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United States Department of State

The Legal Adviser

Washington, D.C. 20520

December 3, 1986

MEMORANDUM

TO: Mr. Cooper, Department of Justice
Mr. Dougherty, Central Intelligence Agency
Mr. Garrett, Department of Defense
Mr. Wallison, White House

FROM: Abraham D. Sofaer *ADS*

SUBJECT: Supplemental Legal Questions Submitted to
Department of State by Hamilton Subcommittee
on Europe and the Middle East

Attached are State's proposed answers to supplemental legal questions submitted by Congressman Hamilton's subcommittee, following the November 24 hearing at which Deputy Secretary of State Whitehead testified. Please comment/clear by COB tomorrow.

attachment

V. LEGAL ISSUES

As a general matter, we refer you to the Justice Department for answers to questions relating to the legal basis for the arms transfers to Iran. We understand that the Justice Department may have relied in part on a 1981 memorandum of law done by the Legal Adviser to the State Department concerning general legal authority for the transfer of arms outside the framework of the Arms Export Control Act. Apart from the question answered below, the State Department is not in a position to answer any of the other questions relating to specific aspects of this operation. We recommend that the Committee refer these questions to the agencies which had direct involvement and responsibility for the operations in question.

A3. President Carter issued Executive Order 12205 on November 14, 1979 which placed an embargo on Iran, but that was revoked January 19, 1981.

- Is there a legally binding arms embargo in effect against Iran today?
- Is there any legal basis for an arms embargo against Iran today?
- Or is the arms embargo against Iran merely a policy decision with no legal basis today?

A. In December 1979, in the exercise of its discretionary authority under Section 38 of the Arms Export Control Act to regulate and license arms exports, the State Department announced that it had suspended all existing licenses and approvals for the export or retransfer to Iran of Munitions List articles and related technical data. This policy was maintained after the signing of the Algiers Accords, notwithstanding the revocation of other sanctions against Iran contained in Executive Order 12205, and this policy remains in effect today. In addition, Section 509 of the Omnibus Diplomatic Security and Antiterrorism Act of 1986 has, since its enactment on August 27, 1986, prohibited (in the absence of a Presidential waiver and report to Congress) the export of Munitions List items to any country which the Secretary of State has determined, for purposes of section 6 of the Export Administration Act, has repeatedly provided support for acts of international terrorism. On January 23, 1984 the Secretary of State determined that Iran is such a country, and that determination remains in effect.

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JOHN J. BRADY, JR.
Chief of Staff

Congress of the United States
Committee on Foreign Affairs
House of Representatives
Washington, DC 20515

November 25, 1986

The Honorable John C. Whitehead
Deputy Secretary
Department of State
Washington, D.C. 20520

Dear Mr. Secretary:

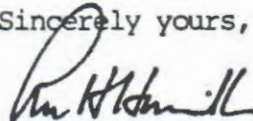
Attached please find supplemental questions submitted by the Committee following the November 24th hearing on the President's foreign policy initiatives toward Iran.

Because of the importance of this subject, it is the committee's desire to have this information as soon as possible. Therefore it would be appreciated if the Department would coordinate, where necessary, with other Executive branch agencies and provide the responses to the committee no later than Friday, December 5.

I appreciated your appearance before the committee yesterday.

With best regards,

Sincerely yours,



Lee H. Hamilton
Chairman
Subcommittee on Europe
and the Middle East

V. LEGAL ISSUES

A. General

1. Under what authority did you transfer or sell military articles to Iran?

- Under what authority did you approve third country transfer of defense articles and services to Iran?
- The Attorney General prepared a memo outlining the legal basis for the President's authorization of arms transfers to Iran. Could you provide the Committee with a copy of that memo?
- Could you also provide the Committee with any other legal memos from White House Counsel, Department of State or other Executive branch agencies stating the Administration's legal basis for proceeding with arms transfers to Iran?

NBA clear with AM and others as appropriate.

2. Military equipment supplied by the United States under the Foreign Military Sales and other security assistance programs is subject to various conditions on use, retransfer, etc.

- In the case of military equipment made available to Iran by the CIA, were any conditions imposed on Iran with respect to that equipment?

3. President Carter issued Executive Order 12205 on November 14, 1979 which placed an embargo on Iran, but that was revoked January 19, 1981.

- Is there a legally binding arms embargo in effect against Iran today?
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L
L

B. Provisions of the Arms Export Control Act

1. Under Section 3(a) of the AECA, no defense article shall be sold by the U.S. to a foreign country unless "the receiving country agrees not to transfer title to, or possession of, the defense article unless the President's consent has first been obtained." The President must promptly submit a report to Congress on the implementation of each agreement entered into pursuant to this provision. L

- Why has no report been submitted to Congress concerning such agreement by Iran?
- Why has no report been submitted to Congress concerning consent by the President to Israel or any other government to permit a third country transfer of arms to Iran?

2. Section 3(f) of the AECA states that "Unless the President finds that national security requires otherwise," arms sales are prohibited to "any government which aids or abets, by granting sanctuary from prosecution, any individual or group which has committed an act of international terrorism." The President may waive this requirement, but he must submit a report to Congress. Since January, 1984, the Secretary of State has designated Iran as a state which has supported terrorism. L

- Why has no report on a waiver been submitted to the Congress?
- Why is this provision not applicable to any arms sales to Iran regardless of the authority under which they may be provided?

3. Section 4 of the AECA states that defense articles can be sold by the United States only to "friendly countries solely for internal security" and only for "legitimate self-defense." L

- Has Iran met these two criteria?
- Would the use of U.S.-supplied arms by Iran in Iraqi-held territory be considered legitimate self-defense?
- Can a state officially designated as one which supports international terrorism also be a "friendly country" ?
- What evidence do you have that what the President has said are "defensive weapons and spare parts for defensive systems" are being used by Iran for "legitimate self-defense"?

3. (continued)

The Administration is on record that Iran is the intransigent party in the Iran-Iraq war and that Iran, not Iraq, is the party which has rejected international mediation or negotiation to end the war.

- How can any provision of arms in this case constitute "legitimate self-defense"?

C. Third Country Transfers

1. No third country transfers of U.S.-supplied defense articles and services can go forward without the consent of the President or the Secretary of State. Congress requires prompt reports of notification of such consent. L

- Was any such authority granted by the U.S. to Israel or any other country?
- Who in the Government gave this consent?
- What was the value (in terms of original acquisition cost) of the equipments whose transfer was approved?
- Was the Congress notified that such approval was being given?
- If not, why not?

2. What military equipment has Israel made available to Iran (directly or through intermediaries) with the knowledge of the United States Government during the past two years? NCA/IAS

- When was this equipment transferred to Iran?
- What was the value of the equipment involved?
- Who in the United States Government knew of the transfer?
- How did the United States Government come to know that the transfer was going to occur?

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Washington, D.C. 20520

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attachment

*NSF
file - State
ok on last 2 paragraphs
7 pages questions - GB
ok and into action
12-7-86*



United States Department of State

Washington, D.C. 20520

DEC 17 1986

Dear Mr. Chairman:

I am writing in response to your letter of November 25, 1986, in which you ask a number of questions relating to the sale of U.S. military equipment to Iran and the provision of funds to the Nicaraguan democratic resistance.

We have reviewed the list of questions carefully. I have enclosed responses to those queries which relate to U.S. policies and routine Department procedures on which the Department has information.

In many instances, however, the Department is unable to provide answers because we do not possess authoritative information on the arms or financial transactions about which you are asking. Other executive branch agencies may be in possession of information responsive to these questions, and we understand that these agencies have been contacted directly by your Subcommittee.

As you are aware, the Secretary of State has provided testimony before the House Foreign Affairs Committee (and is prepared to provide additional testimony in appropriate fora) concerning the Department of State's knowledge of the entire matter. We remain convinced that this comprehensive testimony will provide a full account of the information available to the State Department.

I hope that this information will be of assistance.

Sincerely,

J. Edward Fox
Assistant Secretary
Legislative and Intergovernmental Affairs

Enclosure:
As stated

The Honorable
Lee H. Hamilton, Chairman
Subcommittee on Europe and the Middle East,
House of Representatives.

V. LEGAL ISSUES

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3. President Carter issued Executive Order 12205 on November 14, 1979 which placed an embargo on Iran, but that was revoked January 19, 1981.

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A. In December 1979, in the exercise of its discretionary authority under Section 38 of the Arms Export Control Act to regulate and license arms exports (with the exception of exports by a U.S. Government agency for its official use or to carry out a foreign assistance or sales program authorized by law), the State Department announced that it had suspended all existing licenses and approvals for the export or retransfer to Iran of Munitions List articles and related technical data. This policy is consistent with the Algiers Accords, in our view, and remains in effect today. In addition, Section 509 of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, which was enacted on August 27, 1986, amended the Arms Export Control Act to prohibit (in the absence of a Presidential waiver and report to Congress) the export of Munitions List items to any country which the Secretary of State has determined, for purposes of section 6 of the Export Administration Act, has repeatedly provided support for acts of international terrorism. On January 23, 1984 the Secretary of

State determined that Iran is such a country, and that determination remains in effect. (The foregoing is, of course, without prejudice to the authority of the Executive Branch to carry out transfers of defense articles and services under other legal authorities, such as pursuant to special intelligence findings.)

2. What military equipment has Israel made available to Iran (directly or through intermediaries) with the knowledge of the United States Government during the past two years?

--When was this equipment transferred to Iran?

--What was the value of the equipment involved?

--How did the United States Government come to know that the transfer was going to occur?

A. I have no direct information on this subject. The agencies involved in transfers to Iran have provided full accounting to Congress through appropriate channels.

3. What was the status of equipment Israel supplied to Iran?

--Was any of this equipment Israel supplied to Iran originally provided to Israel by the United States Government under the Foreign Military Sales or other security assistance program?

--Was any of this equipment produced under a manufacturing licensing agreement or a technical assistance agreement?

--Was any of this equipment "U.S. origin" equipment that was obtained by Israel by other means, e.g. captured during military operations or obtained through private arms dealers?

A. I don't have the answers to these questions at this time.

4. Has any other foreign country, with the knowledge of the United States Government, made available to Iran (directly or through intermediaries) during the last two years any US-origin military equipment that was obtained under the Foreign Military Sales or other security assistance program, under a manufacturing licensing or technical assistance agreement, or under a Munitions control license?

A. Not to the knowledge of the State Department.

5. Does the United States Government have any information that any foreign country has transferred U.S.-origin military equipment to Iran without obtaining the required consent of the United States.

--If it does, why has this information not been reported to the Congress?

A. No.

6. To the extent that a foreign government transferred U.S.-origin military equipment to Iran through intermediaries, did the United States Government know this was being done?

--Did it give its approval to such indirect transfers?

--Was Congress informed of the transfer to the intermediary?

A. We do not have information on this subject.

7. With respect to U.S.-origin military equipment supplied to Iran by other countries:

--Would the United States have been willing to transfer this military equipment to Iran itself?

--Were any conditions imposed, especially conditions relating to purposes for which the equipment could be used or relating to retransfers of the equipment?

--Was any of the equipment "demilitarized" prior to its transfer?

--Has Iran provided any commitments in writing to the United States Government that it will not transfer the military equipment, if not demilitarized, to any foreign country or person without first obtaining the consent of the President?

A. I have no information reliably to comment on these questions.

Q. Today's Washington Post says that the State Department told the House Foreign Affairs Committee last week that a special presidential intelligence finding could override the prohibition against selling U.S. arms to Iran established by the 1986 antiterrorism act. Is that correct?

A. The Post article apparently refers to one of a series of answers provided by the State Department to questions submitted by the Chairman of the HFAC Subcommittee on Europe and the Middle East, Lee Hamilton, to Deputy Secretary Whitehead in connection with his appearance before that Subcommittee on November 24.

This answer responded to a question from the Committee as to whether a legally binding arms embargo was presently in effect against Iran, and the Department's answer referred, among other things, to a provision of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, which amended the Arms Export Control Act to prohibit (in the absence of a Presidential waiver and report to Congress) the export of Munitions List items to any country which the Secretary of State has determined to have repeatedly provided support for acts of international terrorism. The Department's answer then notes, in a concluding parenthetical, that "the foregoing is, of course, without prejudice to the authority of the Executive Branch to carry out transfers of defense articles and services under other legal authorities, such as pursuant to special intelligence findings."

This was an appropriate caveat, since it is generally recognized, by both the Executive Branch and the Congress, that the Executive Branch is authorized to transfer arms to foreign governments pursuant to intelligence operations consistent with the National Security Act, outside the terms and limitations of the Arms Export Control Act. It was a general answer to a general question about existing law, not an analysis of any particular arms transfers.

Q. Does that mean that the Administration believes it can legally transfer arms to a country on the terrorism list, without the Presidential waiver and notice to Congress required by the Omnibus Antiterrorism Act, so long as it is done under cover of intelligence operations?

A. We believe that arms transfers pursuant to intelligence operations are in general governed by the National Security Act and not the Arms Export Control Act, which was intended and designed to deal with overt arms transfers through normal government channels. We have not addressed whether the provision of the Omnibus Antiterrorism Act, which amended the Arms Export Control Act on August 27, 1986, was intended to alter this general rule.