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MEMORANDUM

TO: CHAIRMAN DURENBERGER  
VICE CHAIRMAN LEAHY  
SENATOR EAGLETON

FROM: DANIEL FINN

DATE: AUGUST 12, 1986

SUBJECT: MEETING ON COUNTER-TERRORISM, WAR POWERS AND  
INTELLIGENCE OVERSIGHT, AUGUST 13, 1986

Executive branch legal counsels<sup>1/</sup> have been invited to discuss with you the relationship of potential counter-terrorist operations to the Congressional notification, reporting and consultation requirements of the War Powers Resolution and the Intelligence Oversight Act. The question is whether current legislation and understandings are sufficient to cover the range of potential counter-terrorist operations, or new authority or agreements are necessary to enable Congress to discharge its Constitutional responsibilities over war-making and the oversight of programs authorized by it.

INTELLIGENCE OVERSIGHT AND WAR POWERS CONSULTATION

The Intelligence Oversight Act of 1980 (Title V of the National Security Act) requires the Director of Central Intelligence to keep the Oversight Committees "fully and currently informed of all intelligence activities...including any significant anticipated intelligence activity." Under the Hughes-Ryan provision, special activities (covert action)<sup>2/</sup> are automatically considered significant intelligence activities subject to prior notification except in extraordinary circumstances. The legislative history of the Oversight Act also indicated that other intelligence activities would be considered especially significant in this sense, including certain intelligence collection activities if they have policy implications. (Regardless of the intent of the Senate drafters that there be further development of guidelines on what collection activities

<sup>1/</sup> Peter Wolosyn, White House Counsel; Abraham Sofaer, State Department Legal Advisor; Lawrence Garrett, Defense Department General Counsel; and Charles Cooper, Justice Department Legal Counsel. CIA General Counsel was not invited to this meeting since the Committee is in regular contact with the CIA on the scope of reporting on intelligence activities.

<sup>2/</sup> "(O)perations in foreign countries, other than activities intended solely for obtaining necessary intelligence."

are significant in this respect, no formal agreements have yet been concluded with the Executive branch.)

The War Powers Resolution (1973) calls for consultations<sup>3/</sup> with Congress "in every possible instance" prior to the initial introduction of U.S. armed forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances," and thereafter. In the absence of a Declaration of War, the President must also report within 48 hours and periodically thereafter<sup>4/</sup> on the introduction of forces into such situations, into foreign territory while "equipped for combat," or in numbers which "substantially enlarge" forces already located abroad. U.S. forces would be removed from such situations upon passage of a concurrent resolution directing their withdrawal.

### COUNTER-TERRORIST OPERATIONS

Counter-terrorist activities have important potential military and paramilitary components. Counter-terrorist operations overseas, especially those directly ordered by the President, could involve a range of activities involving intelligence or military assets, personnel and missions. Specific operations could include forcible actions to rescue hostages, abduct known terrorists, or pre-empt or retaliate against terrorist organizations.

The sensitivity and exigencies of counter-terrorist operations require that consideration be given to the reporting and consultation requirements that apply. Following is a description of some of the typical situations that can be expected to arise:

#### 1. Activation of Intelligence Assets Overseas

A terrorist incident unfolds overseas, perhaps in an unfriendly country. U.S. intelligence agencies activate their assets on site, especially human agents. These agents would be supervised especially closely by U.S. intelligence officers, and possibly directed to take special risks to obtain information. Would the activation of intelligence assets overseas, especially human agents, be sufficiently sensitive as to constitute significant (anticipated) intelligence activities?

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<sup>3/</sup> Section 3.

<sup>4/</sup> Section 4.

2. Assignment of U.S. Personnel to Assist Foreign Forces

A terrorist incident unfolds overseas in a friendly country. U.S. military or intelligence personnel are sent abroad to assist foreign forces to cope with the incident. Would the deployment of U.S. intelligence officers be a significant intelligence activity? (The Committee understands that it will be informed of the deployment of CIA response teams as such.) Would the deployment of U.S. military personnel come under the War Powers Resolution? If they were "equipped for combat," such as in battle dress or fatigue uniforms (such as in Malta)?

3. Deployment of U.S. Personnel to Prepare for Operation

A terrorist incident unfolds overseas, presumably involving U.S. persons, or a terrorist cell is discovered that threatens U.S. interests. A direct response by the U.S. is being planned, involving special military or intelligence teams. U.S. personnel are deployed to the country to prepare for the operation in order to collect intelligence or conduct operational support activities. Would deployment of U.S. intelligence personnel in such circumstances constitute a significant intelligence activity (sensitive collection operation)? Would deployment of U.S. military personnel in such a capacity constitute their introduction into a hostile or imminently hostile situation? Even if the country were a friendly one? What if the military personnel were under cover and not equipped for combat, and the country were not a friendly one?

4. U.S. Supervision of Foreign Operations

A terrorist incident unfolds overseas, perhaps in an unfriendly country. U.S. intelligence officials are directed to supervise an operation being mounted by a foreign counter-terrorist force, and are deployed to the country. Is the deployment a significant intelligence activity, notwithstanding that it might be conducted under more general authority to conduct such activities for counter-terrorist purposes?

5. Pre-Deployment of Counter-Terrorist Assets

A terrorist incident unfolds overseas. U.S. military or intelligence personnel are pre-deployed to a friendly third country in order to prepare for operational deployment. Would the pre-deployment of the intelligence personnel be a significant intelligence activity? (The Committee understands that it will be informed of pre-deployments of CIA response teams.) Would pre-deployment of the military personnel be subject to consultation under Section 3 of the War Powers Resolution, as an introduction into an imminently hostile situation? Reportable under Section 4 of the Resolution, as an introduction of combat-equipped forces into foreign territory? Neither? Would there be any obligation to consult on pre-deployment of military or intelligence personnel onto platforms, such as vessels, not within foreign territory?

6. Operational Deployment of Counter-Terrorist Assets

A terrorist incident unfolds, or terrorist network is discovered, overseas. U.S. military or intelligence units are ordered to enter foreign territory in order to take direct, forcible action. At what stage should the involvement of intelligence personnel be reported to the Oversight Committees? At what point should commitment of U.S. military personnel be consulted with or reported to Congress?

9/16/86

TO: CIA/GC -- Mr. Jameson  
DOD/GC -- Mr. McNeill  
Justice/OLC -- Ms. Percival  
White House Counsel -- Mr. McGrath ←

FROM: State/L -- Mike Matheson *MDW*

Attached is our draft response to the SSCI questions on War Powers and counter-terrorist operations. We would welcome your clearance/comments by COB Friday (9/16). You'll note that these responses are essentially drawn verbatim, to the extent possible, from Judge Sofaer's previous testimony before the HFAC. Thanks very much.

Responses to Committee  
Staff Hypotheticals  
on War Powers Issues

During our informal discussion on August 13 concerning counter-terrorist operations and the War Powers Resolution, the Executive Branch representatives were asked to provide the Committee with answers to a series of questions formulated by the Committee staff concerning the application of the Resolution to certain hypothetical scenarios involving terrorist incidents. We have done our best to provide such answers, recognizing that each situation must be evaluated on its own facts, that definitive answers can never be given in advance to such hypothetical questions, and that it is ultimately the responsibility of the President to decide how the Executive Branch will apply the provisions of the Resolution in any particular case.

As a general matter, it is often necessary, during terrorist incidents, for the President to deploy specially trained antiterrorist units abroad for possible use to release hostages or capture the terrorists themselves. The War Powers Resolution does not, in general, apply to such deployments, where operations of a traditional military character are not contemplated and where no confrontation is expected between our units and forces of another state, or with a substantial guerrilla force having conventional military capabilities. Such units can reasonably be distinguished from "forces equipped for combat" and their actions against terrorists differ greatly from the "hostilities" contemplated by the Resolution.

Nothing in the legislative history indicates, moreover, that the Congress intended the Resolution to cover deployment of such antiterrorist units. These units are not conventional military forces. A rescue effort or an effort to capture or otherwise deal with terrorists, where the forces of a foreign nation are not involved, is more a law-enforcement than a military mission, and our antiterrorist forces are not equipped to conduct sustained combat with foreign armed forces. Rather, these units operate in secrecy to carry out precise and limited tasks designed to liberate U.S. citizens from captivity or to attack terrorist kidnapers and killers. When used, these units are not expected to confront the military forces of a sovereign state or substantial guerrilla forces. In a real sense, therefore, action by an antiterrorist unit constitutes a use of force that is more analogous to law enforcement activity by police in the domestic context than it is to the "hostilities" between states contemplated by the War Powers Resolution.

With this general background, our answers to your hypothetical questions are as follows with respect to War Powers issues. (The numbering of our answers corresponds to that of your questions.)

1. No War Powers questions are posed in this hypothetical.

2. As indicated above, we do not believe that the War Powers Resolution would apply to the deployment abroad of antiterrorist units (even if in "battle dress" or fatigue uniforms) where no hostilities are expected with forces of another state or with a substantial guerrilla force. Nothing in this hypothetical indicates that this would be the case.

3. As indicated above, we do not believe that an armed confrontation involving such antiterrorist units would constitute "hostilities" for the purpose of the Resolution unless an exchange of fire with the armed forces of another state, or a substantial guerrilla force, were involved. If such an exchange with the forces of another state were possible, then a judgment would have to be made as to whether "imminent involvement" of U.S. military forces in such an exchange is "clearly indicated by the circumstances", as provided in Sections 3 and 4 of the Resolution. This judgment would have to be made in each case on the basis of the specific circumstances prevailing at that time.

4. No War Powers questions are posed in this hypothetical.

5. The answers to the War Powers questions in this hypothetical are the same as in #3 above.

6. The answers to the War Powers questions in this hypothetical are the same as in #3 above.



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September 19, 1986

The Honorable Abraham D. Sofaer  
Legal Advisor  
U.S. Department of State  
Washington, D.C. 20520

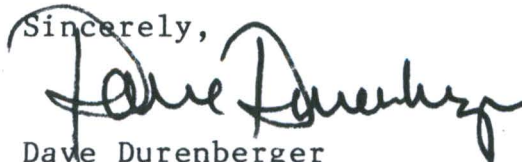
Dear Judge Sofaer:

Thank you for participating in our meeting of August 13 on Congressional notification and reporting requirements related to potential counter-terrorism operations. We were very pleased by your openness to discuss the difficult issues in this area, and particularly by your offer to provide written comments on the issues raised in the staff memorandum circulated at that meeting.

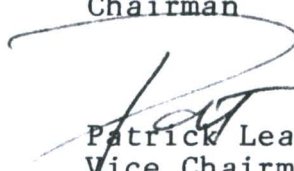
In view of our belief that confidence between the Legislative and Executive branches of government can best be reached in this area through informal consultations, we would ask that you and a staff assistant participate in another informal session on this subject with members of the Committee. We have scheduled this session for October 1, 1986, at 4:00 p.m. in room SH-219 of the Hart Senate Office Building.

Another opportunity to discuss these matters with you prior to the Fall recess would leave us in good position to follow related activities through the remainder of the year, as well as provide a foundation for further consideration of counter-terrorist issues during the next Congress. We understand that interagency coordination is currently underway on finalizing the written responses referred to above. In order to facilitate our consultations, we ask that your office provide the written comments by the close of business Thursday, September 25.

Sincerely,



Dave Durenberger  
Chairman



Patrick Leahy  
Vice Chairman