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Collection Name	CULVAHOUSE, ARTHUR B.:FILES	***Withdrawer***	DLB 5/15/2014
File Folder	IRAN/ARMS TRANSACTION: LEGAL MEMORANDA: LEGAL IMPLICATIONS OF DRAFT NOVEMBER 1985 FINDING	***FOIA***	S643
Box Number	CFOA 1131		SYSTEMATIC

152

ID	Doc Type	Document Description	No of Pages	Doc Date	Restrictions
164988	FINDING	RE: RELEASE OF AMERICAN HOSTAGES IN MIDEAST	1	ND	B1
164989	PAPER	POSSIBLE STATE DEPT. DRAFT FINDING RE: RELEASE OF HOSTAGES (COPY IS REDACTED)	6	ND	B1
164990	MEMO	WILLIAM LYTTON TO CULVAHOUSE, RE: DRAFT NOVEMBER 1985 FINDING	6	7/15/1987	B1
164991	FINDING	DUPLICATE OF #164988	1	ND	B1

The above documents were not referred for declassification review at time of processing

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THE WHITE HOUSE
WASHINGTON

7/15/87

TO: A. B.

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

☑ FYI

☐ COMMENT

☐ ACTION

dlz 5/14/14

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A. B. Culvahouse, Jr.

TF-87-0093
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THE WHITE HOUSE

WASHINGTON

July 14, 1987

UNCLASSIFIED
WITH SECRET ATTACHMENT

MEMORANDUM FOR WILLIAM B. LYTTON III

FROM: JOY YANAGIDA

SUBJECT: LEGAL IMPLICATIONS OF THE DRAFT NOVEMBER 1985 FINDING

This memorandum describes the legal consequences that would flow from a Presidential signature on the draft November finding (Tab 1). No signed copy has been found, but LtCol Oliver North has testified that he saw a signed copy of the finding in Poindexter's office in December 1985. (Testimony of Oliver North, July 7, 1987, morning session at 85-87).

SUMMARY:

The existence of a signed version of the November 1985 finding would have some legal advantages. It would provide a written, contemporaneous record that the President approved the August, September and November 1985 Israeli retransfers as covert actions, rendering them exempt from the Arms Export Control Act. In the case of the August and September retransfers, the statute does not require that such approval take the form of a finding, though an Executive Order and an NSDD would.

Admittedly, the written record was established after the retransfers occurred, and the applicable statute, the Hughes Ryan Amendment does not permit "retroactive findings." In this case, however, the President verbally approved the entire arms sale initiative in September 1985, and perhaps as early as August 1985. As characterized by then CIA General Counsel Stanley Sporkin, in such a circumstance, the finding merely constitutes a written "ratification" of steps taken to implement a program that had been previously approved by the President. Ratification of verbal approval is not desirable, but does not violate the statute.

As a factual matter, it is unhelpful that the draft finding failed to refer to the objective of establishing a bilateral dialogue with the Iranians. But this omission is a consequence of the limited role that the CIA and Sporkin had in the program. Apparently, Sporkin did not receive an adequate briefing on the operation; he avowedly sought full disclosure in the finding, but the draft he prepared omitted another key fact, the participation of the third country that actually conducted the retransfer. He knew nothing of the August/September transfers, though the

lanaguage of his draft would cover the transfer. Sporkin wrote the draft on the basis of a briefing by CIA officials, who were witting only of the agency's last minute intervention in the November retransfer. From the vantage of the CIA's limited involvement, they surmised this was solely an arms for hostage deal, but their knowledge of the operation was hardly comprehensive.

BACKGROUND:

The President's testimony to the Tower Board suggests he approved the Iranian initiative no later than September 1985. His recollection is foggy on whether he approved it as early as August, before the initiative began (Tower Report at III-9). He does not specifically recall authorizing the November 1985 Israeli retransfer of HAWKs. McFarlane has testified that be believed the President to have approved the retransfer in August before any shipments of arms.

Interest in obtaining a signed finding was triggered in November 1985, when Israeli logistical arrangements for their shipment of HAWKs began to fall through. Israeli Prime Minister Shimon Peres called McFarlane at the Geneva Summit for assistance. North asked Maj. Gen. Richard Secord and the CIA to seek flight clearance for the Israeli planes transporting the HAWKs. When CIA efforts proved unavailing, the CIA referred Secord to one of its proprietaries for alternative transportation. Eighteen HAWKs were delivered but ultimately were returned because they were antiquated and bore Israeli markings.

In a contemporaneous memorandum for the record, DDCI John McMahon wrote that Secord was told that the CIA could not provide substitute transport, but that "there was a commercial airlift that might do it. . . General Secord then . . . made arrangements for a flight on a strictly commercial basis." (Tower Report at B 39) (emphasis added). Nonetheless, McMahon directed then General Counsel Stanley Sporkin to prepare a finding that would "cover retroactively the use of the agency's proprietary." Sporkin told the Joint Select Committee that even though the CIA role was small, he felt the finding was necessary to ensure that the entire matter had gone to the President.

Sporkin sent a draft to Poindexter. It would have authorized, among other things:

> The provision of assistance by the Central Intelligence Agency to private parties in their attempt to obtain the release of Americans held hostage in the Middle East. . . .
>
> All prior actions taken by U.S. Government officials in furtherance of this effort are hereby ratified.

It would have deferred notification to Congress. Though triggered by the CIA involvement, it is drafted broadly enough to cover the August/September shipments. As noted, no signed copy of this draft finding has surfaced.

DISCUSSION:

Findings are required by § 662 of the Foreign Assistance Act, 22 U.S.C. § 2422, commonly called the Hughes-Ryan Amendment. That statute provides in part:

> No funds appropriated under the 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. . . .

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." "Special activities" is a term of art for covert operations. As defined in § 3.4(n) of E.O. 12333, it means 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.

At the outset, it may not be necessary or desirable to concede that a finding was legally required for any of the retransfers. Certainly, it would have been "prudential," as Sporkin has acknowledged. But a concession that it was required by law may set a burdensome precedent.

In the November HAWK shipment, as McMahon noted, the proprietary's air services were provided on a "strictly commercial basis." Sporkin told the Joint Select Committee, the CIA played a de minimus role in the operation; when asked to provide emergency assistance to an operation that apparently had Presidential approval, a CIA official tried to get a flight clearance and referred Secord to a proprietary. CIA participation took place in a timeframe that extended no more than 48 hours. It would be a burdensome indeed to concede that as a legal obligation, the President must make a finding before the CIA can render emergency assistance, limited in duration and scope, to covert operations run by other entitities. The requirement is even less compelling if the operation in general was approved by the President.

In respect of the August/September 1985 Israeli retransfer of TOWs, there has been no public or bureaucratic clamor that a finding should have been made. Since CIA funds were not involved, the statute is not triggered. E.O. 12333 and NSDD 159 may require a finding, but even so, there are technical questions as to whether the NSC staff action constituted a covert action.

Insofar as a finding is deemed necessary, the better basis for that conclusion is (a) that it was compelled by policy reasons, because it offers a vehicle for ensuring that the President has approved the initiative as a whole; and/or (b) because in the case of the November 1985 HAWk shipment, although de minimus CIA involvement ordinarily would not require a finding, even incidental participation will require a finding when it is part of a venture that is as major and controversial as selling arms to Iran.

The existence of a signed finding would not necessarily be legally damaging. Under a positive but fair rendition of the facts:

(1) No later than September 1985 and perhaps as early as August 1985, the President approved the Israeli retransfers (Tower Report at III-9). It is apparent that he approved the retransfers as covert actions exempt from the Arms Export Control Act (AECA). The transaction could not have been implemented within the technical or procedural requirements of the AECA. The responsible government officials could not have implemented them within the technical requirements of the AECA. They did not seek to do so. Presumably, the President and McFarlane intended to rely on the technique of covert action to provide a means of avoiding the statutory requirements.

Congress has expressly acquiesced in the Presidential power to use arms sales as covert actions, when on December 4, 1985, it required that covert arms transfers over $1,000,000 be reported to Congress under § 501 of the National Security Act of 1947. § 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). H. Rep. to P.L. 99-169 evinced Congressional recognition of the longstanding use of arms sales as covert activity. It stated in part:

> [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. . . .

Congress has not expressly recognized the President's authority to permit arms retransfers as covert actions. This has

spawned some debate on the issue in the context of the Israeli sales. To wit,

> -- An internal CIA working paper, prepared at Sporkin's request, states that while a direct shipment is permissible under a finding, a problem "could arise . . . if the equipment to be transferred constitutes articles the U.S. has provided to a second country through the Foreign Assistance/Arms Export Control Acts." (Sporkin Exhibit SS-13; discussed in Testimony of Stanley Sporkin, June 24, 1987 at 117-118). But Sporkin said that he viewed the only problem to be with replenishment. (Id. at 119)
>
> -- Stan Sporkin ultimatley admitted that "even under a covert Finding . . . I have problems" (presumably legal) with a retransfer. (Testimony of Stanley Sporkin, June 24, 1987 at 122. But cf. his testimony at 117- 118).
>
> -- An internal draft document prepared after November 1986 by State Department lawyers states that the retransfers violated the Arms Export Control Act. But although it was produced for the Joint Select Committee, it is not clear that the memo was ever signed or sent forward. (Tab 2).
>
> -- To support the view that retransfers cannot be covert actions, Committee Counsel John Nields cited the cover memorandum to the January 6, 1986 finding, which says "Since the Israelis sales are technically a violation of our Arms Export Control Act embargo for Iran, a Presidential Covert Action Finding is required in order for us to allow the Israeli sales to proceed and for our subsequent replenishment sales." (Sporkin Testimony at 117). But that draft seeks authority to conduct retransfers as covert actions, and merely reflects the position that covert retransfers may be implemented legally.

We may credibly maintain that authority to permit retransfers derives from the President's power to conduct covert operations generally (See, e.g. Totten v. United States, 92 U.S. 105 (1875)(citing the President's responsibilities over foreign policy and national security), which Congress has specifically recognized in respect of direct arms transfers. Congress may well already have recognized Presidential authority to retransfer. It has recognized that the President may authorize a transfer outside AECA auspices, and that he may use third countries to make the transfer. Congress would be hard pressed to distinguish authorization to retransfer from a direct shipment using third countries as conduit. Indeed, the constitutional basis for a Congressional role in foreign affairs (the foreign commerce clause, the appropriations power, the necessary and proper clause) may not even be implicated by a retransfer: A direct shipment introduces items into the stream of foreign commerce and requires significant expenditures of funds. A retransfer may not.

(2) The President's September authorization was conveyed verbally. His authorization should have been obtained in writing as a matter of policy, but failure to do so does not violate the Hughes-Ryan Amendment. As Sporkin explained to the Joint Select Committee "If a President orally tells somebody to do something or authorizes an act, I think he ought to be able to three weeks later finish up the paperwork and say I ratify this." Indeed, the Hughes-Ryan Amendment does not even require that the September authorization take the form of a "finding," since it applies only to CIA expenditures that rise to the level of covert operations. Findings should be in writing, but no illegality obtains if they are not.

The State Department has taken the position that 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.

Attorneys at the Justice Department and the CIA informally support this position.

(3) The draft November finding memorializes Presidential authorization for the three Israeli retransfers that took place in August, September and November 1985. It "ratifies" both CIA and U.S. governmental action in assisting the Israelis, pursuant to a program that had been authorized by the President.

(4) The draft November finding is deficient. It completes the paperwork, but it omits reference to the role of the Government of Israeli and to the geo-strategic opening that the Administration has long claimed was a key objective of the initiative. These omissions may aggravate problems stemming from failure to notify Congress. Findings trigger the notification requirements of § 501 of the National Security Act of 1947, 50 U.S.C. § 413, which requires notification to Congress of "significant anticipated intelligence activities in a "timely fashion" ." Prior notication is not required, but the Congress must be "fully informed" in a "timely fashion" of such activities.

The decision to defer notification of the finding will likely be the subject of protracted debate; the factual omissions in the draft may draw additional questions of compliance with § 501 of the National Security Act of 1947.

(5) Whether the finding was signed has no substantial legal implications for the direct U.S. shipments that followed in 1986, since these occurred pursuant to the separate finding that was signed on January 17, 1986.

AAttachments:

1. Draft November 1985 Finding
2. State Department Draft

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164988	FINDING RE: RELEASE OF AMERICAN HOSTAGES IN MIDEAST	1	ND	B1

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