec and the rest of country. It seems doubtful, however, that independence for Quebec would result in a breakup of the rest of the country or in attempts by some provinces to join the U.S. As the Citizens' Forum reported, "Outside Quebec, the vast majority of citizens . . . believe in a strong central government that can act with resolution to remedy the country's ills, unify its citizens and reduce division and discord among groups and regions. This is not to say that they don't also have an attachment to their provinces and regions, only that their attachment to Canada is stronger."

The critical period in this crisis is approaching. The Mulroney Government will make its constitutional proposals in mid-April. This will lead to a period of further debate. The tone of that debate could be decisive for Quebecers who are now scheduled to vote on their province's political future in a referendum this fall.

Mr. Mason is with the Washington law firm of Storch & Brenner. He served in the U.S. Embassy in Ottawa as Political Counselor from 1980 to 1983 and as Deputy Chief of Mission from 1986 to 1990.