THE WHITE HOUSE
WASHINGTON

11/24/86

JP says:

If we ship arms under a finding, regardless of amounts, it is legal not withstanding arms Export control act & its limit. Bill Smith consulted in 1981 & were agreed in Jan 86

Asked JP for cost of TOW — he not sure. I said if 2000 tows cost $10000 per its expensive (20 mm) Hill raising possibility of cost of missile parts + TOWs was $100 mm

DONALD T. REGAN
CHIEF OF STAFF

THE WHITE HOUSE
WASHINGTON

TO: A. B. Culva House

FROM WILLIAM B. LYTTON III
Deputy Special Counsellor
to the President

☑ FYI

☐ COMMENT

☐ ACTION

File
Iran-Contra

THE WHITE HOUSE

WASHINGTON

August 4, 1987

MEMORANDUM FOR ARTHUR B. CULVAHOUSE, JR.

FROM: WILLIAM B. LYTTON III W.B.L.

SUBJECT: ARMS EXPORT CONTROL ACT

Attached is an outline of an argument as to why the Arms Export Control Act was not violated by the 1985 arms shipments.

I. Introduction

The following are what we consider the best arguments for the legality of U.S. consent to retransfer of U.S.-origin arms from Israel to Iran in 1985. Attached are copies of a more extensive paper on the subject by Joy Yanagida (Tab A) as well as a Memorandum for the Attorney General prepared by the Department of Justice's Office of Legal Counsel (Tab B).

II. The recognized exception to the transfer requirements of the AECA for transactions conducted as covert actions pursuant to the National Security Act also extends to retransfers.

A. The Arms Export Control Act ("AECA"), 22 U.S.C. Section 2751, et. seq., contains several specific requirements which must be met before the USG transfers defense articles or defense services to other countries. On its face, the AECA admits of no exception and there is little doubt that the 1986 direct transfers to Iran did not satisfy express requirements of the AECA (Yanagida at 2-6).

B. Congress, however, has acknowledged that an exception to the AECA transfer requirements exists for transactions conducted as covert actions pursuant to the National Security Act, 50 U.S.C. Section 401, et. seq.

1. The National Security Act provides certain specific functions to be performed by the NSC and CIA, but also states that the NSC shall "perform[ ] such other functions as the President may direct...." (50 U.S.C. Section 402) and the CIA is authorized "to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct...." (50 U.S.C. Section 403(d)).

2. In 1981, the Departments of Justice and State and the CIA concluded that "it seems clear that Congress had not regarded the Foreign Assistance Act (FAA) and the AECA as an exclusive body of law which fully occupy the field with respect to U.S. arms transfers." (Yanagida at 9).

3. In 1985, Congress enacted legislation recognizing the President's right to transfer arms as covert actions outside the aegis of the AECA.

a. 50 App. U.S.C. Section 415(a)(1) provides:

> the transfer of a defense article or defense service exceeding $1,000,000 in value by an intelligence agency to a recipient outside that agency shall be considered a significant anticipated intelligence activity....

By deeming such arms transfers as significant anticipated intelligence activities, Congress imposed certification and reporting requirements for arms transfers conducted as covert actions pursuant to the National Security Act, but did not prohibit such transfers or make them subject to the AECA.

b. The House Report to the above law made clear that Congress recognized, and at least condoned the practice, that the executive was making arms transfers as covert actions, outside the AECA.

> [C]overt transfers of military equipment or services bypass the established statutory framework for the consideration and approval of security assistance programs. Being secret, these transfers avoid public commentary, congressional review and debate. Therefore, they occur without many of the usual checks and balances built into Foreign Assistance Act and the Arms Export Control Act....
>
> In the past, notice of some transfers of significant military equipment had not been provided until after the fact. H. Rep. 99-106(I) at 10-11, 99th Cong. 1st Sess., May 15, 1985 (to accompany H.R. 2419).

C. The AECA provides that the President may not consent to the retransfer of the arms from an original transferee to a third nation "unless the United States itself would transfer the defense article under consideration to that country." 22 U.S.C. Section 2753. The AECA also contains some additional requirements concerning retransfer. (Yanagida at 14-15).

D. Given the existence of a recognized exception to AECA requirements in the case of a covert arms transfer pursuant to the National Security Act, there is simply no logical reason why the USG cannot conduct or approve a covert arms retransfer outside the AECA.

E. The Hughes-Ryan Amendment (22 U.S.C. Section 6422) prohibits the expenditure of funds by the CIA for operations abroad unless the President finds such an operation is "important to the national security."

1. Although it is unclear that even an unwritten finding was made for the August/September shipment, no CIA or other U.S. Government funds were expended in this retransfer and thus the need for a finding is doubtful.

2. Although there may have been a signed retroactive finding, there was no prospective written finding for the November 1985 retransfer, in which the CIA played a role.

- The need for a finding for this shipment is not clear as CIA's General Counsel

Stanley Sporkin recognized.

- Even though it has been the President's practice, there is no statutory requirement that a finding be written.

- The November shipment was ultimately returned to the Israelis.

F. Section 501 of the National Security Act requires Congressional notification of "any significant anticipated intelligence activity" which is "carried on for or on behalf of any...entity of the United States," but states that such notification need only be made "in a timely fashion" (50 U.S.C. Section 413(b)). Section 501 also expressly recognizes that the notification requirement applies only "to the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of Government...."

III. On December 17, 1986, OLC prepared a memorandum for the Attorney General concerning the legality of the arms transfers. OLC concluded that the 1985 transactions were in the nature of direct transactions from the U.S. to Iran, using Israel as a conduit (Tab B at 16-17).

A. This opinion, however, was based on incomplete information. Evidence adduced in the months since December 1986 suggests that in 1985 the President would not have approved direct transfers to Iran and casts doubt on OLC's presumption that the U.S. firmly agreed to replenish in advance of Israeli shipments.

IV. That section of the AECA providing for criminal sanctions makes criminal the violation of two specific sections of the AECA (22 U.S.C. Section 2778). Neither section deals with retransfer requirements. The export of certain defense articles and defense services without a license is a criminal violation, but seems to refer only to exports from the U.S.

TAB A

ARMS SHIPMENTS
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ARMS SHIPMENTS

Summary

This memorandum describes the law applicable to the seven shipments of U.S.-origin arms to Iran during the period August 1985 to October 1986. The United States made four direct shipments in 1986, authorized as covert actions pursuant to a written Presidential finding. In 1985, Israel retransferred three shipments of U.S.-origin arms to Iran, without written U.S. authorization. For the U.S. and Israeli shipments, respectively, described below are (a) the authorizing legislation; (b) requirements of a "Presidential finding" under the Hughes-Ryan Amendment insofar as the CIA may have been involved; and (c) reporting requirements.

Both the U.S. and Israeli shipments comprised TOW and HAWK missiles and components of the latter. All are items on Category IV of the Munitions List, which includes "guided, tactical and strategic missiles, launchers and systems." In general, export of defense articles and services on the Munitions List 1/ may be authorized through one of four routes, two of which are inapplicable here:

(1) as a private transaction licensed under the International Traffic in Arms Regulations, 22 C.F.R. Pt. 121 et seq. ("ITAR"), regulations implementing the the Arms Export Control Act (22 U.S.C. §§ 2751-2796c) ("AECA");

(2) as a governmental transfer under the military assistance program of the Foreign Assistance Act of 1961 (22 U.S.C. §§ 2151-2429a) ("FAA");

(3) as a governmental transfer authorized as a foreign military sale ("FMS") under the AECA; or

(4) as a covert action pursuant to the National Security Act, 50 U.S.C. §§ 401 et seq. If CIA funds are involved in the action, § 662 of the FAA, 22 U.S.C. § 2422 ("the Hughes-Ryan Amendment"), also requires a Presidential finding that the action is important to the national security of the United States.

Each route triggers reporting requirements.

Neither the ITAR nor the FAA govern the transactions at issue. The direct U.S. sales were exempt from the ITAR because

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1. By terms of 15 C.F.R. § 270.10, Munitions List items are not subject to Export Administration Regulations (15 C.F.R. Pt. 370 et seq.) implementing the Export Administration Act, 50 App. §§ 2401 et seq., ("EAA").

U.S. Governmental transfers are so exempt. 2/ The arms retransferred by the Israelis almost certainly were not obtained through the ITAR, and therefore are not subject to ITAR restrictions, because TOWs and HAWKs are not available commercially (See testimony of Sam Cummings to the Tower Commission). The military assistance program authorized under the FAA is also inapplicable, since the U.S. did not use the program to transfer the TOWs and HAWKs to Iran, and has not used the program to transfer arms to Israel.

The direct U.S. shipments do not raise substantial legal issues. They were authorized as covert actions, thus obviating issues of compliance with the AECA. As required by the Hughes-Ryan Amendment, the President found that the operation was "important to the national security." There are substantial grounds for deferring congressional notification, though questions on the duration of the deferral may well be revisited by Congress.

The Israeli retransfers pose more complex legal questions. Since Israel obtained the arms from the United States pursuant to the AECA, they already were subject to AECA restrictions on retransfer. Israel was obliged to obtain U.S. authorization to retransfer; as well, it sought a U.S. commitment to replenish Israeli stocks. The retransfer was not handled as a routine AECA retransfer. The AECA retransfer limitations, more exacting than those on direct shipments, were not satisfied. As a legal matter, it is likely -- but not conclusive -- that the President may authorize retransfers as covert actions just as he may with direct shipments.

As a factual matter, presuming information in the Tower Report is correct, it is not clear that the President authorized the shipments before the fact, especially since his concurrence was verbal. Indeed, it is not even clear that he intended to authorize them as covert actions, though one may fairly deduce that he did so.

---

2. § 38(b)(2) of the AECA, 22 U.S.C. § 2778, provides:

> Except as otherwise specifically provided in [the ITAR] regulations issued under subsection (a)(1), no defense articles or defense services designated by the President under subsection (a)(1) may be exported or imported without a license for such export or import, issued in accordance with this Act and regulations issued under this Act, except that no license shall be required for exports or imports made by or for an agency of the United States Government (A) for official use by a department or agency of the United States Government, or (B) for carrying out any foreign assistance or sales program authorized by law and subject to the control of the President by other means.

(emphasis added throughout, unless otherwise specified.)

The Hughes-Ryan Amendment requirement for a finding is triggered by the expenditure of funds "by or on behalf of the CIA." A fair case can be made that the requirement did not apply to the first two Israeli retransfers, since they did not involve the CIA; and that it was satisfied for the third and final retransfer, (the only one that involved the CIA) because the retransfer was authorized by the President.

It may well be that notification to the Congress is not required by statute; that authorization to retransfer does not per se constitute "intelligence activity" or "special activity." If notification nonetheless is deemed applicable or desirable, the arguments for or against postponement parallel those applicable to direct shipments.

1986 Direct Transfers by the United States

The 1986 arms transfers were authorized as a covert action undertaken pursuant to the National Security Act of 1947. Upon a finding by the President on January 17, 1986 that arms shipments to Iran were "important to national security," four shipments took place:

Feb. 20, 1986	1000 TOWs
May 24, 1986	1 pallet of HAWK spares
Aug. 3, 1986	3 pallets of HAWK spares
Oct. 29, 1986	500 TOWs

Authorization of the covert action rendered inapplicable the complex of restrictions under either the AECA (for foreign military sales ("FMS") conducted by the U.S. Government) or the FAA (which establishes nearly identical provisions governing the military assistance program). Such restrictions probably could not have been satisfied in the case of transfers to Iran.

1. Authorizing Legislation.

The National Security Act.

It is now accepted doctrine the Executive Branch may transfer items on the Munitions List as covert actions not subject to the AECA or the FAA. Such transfer may be effected through: first, a DOD transfer of the weapons to the CIA under the Economy Act of 1932, 3/ which permits a federal agency to procure equipment from another; and second, a CIA transfer to the foreign country under its general authority conferred by the National Security Act of 1947.

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3. § 601 of P.L. 98-216; § 1(2) of 98 Stat. 3, Feb. 14, 1984; 31 U.S.C. § 1535, then 31 U.S.C. § 686.

Neither the Economy Act nor the National Security Act authorize covert arms transfers expressly. Section 601(a) of the Economy Act simply provides:

> The head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency or another agency for goods or services if --
>
> (1) amounts are available;
> (2) the head of the ordering agency or unit decides the order is in the best interest of the United States Government;
> (3) the agency or unit to fill the order is able to provide or get by contract the ordered goods or services; and
> (4) the head of the agency decides ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise.

The CIA's general authority to conduct covert operations requires that agency, under NSC direction, to perform services of common concern for the benefit of existing intelligence agencies and to

> perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct. 4/

Congressional Acquiesence in Covert Arms Transfers. As recently as 1981, there had been concern over whether covert arms transfers could take place outside AECA auspices. 5/ By 1985, Congress recognized that arms transfers constitute "significant intelligence activities." It imposed certification and reporting requirements, but neither prohibited such transfers nor rendered

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4. § 102(d) of the National Security Act of 1947, 50 U.S.C. § 403(d).

5. Letter, William French Smith to William J. Casey, October 5, 1981, and accompanying memorandum of the Legal Adviser. See also Memorandum for Office of the Legal Counsel to Attorney General, undated but post-November 1986.

them subject to the AECA or FAA restrictions. 6/ 50 App. U.S.C. § 415(a)(1) provides:

> the transfer of a defense article or defense service exceeding $1,000,000 in value by an intelligence agency to a recipient outside that agency shall be considered a significant anticipated intelligence activity for the purpose of [section 501 of the National Security Act of 1947.] 7/

The House Report to P.L. 99-569 makes clear that Congress recognized that arms were being transferred under the guise of covert activity:

> [C]overt transfers of military equipment or services bypass the established statutory framework for the consideration and approval of security assistance programs. Being secret, these transfers avoid public commentary, congressional review and debate. Therefore, they occur without many of the usual checks and balances built into the Foreign Assistance Act and the Arms Export Control Act. . . .
>
> Section 502(b) will not require prior notification of all covert military transfers, only those which involve expensive, technologically important items of military equipment. . . . Thus, the Committee is creating a rule that a transfer of an item of a value in excess of $1,000,000 is per se "significant"; and leaving transfers of an item of a value of less than $1,000,000 to be determined as the Intelligence Oversight Act and its legislative history dictate. . . . 8/

The propriety of transferring arms as covert actions, outside the aegis of the AECA, is well-established.

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6. Section 403(a) of the FY 1986 Intelligence Authorization Act (P.L. 99-169, 99 Stat. 1002, 1006, Dec. 4, 1985)("IAA"), incorporated permanently into the National Security Act of 1947 by section 602 of the FY 1987 IAA (P.L. 99-569, Oct. 27, 1986).

7. Section 501 is discussed infra.

   Separate memoranda discuss 50 App. U.S.C. § 415(a)(3), which provides:

   > An intelligence agency may not transfer any defense articles or defense services outside the agency in conjunction with any intelligence or intelligence-related activity for which funds were denied by the Congress.

8. H. Rep. 99-106(I) at 10-11, 99th Cong. 1st sess., May 15, 1985 (to accompany H.R. 2419).

2. Hughes-Ryan Requirements. Section 662 of the FAA, 22 U.S.C. § 2422, the Hughes-Ryan Amendment, provides in part:

> No funds appropriated under this authority of this or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States. . . . 9/

The President made the requisite finding on January 17, 1986. 10/ The sufficiency of that finding has not yet been challenged.

3. Notification to Congress. Section 501 of the National Security Act of 1947, 50 U.S.C. § 413, requires timely notification to Congress of "significant anticipated intelligence activities." There is no dispute that notification was required; as noted supra, covert transfers of defense articles in excess of $1,000,000 are now per se "significant anticipated intelligence activities" and automatically trigger the requirement. There may be some question, however, over the duration for which notification was deferred.

The statute does not require prior notification, but rather takes due regard of the need for secrecy in conducting covert operations. Section 501(a) provides in part:

> To the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to

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9. Section 3.1 of E.O. 12333 (3 C.F.R. comp. 1983 at 201-220, Dec. 4, 1981), provides that the Hughes-Ryan Amendment "shall apply to all 'special activities' as defined in this Order." Section 3.4(n) defines "special activities" as activities

> conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activities, but which are not intended to influence Unitd States political processes, public opinion, policies, or media and do not include diplomatic activities or the collection and production of intelligence or related support functions.

10. Reprinted in the Tower Rept. at B-58-60.

intelligence sources and methods, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall --

> (1) keep the ["intelligence committees"] fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States, including any significant anticipated intelligence activity, . . .

Subordination of the notification requirement to the constitutional "authorities and duties" of the executive recognizes that covert actions are an executive responsibility; that premature disclosure could be life-threatening; and that legislation which did not accomodate the need for secrecy would be deemed to traduce Presidential prerogatives. 11/

Section 413(b) expressly contemplates that notice must sometime be deferred:

> The President shall fully inform the intelligence committees in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, for which prior notice was not given under subsection (a) of this section and shall provide a statement of the reasons for not giving prior notice. . . .

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11. See colloquoy between Senators Javits and Huddleston, 126 Cong. Rec. § 17693 (1980), cited in "Memorandum for the Attorney General, Re: The President's Compliance with the 'Timely Notification' Requirement of Section 501(b) of the National Security Act," prepared by the Office of Legal Counsel, Dec. 17, 1986.

    But cf. the House Report to new § 403 of the National Security Act, supra at note 8, which reveals that the House expected that Congress would be notified before covert arms sales occurred:

> In the past, notice of some transfers of significant military equipment had not been provided until after the fact. . . . Accordingly, the Committee has adopted Section 502(b) [ultimately § 403(a) of the IAA] to require prior notification of all military equipment transfers whose value exceeds $1,000,000 per unit.

Justice Department Memorandum. The OLC memorandum of December 17, 1986 reviewed the constitutional prerogatives of the President in the conduct of foreign covert operations, as well as the legislative history of the statute. It concluded:

> Because the recent contacts with elements of the Iranian government could reasonably have been thought to require the utmost secrecy, the President was justified in withholding section 501(b) notification during the ongoing effort to cultivate those individuals and seek their aid in promoting the interests of the United States.

We do not foreclose the possibility that Congress will seek to revisit these issues.

4. AECA Restrictions. If the transfers had not been authorized as covert actions, they may not have satisfied AECA requirements. Even if the requirements were inapplicable to the direct transfers, whether or not they may be satisfied has legal consequences for the Israeli retransfers. They are set out below.

Initially, § 4 of the AECA, 22 U.S.C. § 2754, establishes substantive conditions related to end use: that the arms be used for internal security, self-defense, participation in collective security arrangements, or to assist in public works. 12/ The only possible candidate among these justifications is that the arems were to have been used for Iranian self defense -- a difficult case to sustain, albeit a subjective one.

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12. That section provides:

> Defense articles and defense services shall be sold or leased by the United States Government under this Act to friendly countries solely for internal security, for legitimate self-defense, to permit the recipient country to participate in regional or collective arrangements or measures consistent with the Charter of the United Nations, or otherwise to permit the recipient country to participate in collective measures requested by the United Nations for the purpose of maintaining or restoring international peace and security, or for the purpose of enabling foreign military forces in less developed friendly countries to construct public works and to engage in other activities helpful to the economic and social development of such friendly countries.

Additional substantive conditions are established by AECA § 3(a), 22 U.S.C. § 2753(a), which provides that "No defense article or defense service shall be sold or leased by the United States Government under this Act to any country" unless four conditions are met. The first two would have been satisfied in the case of Iran; the last two are more problematic.

The first condition is that "the President find" that the transfer "will strengthen the security of the United States and promote world peace." Such a finding was made on January 2, 1973. (Presidential Determination 73-10, 3 C.F.R. 1105 (1971-1975 Comp.)) The State Department, which has been delegated this authority, deem the finding to remain effective to date. (Congressional Presentation Document for FY 1987, Vol. I at 119 (1986)).

Second, the recipient must agree not to transfer the arms or permit third party use for unauthorized purposes "unless the consent of the President has first been obtained." The State Department deems the non-transfer agreements Iran made before 1980 to remain in force.

The third requirement is problematic. The recipient country must agree that it "will provide substantially the same degree of security protection afforded to such article or service by the United States Government." (AECA § 3(a)(3)).

The fourth requirement under § 3(a)(4) subsumes the host of other requirements under the AECA. No sale shall take place unless "the country or international organization is otherwise eligible to purchase or lease defense articles or defense services."

AECA Anti-terrorism Restrictions. AECA § 3(a)(4) in turn requires consideration of two anti-terrorism prohibitions, both of which may be waived for national security reasons. The principal such prohibition, relating to states that "grant sanctuary from prosecution," probably was not trigerred. 13/ A second prohibition relating to states that "repeatedly provide support" for terrorism is applicable to AECA transfers to Iran, but since it was enacted August 27, 1986, it would apply only to

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13. § 3(f) of the AECA, 22 U.S.C. § 2753(f) provides in part:

> (1) Unless the President finds that the national security requires otherwise, he shall terminate all sales under this Act to any government which aids or abets, by granting sanctuary from prosecution to, any individual or group which has committed an act of international terrorism. . . .

To date, no determination has been made that Iran falls under this category.

the last transfer. 14/ On January 23, 1984 the Secretary of State determined for purposes of § 6 of the EAA, that Iran is a country which has repeatedly provided support for acts of international terrorism (49 Fed. Reg. 2836). There is some question as to whether these requirements, unlike other AECA requirements, may be deemed to govern covert action transfers: its language is categorical; it was promulgated as part of a separate anti-terrorism bill; and it was passed subsequently to amendments to § 403 of the National Security Act, 50 U.S.C. § 415, through which Congress is deemed to have recognized the propriety of covert action transfers outside the aegis of the AECA or FAA. On the other hand, these factors support the contrary position: the provision expressly amends the AECA; it is neither an independent statute nor an amendment to the National Security Act.

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14. Section 40 to the AECA now provides in part:

> (a) Except as provided in subsection (b), items on the United States Munitions List may not be exported to any country which the Secretary of State has determined, for the purposes of [section 6 of the Export Administration Act of 1979], has repeatedly provided support for acts of international terrorism.
>
> (b) The President may waive the prohibition contained in subsection (a) in the case of a particular export if the President determines that the export is important to the national interests of the United States and submits to the Congress a report justifying that determination and describing the proposed export. Any such waiver shall expire at the end of 90 days after it is granted unless the Congress enacts a law extending the waiver.

Section 509(a) of the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986 (Pub. L. 99-399, 100 Stat. 874); 22 U.S.C. § 2790.

AECA Reporting Requirements. The AECA carries a host of reporting requirements. Both anti-terrorism provisions noted above require congressional notification in the event of a Presidential finding or waiver:

> -- If the President finds that the national security requires a sale to a country that aids or abets terrorism by providing sanctuary to terrorists, AECA § 3(f) requires a report to the Speaker of the House and Committee on Foreign Relations. 15/
>
> -- If the President waives the ban on exports to countries that have repeatedly provided support for acts of international terrorism, AECA § 40 requires a report to the Congress.

Neither section specifies a deadline.

AECA § 28(b) imposes additional reporting requirements, requiring the President to report quarterly sales of major defense equipment for $7,000,000 or more. The transactions would have triggered this threshold, provided: (a) the sales would not have been aggregated; and (b) for want of a better proxy, costs would have approximated DOD "standard costs" rather than the prices charged Iran. 16/

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15. By comparison, the corresponding for Presidential waiver under section 620A of the FAA requires publication of the waiver in the Federal Register and notification to the House Committee on Foreign Affairs and the Senate Committee on Foreign Relations "at least fifteen days before the waiver takes effect."

16. DOD established its price to the CIA on the basis of "standard costs" prescribed in chapter 2 of Army Regulation 37-60 (Pricing for Materiel and Services, July 1986):

Feb. 20, 1986	1000 TOWs	$3.9 m
	(Iran pd $12 m)	
May 24, 1986	1 pallet of HAWK spares	
Aug. 3, 1986	3 pallets of HAWK spares	
	total est. 4.3 m	
	(Iran pd $8m)	
Oct. 29, 1986	500 TOWs	1.7 m
	(Iran pd $7m)	
(Total paid by Iran - $27 m)	Total -	$9.9 m

According to the GAO, DOD's standard cost should have been $2.1 million more, bringing the total "standard cost" for all U.S. transactions to $11.3 million.

In sum, the U.S. transfers were properly promulgated as covert actions, pursuant to a written finding by the President. Deferral of congressional notification is justifiable, but questions on the duration of deferral are likely.

1985 Israeli Retransfers

In 1985, the Government of Israel made three shipments of U.S.-origin arms to Iran:

Aug. 30, 1985	100 TOWs
Sept. 14, 1985	408 TOWs
Nov. 25, 1985	18 HAWKs

part of an abortive 120 HAWK shipment

The President has stated that he cannot recall whether he authorized the first two retransfers before they took place. 17/ At best, such authorization was verbal and appparently no contemporaneous written record was made. Authorization for the November shipment was conferred, but not memorialized in writing.

The Israeli retransfers pose issues more complex than those raised by the direct transfer. Since Israel initially obtained the arms through an FMS transaction under the AECA, the arms were subject to AECA retransfer restrictions. These restrictions are more exacting than those applicable to direct shipments. Had they been applicable, they would not have been satisfied. Indeed, North appears to have been so advised. The cover memo to the January 17, 1987 finding stated:

> We have researched the legal problems of Israel selling U.S. manufactured arms to Iran. Because of the requirement in U.S. law for recipients of arms sales to notify the U.S. Government of transfers to third countries, I do not recommend that you agree with the specifics of the Israeli plan.

The cover memo to the draft January 6, 1986 finding, inadvertently signed by the President, acknowledged the defects of an AECA retransfer and proposed to authorize the retransfer as a covert action not subject to the AECA:

> Since the Israeli sales are technically a violation of our Amrs Export Control Act embrgo for Iran, a Presidential Covert Action Finding is required in order for us to allow the Israeli transfers to proceed, for our subsequent replenishment sales to Israel, or for other assistance which may be deemed appropriate (e.g. intelligence). 18/

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17. Tower Report at III-7.

18. Tower Report at B-59.

There we have no evidence that the cover memo was signed

At the same time, there are some hurdles to making the claim that the AECA was rendered moot because the operation was a covert action. Specifically, it is not clear that:

(i) the President or his designee so authorized the first two transfers before they occurred;

(ii) the executive may exempt retransfers from AECA restrictions by characterizing them as covert actions; and

(iii) that the NSC staff is authorized to undertake covert activity normally undertaken by the CIA, which is authorized by statute and subject to oversight.

1. Authorizing Legislation.

A. AECA Restrictions. The AECA incorporates the strictures on direct transfers into the restrictions on retransfers. The somewhat circuitous provisions of AECA § 3(a)(2), 22 U.S.C. § 2753(a)(2), require FMS recipients to commit not to retransfer the arms "unless the consent of the President has first been obtained," a responsibility delegated to the Secretary of State by E.O. 11958 19/ In turn, the consent of the President or his designee may not be granted "unless the United States itself would transfer the defense article under consideration to that country." As discussed above, it is not clear that the United States could have made the transfer under the AECA. But since the United States could -- and did -- make the transfer under the National Security Act, one could argue that § 3(a) was satisfied.

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19. 42 FR 4311, 3 CFR 1977 Comp at 79, Jan. 18, 1977.

AECA Retransfer Restrictions. The AECA poses additional restrictions on retransfer of FMS arms, some of which if applicable, would not have been satisfied. These are set out principally in § 3 of the AECA, 22 U.S.C. § 2753:

-- Consent by the President or his Designee. As noted above, the President or his designee, the Secretary of State, must agree to a retransfer before it takes place. § 3(a)(2).

-- Demilitarization. The President may not consent to the transfer of "significant defense articles" unless the items are "demilitarized" or the recipient commits to the United States not to retransfer absent consent by the President. The statute expressly requires that the commitment be in writing. § 3(a). HAWKs and TOWs have been designated "significant defense articles" as defined by 22 CFR 121.1(b).

-- Report of Retransfer Agreement. The President is required to "promptly submit a report" to the Speaker of the House and Senate Committee on Foreign Relations on "the implementation" of each retransfer agreement.

-- Original Acquisition Cost. If the "original acquisition cost" of the transfer exceeds $14 million, the President may not consent to the transfer unless he submits a certification to Congress. AECA § 3(d)(1), 22 U.S.C. § 2753(d)(1) prohibits the President from not granting his consent if "a transfer of any major defense equipment [is] valued (in terms of its original acquisition cost) at $14,000,000 or more," unless he has certified to the Congress the identity of the transferor, the articles in question, the recipient, and the date and purpose of the proposed retransfer. These Presidential responsibilities have been delegated to the Secretary of State pursuant to E.O. 11958, supra at 13. It is debatable whether the threshold amounts are satisfied. 20/

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20. We do not know the "original acquisition cost" of the shipments, but the "standard cost" established under Army regulations is set out as a possible proxy:

Aug/Sept 1985 508 TOWs
amt the Army billed the CIA
as "standard cost" to resupply Israel $1.8 m
(+$6 m pd by Iran to Israel)

November 1985 18 HAWKs del'd
($5 m pd by Iran)
scheduled delivery and Iranian payment:
120 HAWKs $24.72 m

At minimum, technical requirements of the AECA ordinarily applicable to retransfer were not satisfied.

We do not suggest that Israel failed to comply with any applicable retransfer restrictions, since it may well have had substantial reason to believe that, through then National Security Adviser Robert McFarlane, the President had consented to the retransfer. 21/ Thus, we have not considered applicability of sanctions of AECA § 3(c), 22 U.S.C. 2753(c), which bar certain credits, guarantees, sales and deliveries to countries that have breached the aforementioned retransfer conditions.

B. The National Security Act.

(i) Retransfers as Covert Actions. The better view may be that the authorization for the retransfers was a covert action exempt from the AECA and the FAA. This is not conclusive, however. Since the restrictions on FSM restransfer had already attached, could the Executive vitiate them by authorizing retransfer as a covert action? or did the restrictions "run with" the arms?

On the one hand, Congress seems to view retransfers as qualitatively different from initial transfers: additional, more stringent reporting and certification requirements are imposed on retransfer. The Congress has acquiesced in the practice of bypassing AECA requirements in the case of initial tranfers, but it is difficult to say that it has done so in the case of retransfers.

On the other hand, one could deem a retransfer to be a subset of transfers. If the President could authorize a transfer outside AECA auspices, then a retransfer and commitment to replenish would be subsumed under the recognition of overall authority. Authorization to retransfer is after all, within Presidential responsibilities to conduct foreign affairs and act as Commander-in-Chief. A role for Congress has developed, too, legislating substantive restrictions that in some cases require Congressional authorization for specific transactions. Its authority is grounded in its responsibilities over foreign commerce, appropriations and to implement laws necessary and proper to implement its powers. These responsibilities are often more attenuated in the context of retransfers instead of direct shipments. A direct shipment introduces items into the stream of foreign commerce and requires significant expenditures of funds. A retransfer may not.

Justice Department Memorandum. OLC's view is that these were not retransfers at all, but direct shipments. The United

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21. See Tower Rept. at III-7 and B-14-21.

States simply used Israel as an instrument of convenience to accomplish U.S. objectives. As a legal matter, this leaves open the question of whether a retransfer could be deemed a covert action. As a factual matter, it ignores the difference in political implications of transfers and restransfers. For example, on August 2, 1985, prior to any of the retransfers, Robert McFarlane says he told David Kimche that the United States probably would not sell arms directly to Iran, but was open to the possibility of Israeli retransfers. 22/ The purpose of the President's finding on January 17, 1986 was to stop relying on an Israeli conduit and ship arms directly -- another indication that transfers and retransfers have qualitatively different ramifications.

In short, it is not a foregone conclusion that retransfer of FMS items, like direct shipments, may be deemed exempt from the FAA or AECA through designation as a covert action.

(ii) NSC Staff Involvement. The second question in characterizing the authorization to retransfer as a covert operation is that the NSC staff undertook the action, thus nominally avoiding Congressional restrictions, oversight and reporting requirements. The CIA, which was involved only incidentally, is authorized to "perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct." § 102(d) of the National Security Act of 1947, as amended, 50 U.S.C. § 403(d). Its actions are subject to the explicit reporting requirements § 662 of the FAA and § 501 of the National Security Act of 1947, as amended, as well as the continuing oversight of the intelligence committees.

Such activities are not explicitly within the prescribed ambit of the NSC staff. Indeed, neither the NSC nor its staff, it is said in other contexts, is an intelligence agency.

E.O. 12333 does not identify either to be a member of the Intelligence Community. The affirmative duties of the NSC proper, the Council, are quite general. The National Security Act describes the duties of the Council as: "In addition to performing such other duties as the President may direct. . . " 50 U.S.C. § 401(b). E.O. 12333, which is said to elaborate NSC staff duties, makes only passing reference to the possibility that agencies other than the CIA may conduct intelligence activities. It does not expressly identify the NSC staff as one of the agencies. Section 1.8(e) of E.O. 12333 provides that the CIA shall:

> Conduct special activities approved by the President. No agency except the CIA . . . may conduct any special activity unless the President determines that another agency is more likely to achieve a particular objective.

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22. Tower Rept. at III-6.

Some may question whether the National Security Act and E.O. 12333 are affirmative grants of authority to the NSC staff to conduct covert operations. Some may also question whether the President, pursuant to his executive power and plenary authority over foreign affairs, may direct his personal staff to undertake activity that otherwise would be subject to statutory constraints and Congressional oversight. The case for implementation by the CIA is an easier one to make.

Justice Department Memorandum. Citing the 1981 example, the Justice Department concluded that "under the executive branch's prior interpretation of the Arms Export Control Act, this Act is inapplicable to the arms transfers to Iran." (Memorandum for the Attorney General from Charles J. Cooper, undated). The OLC memorandum stated:

> We understand that the arms transfer to Iran had an intelligence objective among its objectives. Accordingly, under prior precedent, section 102(d) of the National Security Act furnishes authority for the President's action, and the restrictions of the Arms Export Control Act do not apply.

2. Hughes-Ryan Requirements.

As set out supra at 10, the Hughes-Ryan Amendment prohibits funds from being expended "by or on behalf of the CIA for operations in foreign countries" unless and until the President finds that such operation is "important to the national security of the United States." It is not clear whether such a finding was made for the August/September 1985 retransfer, since it was in any event unwritten. 23/ It may well be that the Hughes-Ryan Amendment does not require such finding:

> -- No CIA funds were spent in authorizing the retransfer. At best, the CIA had a latent role in that transaction, providing transport for the U.S. replenishment of Israeli stock on May 23, 1986 -- some nine months after the shipment after a finding authorized such activity.

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23. In the State Department view, such findings need not be written; Memorandum, Office of the Legal Adviser to the White House Counsel, Dec. 11, 1986 at 7. The Legal Adviser concluded:

> In the current case, Section 662 would be satisfied if the President had adequately conveyed his judgment that the operation in question would be important to U.S. national security, or words expressing the same substance.

-- Authorization for the retransfer was not an "operation in a foreign country," as we are told that term is understood by intelligence experts. Arguably, it does not rise to the level of "special activities;" defined in E.O. 12333 as:

> activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activities, but which are not intended to influence United States political processes, public opinion, policies or media and do not include diplomatic activities or the collection and production of intelligence or related support functions.

A finding may well have been required for the November 1985 retransfer of HAWKs. The CIA provided transport to Iran when Israeli arrangements for flight clearance fell through. Then CIA General Counsel Sporkin prepared a draft finding, never signed, after the retransfer took place. 24/ However, it is not disputed that the President authorized the retransfer, an action that arguably constitutes a verbal finding.

In short, one may credibly maintain that no finding was required for the August/September 1985 shipment; and that a finding was made for the November 1985 shipment in which the CIA participated.

3. Notification to Congress. As set out supra, § 501 of the National Security Act requires notification of

> all intelligence activities which are the responsiblity of, are engaged in by, or are carried out for or on behalf of any department, agency, or entity of the United States, including any significant anticipated intelligence activity. . . .

It may well be that the retransfers do not trigger the above requirements, if the retransfers are characterized as Israeli enterprises not "carried out for or on behalf of" the United States. (However, this undercuts the OLC theory that the retransfers could have been authorized as covert actions because they were in fact direct transfers carried out by the Israelis for the United States.) Moreover, Congress expressly required notification of covert arms sales in excess of $1 million to be reported, supra at 9-10, but it was silent on the question of authorization to retransfer.

Insofar as notification was deemed necessary, issues related to the propriety of deferral are similar to those related to direct trnasfers (supra at 12-13).

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24. Tower Rept. at B- 57-58.

U.S. Department of Justice
Office of Legal Counsel

December 17, 1986

Office of the
Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Legal Authority for Recent Covert Arms Transfers to Iran

This memorandum responds to your request for a summary of the legal authorities affecting the recently disclosed arms transfers to Iran. Because the exact details of the transfers have apparently not completely transpired, this memorandum will provide a general framework for analysis, with references only to the basic facts that have already emerged. Although this memorandum does not deal with questions arising from the handling of the monies that Iran paid for the arms in question, the operation in which weapons were sold to Iran appears in other respects to have been lawful.

I. General Authority for Arms Transfers to Iran

As you know, there are numerous statutes that regulate the export of weapons. The principal statutes directly affecting transfers by the government are the Foreign Assistance Act of 1961[1] and the Arms Export Control Act.[2] Although both statutes establish substantially comprehensive regulatory schemes in the areas of military assistance and military sales, they do not purport to constitute the sole and exclusive authority under which the executive branch may transfer weapons to foreign nations. Thus, the limitations that the Foreign Assistance Act and Arms Export Control Act impose on arms transfers apply only to transfers undertaken pursuant to those statutes. If the sales to Iran were accomplished under other authorities, as we believe

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[1] Codified, as amended, in relevant part at 22 U.S.C. 2311 et seq.

[2] Codified, as amended, in relevant part at 22 U.S.C. 2751 et seq.

they were, these restrictions would not apply.[3]

Consistent with the President's constitutional responsibilities for conducting the foreign policy of the nation, Congress has recognized that the executive has considerable discretion to use government resources for a variety of activities not specifically authorized by statute.[4] Most conspicuously for present purposes, section 101 of the National Security Act of 1947[5] assigns certain functions to the National Security Council, but expressly acknowledges that that entity may "perform[] such other functions as the President may direct."[6] Similarly, section 102 of the same Act assigns certain functions to the Central Intelligence Agency, while authorizing that Agency "to perform such other functions and duties related to intelligence affecting the national security as the National Security Council may from time to time direct." We believe that these two provisions may be relied on to support a wide range of foreign covert activities not otherwise forbidden by law.

The authorities exercised by the NSC and the CIA include the discretion to transfer arms to foreign recipients in the course of intelligence or intelligence-related activities. Congress recently confirmed the existence of such authority in section 403 of the Intelligence Authorization Act for Fiscal Year 1986, Pub. L. No. 99-169, 99 Stat. 1002, 1006 (1985). That provision provides in relevant part:

> Sec. 403. (a)(1) During fiscal year 1986, the transfer of a defense article or defense service exceeding $1,000,000 in value by an intelligence agency to a recipient outside that agency shall be considered a significant

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[3] It should be noted that the Department of State and the Department of Justice have both taken the position, long before the operation at issue in this memorandum, that arms may be transferred to foreign countries outside the context of the Arms Export Control Act. See Memorandum of Law on Legal Authority for the Transfer of Arms Incidental to Intelligence Collection, by David R. Robinson, Legal Adviser, Department of State; Letter from William French Smith to William J. Casey (Oct. 5, 1981).

[4] For a detailed discussion of the President's constitutional powers and responsibilities, as they relate to the Iran operation, see our memorandum on section 501(b) of the National Security Act.

[5] Codified as amended at 50 U.S.C. 402.

[6] Codified as amended at 50 U.S.C. 403.

anticipated intelligence activity for the purpose of section 501 of the National Security Act of 1947.

(2) Paragraph (1) does not apply if--

(A) the transfer is being made to a department, agency, or other entity of the United States (so long as there will not be a subsequent retransfer of the defense articles or defense services outside the United States Government in conjunction with an intelligence or intelligence-related activity); or

(B) the transfer--

(i) is being made pursuant to authorities contained in part II of the Foreign Assistance Act of 1961, the Arms Export Control Act, title 10 of the United States Code (including a law enacted pursuant to section 7307(b)(1) of that title), or the Federal Property and Administrative Services Act of 1949, and

(ii) is not being made in conjunction with an intelligence or intelligence-related activity.

(3) An intelligence agency may not transfer any defense article or defense services outside the agency in conjunction with any intelligence or intelligence-related activity for which funds were denied by the Congress.

(b) As used in this section--

(1) the term "intelligence agency" means any department, agency or other entity of the United States invclved in intelligence or intelligence-related activities;

This provision, which was made a permanent part of the National Security Act (new section 503) by the Intelligence Authorization Act for Fiscal Year 1987, was primarily intended to limit the executive's discretion to transfer arms in the course of intelligence-related activities. Its present significance, however, lies in its unambiguous recognition that the executive possesses such discretion <u>apart from</u> the Foreign Assistance Act

and the Arms Export Control Act.[7] Assuming that the arms transferred to Iran were sold to that country at a legally justified price,[8] the language of sections 101 and 102 of the National Security Act is broad enough to encompass the kind of discretion whose existence is manifestly implied in section 403 of the Intelligence Authorization Act.[9] It follows that the NSC and/or the CIA had authority to arrange for the sale of arms to Iran as part of an intelligence or intelligence-related operation, subject to such other restrictions as Congress may have imposed by law. The remainder of this memorandum discusses the applicability of such restrictions.

[7] Because subsection (a)(2) states that subsection (a)(1) does not apply to transfers made pursuant to authorities contained in the Foreign Assistance Act or the Arms Export Control Act, the clear implication is that the restriction in subsection (a)(1) applies to transfers made pursuant to some other authority.

The same implication can be drawn from other congressional actions that have imposed restrictions on covert arms transfers without suggesting that such transfers were subject to existing restrictions under the Foreign Assistance Act or the Arms Export Control Act. For example, a provision was enacted in 1974 precluding funding for military assistance to Laos outside the confines of the Foreign Assistance Act and the Arms Export Control Act. See Pub. L. No. 93-559, sec. 12, 88 Stat. 1798 (1974) (repealed by Pub. L. No. 97-113, title VII, sec. 734(a)(1), 95 Stat. 1560 (1981)).

[8] Our point here is that the charters of the CIA and NSC appear to recognize that those entities may use their facilities to arrange an arms sale to Iran. Whether these or other governmental agencies would be authorized to spend the sums of money necessary to procure and give arms to Iran is a distinct question, which need not be addressed at this time.

Because we have not seen the classified Schedule of Authorizations referred to in section 102 of the Intelligence Authorization Act for Fiscal Year 1986 or the similar schedule referred to in the FY 1985 authorization legislation, we do not know whether anything in those schedules would affect the issues addressed in this memorandum.

This memorandum does not address the legal questions that may arise from arms having been sold to Iran at prices higher than the prices at which they were made available to the CIA or NSC.

[9] Whether the ultimate source of this discretion is the President's inherent constitutional authority in foreign affairs, or the cited statutes, or some other statute, is a question that need not be resolved. The crucial point is that section 403 of the Intelligence Authorization Act clearly recognizes the existence of the authority, whatever its source.

II. Section 501 of the National Security Act

Under section 403 of the Intelligence Authorization Act for Fiscal Year 1986 (which has now been made permanent as new section 503 of the National Security Act), an arms transfer by either the NSC[10] or the CIA exceeding $1 million in value is subject to the congressional oversight provisions of Section 501 of the National Security Act.[11] We have prepared a separate memorandum in which we concluded that the requirements of section 501 were satisfied as to the recent arms shipments to Iran. We will not repeat that discussion here.

III. The Hughes-Ryan Amendment

The so-called Hughes-Ryan Amendment, section 662 of the Foreign Assistance Act, (codified as amended at 22 U.S.C. 2422), provides in its present form:

[10] The NSC clearly falls within the definition of an intelligence agency given in section 403(b)(1) of the Intelligence Authorization Act: "any department, agency or other entity of the United States involved in intelligence or intelligence-related activities."

[11] Covert intelligence operations are subject to the congressional reporting requirements of section 501 of the National Security Act, whether they are conducted by the CIA, the NSC, or some other agency. Section 501(a), 50 U.S.C. 413(a), imposes reporting requirements not only on the Director of Central Intelligence, but also on "the heads of all departments, agencies, and other entities of the United States involved in intelligence activities" (emphasis added). Furthermore, the reporting requirements apply to "all intelligence activities which are the responsibility of, are in engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States . . . ." (emphasis added). This language is broad enough to encompass the NSC. Finally, even if activities carried out by the NSC could somehow escape the broad language of section 501(a), section 501(b) contains unqualified language requiring the President to "fully inform the [congressional] intelligence committees in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, for which prior notice was not given under subsection (a) of this section . . . .". Thus, unlike the Hughes-Ryan Amendment (discussed in Part III of this memorandum), section 501 of the National Security Act applies to all intelligence operations in foreign countries, whether conducted by the CIA, the NSC, or some other governmental entity.

> No funds appropriated under the authority of this chapter or any other Act may be expended by or on behalf of the Central Intelligence Agency for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, unless and until the President finds that each such operation is important to the national security of the United States. Each such operation shall be considered a significant anticipated intelligence activity for the purpose of section 413 of title 50 [i.e. section 501 of the National Security Act].

The original version of this provision, Pub. L. No. 93-559, sec. 32, 88 Stat. 1804 (1974), contained identical language pertaining to the President's national security finding and also required him to "report[], in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress . . . ." In 1980, the reporting requirement was replaced with the current reference to section 501 of the National Security Act.[12]

The current version of Hughes-Ryan, which recognizes the President's authority to conduct covert operations abroad,[13] applies by its terms only to activities involving the CIA and requires only that the President make the requisite finding before funds are expended on the operation. Thus, any transfer of arms to Iran in which the CIA was not involved (for example, an operation conducted by NSC staff members without the aid of the CIA) is exempt from Hughes-Ryan. Thus, based on what we know at this time, it appears that no presidential finding was required under Hughes-Ryan with respect to the September 1985 arms transfer to Iran.

Further, the President's written finding of January 17, 1986 sufficed to satisfy Hughes-Ryan as to CIA-assisted transfers that occurred after that date. Because the Iran project appears to have been a single, ongoing operation and because the January 17,

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[12] The statutory language requiring a presidential finding was not amended, and the legislative history indicates that no change in this requirement was intended. See S. Rep. No. 730, 96th Cong., 2d Sess. 5 (1980), reprinted in 1980 U.S. Code Cong. & Admin. News 4192, 4196.

[13] Cf. 120 Cong. Rec. 33,489 (1974) (colloquy between Senators Humphrey and Hughes).

1986 finding was drafted broadly enough to cover multiple arms shipments in the course of that ongoing operation, we do not believe that separate presidential findings were required for each of the shipments that took place after that date.

Thus, the main issue under Hughes-Ryan concerns the November 1985 arms shipment. Robert McFarlane, formerly Assistant to the President for National Security Affairs, has publicly testified that shipments prior to January 17, 1986 were carried out pursuant to an oral authorization from the President.[14] And it appears that CIA resources were used to facilitate the November shipment.[15] The question, then, is whether the President's oral authorization of arms transfers to Iran could have implied or constituted a Hughes-Ryan "finding" that would allow the CIA to participate or aid in the transfer.

On its face, Hughes-Ryan requires only that the President find each CIA foreign operation "important to the national security of the United States" before such operation is undertaken. The Hughes-Ryan Amendment contains no requirement that this finding be reduced to writing or indeed that it be articulated in so many words.[16] We believe that the main purpose of the presidential finding requirement is to ensure that the

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[14] Because there is some reason to believe that Mr. McFarlane's recollection was not wholly accurate, this Office is preparing a separate analysis of the legal issues that would arise from the absence of an oral authorization by the President for the September and/or November shipments.

[15] There may have been pre-existing written "omnibus" Hughes-Ryan findings that would cover whatever tasks the CIA performed in connection with the November shipment. Further research into the exact nature of the CIA's participation and into the existence of such findings will be needed in order to resolve this issue.

Although the facts are not clear at this time, it appears possible that the only significant CIA involvement in the November shipment was through the use of one its proprietaries. If the proprietary was paid for its services with non-CIA funds, then CIA appropriations may not have been used at all. If that is true, Hughes-Ryan would not be applicable to the November shipment. Alternatively, the CIA's involvement in the November shipment may have been so peripheral that it should be treated in terms of a de minimis exception to Hughes-Ryan; such an analysis would require further research.

[16] There are other statutory provisions requiring that findings or determinations by executive branch officials be committed to writing. See e.g., 20 U.S.C. 2836(c)(3).

President himself[17] decides, before each operation, whether the national security justifies its being carried out. Such a decision, which can be inferred from an oral authorization, satisfies this purpose, and an oral authorization therefore satisfies the Hughes-Ryan finding requirement.[18]

So far as we know, the only legal provision suggesting that the President's finding under Hughes-Ryan might have to be in written form is found in section 654 of the Foreign Assistance Act:[19]

> (a) Report to Congress
>
> In any case in which the President is required to make a report to the Congress, or to any committee or officer of either House of Congress, concerning any finding or determination under any provision of this chapter . . . that finding or determination shall be reduced to writing and signed by the President.

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[17] The President could, presumably, delegate this function to any executive branch official who had been confirmed by the Senate. 3 U.S.C. 301. Such a delegation would have to be published in the Federal Register, which would give Congress the opportunity to object or enact new legislation if it were felt that such delegation was inadvisable.

[18] The legislative history of the Hughes-Ryan Amendment, which focuses mostly on the reporting requirement and congressional oversight generally, contains little discussion of the presidential finding requirement itself. On the floor of the Senate, Senator Humphrey mentioned in passing that national security "would be the only reason we would want to have covert operations . . ." The bill's sponsor, Senator Hughes, interrupted to remark, "I hope that is the only reason." 120 Cong. Rec. 33,489 (1974). We interpret this exchange to confirm our conclusion that the requisite finding could be inferred from the President's having personally authorized a particular operation. We know of nothing in the legislative history of Hughes-Ryan suggesting that Congress meant to disallow oral or implied "findings" by the President. Indeed, Senator Hughes stated on the floor of the Senate that even the congressional report itself, which was regarded as the more important requirement of the Amendment, could be delivered orally by a presidential aide. 120 Cong. Rec. 33,490 (1974) (colloquy between Sen. Hughes and Sen. Stennis).

[19] Codified at 22 U.S.C. 2414.

(b) Action prohibition prior to execution of report

No action shall be taken pursuant to any such finding or determination [prior to the date on which that finding or determination] has been reduced to writing and signed by the President.

(c) Publication in Federal Register

Each such finding or determination shall be published in the Federal Register as soon as practicable after it has been reduced to writing and signed by the President. In any case in which the President concludes that such publication would be harmful to the national security of the United States, only a statement that a determination or finding has been made by the President, including the name and section of the Act under which it was made, shall be published.

(d) Information accessible to Congress prior to transmission of report

No committee or officer of either House of Congress shall be denied any requested information relating to any finding or determination which the President is required to report to the Congress, or to any committee or officer of either House of Congress, under any provision of this chapter, the Foreign Military Sales Act [22 U.S.C. 2751 et seq.], or the Foreign Assistance and Related Programs Appropriation Act for each fiscal year, even though such report has not yet been transmitted to the appropriate committee or officer of either House of Congress.

Because Hughes-Ryan and this provision are both in chapter 32 of title 22, the President would be required to reduce the required finding to writing before each covert operation if he were required to make a report concerning that finding to Congress or to any congressional committee or officer. Hughes-Ryan, however, has never required the President to make any such report concerning his findings: (1) in its present version, Hughes-Ryan requires compliance with section 501 of the National Security Act, which demands certain reports about "intelligence

activities"[20] and "intelligence operations"[21] but requires no reports about presidential findings;[22] (2) as originally enacted, Hughes-Ryan required the President to report "a description and scope" of the operation to certain congressional committees;[23] (3) as originally introduced by Senator Hughes, the Hughes-Ryan Amendment would have required that the President provide Congress with both a report of his finding and a description of the nature and scope of each operation;[24] the first of these requirements would have made the requirements of section 654 applicable, but this requirement was dropped from the final version of the bill; thus, Congress deliberately rejected the language that might have brought section 654 into play and substituted language that made section 654

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[20] 50 U.S.C. 413(a)(1) (requiring that executive branch officials keep certain congressional committees "fully and currently informed of all intelligence activities" within their jurisdiction).

[21] 50 U.S.C. 413(b) (requiring that the President "fully inform the [congressional] intelligence committees in a timely fashion of intelligence operations in foreign countries . . . for which prior notice was not given under subsection (a) of this section . . . .").

[22] Section 501(a)(2), 50 U.S.C. 413(a)(2), might require certain executive branch officials to provide information about presidential findings, if the information is in their "possession custody, or control," to a congressional intelligence committee upon that committee's request, but it does not require that the President himself make any such report. Section 654 applies only to findings as to which the President himself is required to report to Congress.

[23] As originally enacted, Hughes-Ryan forbade the CIA to spend appropriated funds for covert foreign operations unless and until the President had made the requisite national security finding and had "report[ed], in a timely fashion, a description and scope of such operation to the appropriate committees of the Congress . . . .".

[24] See 120 Cong. Rec. 33,490 (1974), reproducing Senator Hughes' proposed amendment, which would have permitted the President to authorize covert operations "if, but not before, he (1) finds that such operation is vital to the defense of the United States, and (2) transmits an appropriate report of his finding, together with an appropriate description of the nature and scope of such operation" to certain congressional committees.

inapplicable.[25] We therefore conclude that section 654[26] by its own terms does not apply to the Hughes-Ryan Amendment.

This conclusion is reinforced by the structure of the Foreign Assistance Act and long-standing practice. This Act deals primarily with overt foreign aid, including military assistance. To subject covert operations, including covert arms transfers, to the requirements of section 654(c), which requires publication in the Federal Register, would not make much sense, especially now that the National Security Act contains an elaborate mechanism by which Congress is kept informed of covert

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[25] The language ultimately adopted by Congress was taken from the House of Representatives' version of the proposed amendment. See 120 Cong. Rec. 39,135 (1974); H.R. Conf. Rep. No. 1610, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 6734, 6744-6745.

[26] This analysis does not leave section 654 without any applications. Chapter 32 of title 22 contains numerous provisions requiring both a presidential finding or determination and a report to Congress concerning such finding or determination. See, e.g., 22 U.S.C. 2364(a); 2370(f); 2371(b); 2414a(b); 2428b(b); 2429(b)(1); 2429a(b)(2)(A). Furthermore, chapter 32 also contains numerous provisions requiring presidential findings or determinations without also requiring a congressional report. See, e.g., 22 U.S.C. 2179(a); 2183(a); 2199(b); 2314(b); 2357(a); 2360(a); 2370(a); 2775. Thus, there is a meaningful distinction, reflected in the language of section 654, between findings concerning which the President must report to Congress and findings concerning which no such report is required.

It should be noted that the legislative history of section 654 suggests that it was enacted in response to incidents in which (1) the Nixon Administration provided military aid to Cambodia and obtained the presidential determination required by the Foreign Assistance Act after the fact; and (2) President Nixon orally determined to authorize military aid to Ceylon, but did not put the determination in writing or inform Congress until some weeks later. S. Rep. No. 431, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S. Code Cong. & Admin. News 1883, 1895-1896. The legislative history of section 654 cannot properly be used to draw inferences about the subsequently enacted Hughes-Ryan Amendment, especially if those inferences would be contrary to the language and legislative history of Hughes-Ryan itself.

operations.[27] We are informed by the General Counsel of the CIA that presidential findings made pursuant to Hughes-Ryan have never been published in the Federal Register, and that Congress has never objected to this practice. This confirms our conclusion, based on the language and legislative history of the statutory provisions at issue, that section 654 does not apply to presidential findings under Hughes-Ryan.[28]

Our conclusion, that Hughes-Ryan findings may take the form of an oral authorization for a particular operation, agrees with previous opinions by Attorney General Bell,[29] by this Office,[30] and by the Legal Adviser at the Department of State.[31]

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[27] The anomalous nature of publishing notice of covert operations in the Federal Register is reduced, but not completely eliminated, by the following provision in section 654(c): "in any case in which the President concludes that such publication would be harmful to the national security of the United States, only a statement that a determination or finding has been made by the President, including the name and section of the Act under which it was made, shall be published." 22 U.S.C. 2414(c). Some covert operations could well be so sensitive that the mere publication of the section of the act under which a presidential finding was made could in some circumstances serve to alert a foreign intelligence agency to the possible existence of the operation.

[28] This conclusion is further strengthened by the nature of section 654(d), which requires the executive branch to respond to inquiries about presidential findings before the report concerning them has been transmitted to Congress. Such a provision would make no sense as applied to the covert operation findings required by Hughes-Ryan.

[29] In a classified memorandum of Oct. 20, 1977, for the Assistant to the President for National Security Affairs, which dealt with a particular proposed covert operation, Attorney General Bell opined that the President's decision that the operation was important to the national security constituted the finding required by Hughes-Ryan "notwithstanding the fact that his Finding has not been reduced to writing."

[30] OLC Memorandum for the Attorney General, Oct. 25, 1977, on Requirements of the Hughes-Ryan Amendment, 22 U.S.C. 2422, at 6 & n.9.

[31] Memorandum of Dec. 11, 1986, to the White House Counsel et al. on Validity of Oral Instruction to Initiate Covert Action.

IV. Other Legal Objections to the Arms Shipments

A number of other legal provisions have been mentioned as possibly raising problems about the arms transfers to Iran. None of them raises serious questions, and they warrant only a brief discussion.

A. Omnibus Diplomatic Security and Antiterrorism Act of 1986.

Section 509 of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, 100 Stat. 853, 874 (1986), which became effective August 27, 1986, amended the Arms Export Control Act by adding a new section providing:

> (a) Prohibition.--Except as provided in subsection (b), items on the United States Munitions List may not be exported to any country which the Secretary of State has determined, for purposes of section 6(j)(1)(a) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)(1)(A)), has repeatedly provided support for acts of international terrorism.
>
> (b) Waiver.--The President may waive the prohibition contained in subsection (a) in the case of a particular export if the President determines that the export is important to the national interests of the United States and submits to the Congress a report justifying that determination and describing the proposed export. Any such waiver shall expire at the end of 90 days after it is granted unless the Congress enacts a law extending the waiver.

The Secretary of State has identified Iran as a country that has repeatedly provided support for acts of international terrorism.[32]

The same reasons that require treating the covert arms shipments to Iran as outside the ambit of the Arms Export Control Act also require that this new amendment to the same Act be treated as inapplicable to covert arms shipments. The President

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[32] 49 Fed. Reg. 2836 (1984).

has independent authority, recognized in the National Security Act, for transferring arms in the course of covert intelligence-related operations; the congressional notification requirement in the above-quoted provision is at odds with the congressional oversight process established in section 501 of the National Security Act; and the sparse legislative history of this new provision gives no indication of an intent to override section 501. We therefore conclude that this new provision was not violated by the covert shipment of arms to Iran.

B. Export Administration Act of 1979.

Section 6(j) of the Export Administration Act of 1979, 50 U.S.C. App. 2405(j), limits the issuing of licenses for the export of goods or technology to countries that the Secretary of State has identified as having repeatedly provided support for acts of international terrorism. This statute does not apply to items on the United States Munitions List, which are covered instead by the Arms Export Control Act. Nor does the statute apply to shipments by the United States government, for which no "license" is required. The Export Administration Act is therefore inapplicable to the Iran project.

C. Executive Order 12333

It has been suggested that the Iran project in some way violated the provisions of E.O. 12333, which is the executive order dealing with the structure and conduct of the nation's intelligence effort. E.O. 12333, however, like all executive orders is a set of instructions from the President to his subordinates in the executive branch. Activities authorized by the President cannot "violate" an executive order in any legally meaningful sense, especially in a case where no private rights are involved, because his authorization creates a valid modification of, or exception to, the executive order.

V. Three-way Transactions Involving Israel

Robert McFarlane, formerly Assistant to the President for National Security Affairs, in the public testimony previously mentioned, has said that the arms transfers that took place before January 17, 1986 were accomplished by inducing Israel to ship weapons, which she had obtained from the United States, to Iran on the understanding that our government would replenish Israeli stocks; we also gather that the commitment to resupply Israel was kept. As a legal matter, we believe that such a transaction is equivalent to one in which the United States sells the weapons directly to Iran.

Assuming that the weapons shipped to Iran were originally supplied to Israel under the Foreign Assistance Act or the Arms Export Control Act, Israel would have been forbidden to retransfer them to Iran without the consent of the President.[33] These statutes permit the President to consent to retransfers, but they also require him to comply with a number of formalities. (1) Under the Arms Export Control Act, the President must not consent to a retransfer "unless the United States itself would transfer the defense article under consideration to that country."[34] (2) Furthermore, retransfer of Munitions List items is not permitted under this Act unless "the proposed recipient foreign country [i.e. Iran] provides a commitment in writing to the United States Government that it will not transfer such defense articles . . . to any other foreign country or person without first obtaining the consent of the President."[35] (3) Finally, the President must "promptly submit a report to the Speaker of House of Representatives and to the Committee on Foreign Relations of the Senate on the implementation of each [retransfer] agreement."[36] So far as we know, the second and third of these requirements were not complied with.

The President also has special statutory authority to authorize military assistance and arms export sales, but the

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[33] 22 U.S.C. 2314(a); 2753(a)(2).

[34] 22 U.S.C. 2753(a). The Foreign Assistance Act contains a similar provision. 22 U.S.C. 2314(e). This language appears to allow presidential approval if the United States would itself transfer the defense article under some authority other than the Arms Export Control Act (e.g., as part of a covert operation undertaken pursuant to the National Security Act). If this interpretation is correct, the requirement would have been satisfied as to the Iranian project. As we point out in the text, however, there appear to be other formalities that were not satisfied.

[35] 22 U.S.C. 2753(a). The Foreign Assistance Act contains a similar provision. 22 U.S.C. 2314(e).

[36] 22 U.S.C. 2753(a). The Foreign Assistance Act does not contain a similar provision.

It should also be noted that the Arms Export Control Act imposes additional congressional notification requirements for retransfers of "major defense equipment" valued at $14 million or more and for other retransfers valued at $50 million or more. 22 U.S.C. 2753 (d). "Major defense equipment" is defined as "any item of significant military equipment on the United States Munitions List having a nonrecurring research and development cost of more than $50,000,000 or a total production cost of more than $200,000,000." 22 U.S.C. 2794(6).

exercise of this authority is contingent upon prior consultations with certain congressional committees,[37] which again does not seem to have been done.

Assuming that the formalities and congressional notification requirements discussed in the previous paragraph were not complied with, the arrangement with Israel cannot be regarded as a retransfer specifically authorized by the Foreign Assistance Act or the Arms Export Control Act. We do not believe, however, that these statutes are the only authorities that could justify the transaction. Nor do we believe that the three-way transactions involving Israel and Iran are properly analyzed under these statutes.

In evaluating the legal significance of the shipment to Iran of weapons from Israeli stocks, one must focus on the nature of the three-way transaction as a whole. According to Mr. McFarlane's testimony, the transaction was designed to expedite the arrival in Iran of arms that could lawfully have been supplied directly from American stocks; further, Israel participated in the transaction as an accommodation to the American government, and did not itself gain or lose any weapons as a result. Seen in this light, it is apparent that the real nature of the transaction was a bilateral sale between the United States and Iran, with Israel serving solely as a conduit or facilitator in the execution of that sale.[38]

We see no reason to treat the legality of Israel's participation differently than we would treat the participation of any other party that served as a conduit in a lawful covert operation. Had the United States consigned weapons from American stocks to Israel for shipment to Iran, Israel's role would have been exactly equivalent to the role that common carriers or public warehouses play in overt transactions. Because, so far as we know, the weapons that Israel shipped to Iran and received from the United States were completely fungible, a similar equivalence is present here. Just as an <u>illegal</u> sale of arms to Iran could not be made legal by using Israel as a conduit, so too a <u>legal</u> transaction could not become illegal by Israel being used

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[37] 22 U.S.C. 2364.

[38] This memorandum does not deal with the financing of the transaction, the details of which are apparently not yet clear. If Israel retained some of the funds that the Iranians paid for the weapons, the analysis might change, depending on whether the retained funds were viewed as a fee in the nature of a brokers' commission or as profit on a resale. Without now deciding how the analysis would differ, we can note that retention of some funds by Israel would make it less <u>obviously</u> appropriate to treat the whole transaction as essentially a bilateral sale of U.S. weapons to Iran.

in the same way.[39]

Several features of the relevant statutes support this analysis. First, the statutes restricting retransfers of American-supplied weapons clearly contemplate situations in which the transferring country, not the United States itself, is the source of the request to make the transfer. The Arms Export Control Act, for example, requires the recipient of American arms (in this case, Israel) to agree not to transfer the arms to a third country (e.g., Iran) without the President's approval,[40] and then goes on to specify certain factors that the President must look to "[i]n considering a request for approval of any transfer . . . ." Clearly, the statute is not aimed at situations in which the President is considering requests from himself for his own approval. The Foreign Assistance Act contains similar provisions, to which the same analysis applies.[41]

The Arms Export Control Act also makes an express distinction between arms exports by private parties in the United States (which ordinarily require an export license) and exports by such private parties "by or for an agency of the United States Government . . . (B) for carrying out any foreign assistance or sales program authorized by law and subject to the control of the President by other means" (which do not require an export license).[42] Analogously, a distinction should be made between Israel's transferring American-supplied arms for her own benefit (which would be subject to the retransfer requirements of the Foreign Assistance Act or the Arms Export Control Act) and such transfers "by or for an agency of the United States Government" (which were not contemplated by the retransfer provisions of those statutes). That Israel's shipments of arms to Iran were "by or for an agency of the United States Government" is clear from (1) the fact that the Israeli shipments were made at the request of American authorities, and (2) the fact that Israel was promised and given identical replacements for the arms that she shipped to Iran.

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[39] So far as we know, there is no legal bar to the use of Israeli help in American intelligence operations.

[40] 22 U.S.C. 2753(a).

[41] See 22 U.S.C. 2314(a)(1)(B); 2314(e).

[42] 22 U.S.C. 2778 (b)(2). Note that this provision appears to assume that there may be arms sales programs carried out pursuant to legal authorities other than the Arms Export Control Act.