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ID	Doc Type	Document Description	No of Pages	Doc Date	Restrictions
1.	57276 LIST	KIDNAPPINGS OF FOREIGNERS IN LEBANON D 4/13/2006 F97/108/1 #107; UPHELD 12/16/2010 M08-099/1 #57276	6	4/18/1986	B1 B3
2.	57277 MEMO	OLIVER REVELL TO OLIVER NORTH, OAKLEY ET AL PAR 10/24/2000 NLSF97/108/1 #108	1	5/16/1986	B7(C)
3.	57278 CABLE	162024Z MAY 86 D 6/21/2001 F97/108/1 #109; UPHELD 5/7/2010 M08-099/1 #57278; UPHELD 12/16/2010 M08-099/1 #57278	2	5/16/1986	B1 B3
4.	57279 PAPER	RE LEBANON HOSTAGES PP. 11 PP. INCLUDING DUPLICATES OF PP. 5-7 D 4/13/2006 F97/108/1 #110; UPHELD 12/16/2010 M08-099/1 #57279	11	ND	B1 B3
5.	57280 MEMO	TO NORTH RE LEBANON HOSTAGES D 4/13/2006 F97/108/1 #111; UPHELD 12/16/2010 M08-099/1 #57280	1	ND	B1 B3
6.	57281 PAPER	RE LEBANON HOSTAGES D 4/13/2006 F97/108/1 #112; UPHELD 12/16/2010 M08-099/1 #57281	7	8/18/1986	B1 B3

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NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

April 28, 1986

ACTION

MEMORANDUM FOR RODNEY B. MCDANIEL

FROM: OLIVER L. NORTH

SUBJECT: Testimony by Judge Sofaer on War Powers

Attached at Tab I is a memo from you to Nicholas Platt forwarding NSC concurrence in the subject testimony (Tab II).

Howard Teicher and Peter Rodman concur.

RECOMMENDATION

That you sign and forward your memo at Tab I.

Approve _____ Disapprove _____

cc: Jim Stark
Ron Sable

Attachments

Tab I - McDaniel Memo to Platt
Tab II - Platt Memo to Poindexter

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

MEMORANDUM FOR MR. NICHOLAS PLATT
Executive Secretary
Department of State

SUBJECT: Testimony by Judge Sofaer on War Powers

NSC has reviewed and concurs in the subject testimony.

Rodney B. McDaniel
Executive Secretary



United States Department of State

Washington, D.C. 20520

3416

April 25, 1986

MEMORANDUM

TO: DOD/GC - Mr. McNeill
Justice/OLC - Mr. Girado
NSC - CDR. Thompson
White House Counsel's Office - Mr. McGrath

FROM: State/L - Mike Matheson ^{NDM}

SUBJECT: War Powers Testimony

Judge Sofaer has just been asked to testify before the House Foreign Affairs Committee on Tuesday April 29 concerning the applicability of the War Powers Resolution to the recent operations against Libya, and to counter-terrorist operations generally. We have prepared a draft statement and a few Qs/As for this purpose, which are attached. Because of the short deadline under which we are working, we will need your clearance and/or comments as soon as possible, and in any event no later than noon Monday; please provide them to myself or Tim Ramish of L/PM (647-7838). The draft statement will probably undergo further editing during the course of the day on Monday, but I will keep you updated on any substantive changes. Thanks for your help, and our apologies for the short deadline.

STATEMENT OF ABRAHAM D. SOFAER
LEGAL ADVISER OF THE DEPARTMENT OF STATE
TO THE COMMITTEE ON FOREIGN AFFAIRS
OF THE HOUSE OF REPRESENTATIVES

TUESDAY, APRIL 29, 1986

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE:

I AM PLEASED TO HAVE THE OPPORTUNITY TO APPEAR BEFORE YOU TODAY TO DISCUSS THE WAR POWERS RESOLUTION IN THE CONTEXT OF RECENT EVENTS. I WOULD LIKE TO BEGIN BY SETTING OUT SOME GENERAL CONSIDERATIONS REGARDING THE RESOLUTION, AND THEN FOCUS ON THE APPLICATION OF THE RESOLUTION TO SPECIFIC CASES WHICH MAY BE OF PARTICULAR INTEREST TO THE COMMITTEE.

BASIC FRAMEWORK

THE WAR POWERS RESOLUTION WAS ENACTED IN 1973 IN ORDER TO ENSURE APPROPRIATE CONGRESSIONAL INVOLVEMENT IN SITUATIONS IN WHICH THE UNITED STATES MAY BECOME ENGAGED IN HOSTILITIES

WITH OTHER STATES. TO THAT END, THE RESOLUTION CONTAINS CERTAIN REQUIREMENTS CONCERNING CONSULTATION, REPORTING, AND TERMINATION OF THE USE OF U.S. ARMED FORCES.

THE CONSULTATION REQUIREMENT IS CONTAINED IN SECTION 3. THAT SECTION PROVIDES:

"THE PRESIDENT IN EVERY POSSIBLE INSTANCE SHALL CONSULT WITH CONGRESS BEFORE INTRODUCING UNITED STATES ARMED FORCES INTO HOSTILITIES OR INTO SITUATIONS WHERE IMMINENT INVOLVEMENT IN HOSTILITIES IS CLEARLY INDICATED BY THE CIRCUMSTANCES, AND AFTER EVERY SUCH INTRODUCTION SHALL CONSULT REGULARLY WITH THE CONGRESS UNTIL UNITED STATES ARMED FORCES ARE NO LONGER ENGAGED IN HOSTILITIES OR HAVE BEEN REMOVED FROM SUCH SITUATIONS."

THE RESOLUTION DOES NOT DEFINE THE NATURE OF THE CONSULTATIONS THAT ARE REQUIRED. RATHER, IT LEAVES IT TO THE PRESIDENT TO DETERMINE PRECISELY HOW SUCH CONSULTATIONS ARE TO BE CARRIED OUT. SIGNIFICANTLY, IN MAKING THE REQUIREMENT APPLICABLE ONLY WHERE CONSULTATION IS "POSSIBLE," THE RESOLUTION EXPRESSLY CONTEMPLATES THAT CONSULTATION IN A

PARTICULAR CASE WILL DEPEND TO SOME EXTENT ON THE PREVAILING CIRCUMSTANCES.

OVER THE YEARS, BOTH BEFORE AND AFTER THE RESOLUTION WAS ADOPTED, THE EXECUTIVE BRANCH HAS ENGAGED IN EXTENSIVE CONSULTATIONS WITH THE CONGRESS IN A WIDE VARIETY OF CIRCUMSTANCES INVOLVING THE POSSIBLE DEPLOYMENT OF U.S. FORCES ABROAD. CONSULTATIONS HAVE OCCURRED IN CASES WHERE THE RESOLUTION MIGHT HAVE BEEN THOUGHT TO APPLY AND IN CASES WHERE IT CLEARLY DID NOT. THE PURPOSE OF SUCH CONSULTATIONS IS TO KEEP THE CONGRESS INFORMED THROUGH ITS LEADERSHIP, TO DETERMINE WHETHER THE CONGRESS APPROVES OF A PARTICULAR POLICY, AND TO GIVE THE CONGRESS AN OPPORTUNITY TO PROVIDE THE PRESIDENT WITH ITS VIEWS, ESPECIALLY WHERE IT MAY DISAGREE WITH THE POLICY. CONSULTATIONS ARE NOT INTENDED TO INVOLVE THE CONGRESS IN REVIEWING THE DETAILED PLANS OF A MILITARY OPERATION. THE DEGREE TO WHICH THE PRESIDENT IS IMPLEMENTING A POLICY OF WHICH THE CONGRESS IS WELL AWARE AND WHICH IT HAS ALREADY APPROVED IN PRINCIPLE IS ONE IMPORTANT FACTOR TO BE CONSIDERED IN DETERMINING THE NATURE AND TIMING OF CONSULTATIONS.

IN PRACTICE, THE CIRCUMSTANCES OF EACH CASE HAVE IN FACT DETERMINED TO A SIGNIFICANT DEGREE THE FORM AND SUBSTANCE OF CONSULTATIONS. IN SOME INSTANCES, SUCH AS THE INTRODUCTION

OF U.S. FORCES INTO LEBANON TO PARTICIPATE IN PEACEKEEPING OPERATIONS, OR THE CASE OF THE VIETNAM EVACUATION, THE SITUATION PERMITTED DETAILED CONSULTATIONS WELL IN ADVANCE OF THE ACTION CONTEMPLATED. IN OTHER INSTANCES, AS WITH THE TEHRAN RESCUE MISSION, PRIOR CONSULTATION WAS NOT POSSIBLE IN VIEW OF EXTRAORDINARY MILITARY OPERATIONAL NEEDS.

SECTION 4 OF THE RESOLUTION REQUIRES THAT THE PRESIDENT SUBMIT WITHIN 48 HOURS A WRITTEN REPORT TO THE CONGRESS IN THREE CIRCUMSTANCES (WHERE WAR HAS NOT BEEN DECLARED). A REPORT MUST BE SUBMITTED WHEN U.S. FORCES ARE INTRODUCED "INTO HOSTILITIES OR INTO SITUATIONS WHERE IMMINENT INVOLVEMENT IN HOSTILITIES IS CLEARLY INDICATED BY THE CIRCUMSTANCES." THESE SITUATIONS ARE THOSE TO WHICH THE CONSULTATION REQUIREMENT OF SECTION 3 ALSO APPLIES. IN ADDITION, A REPORT MUST BE SUBMITTED WHEN U.S. FORCES ARE INTRODUCED "INTO THE TERRITORY, AIRSPACE OR WATERS OF A FOREIGN NATION, WHILE EQUIPPED FOR COMBAT" (WITH CERTAIN SPECIFIED EXCEPTIONS), OR WHEN SUCH FORCES ARE INTRODUCED "IN NUMBERS WHICH SUBSTANTIALLY ENLARGE UNITED STATES ARMED FORCES EQUIPPED FOR COMBAT ALREADY LOCATED IN A FOREIGN NATION"

AS THE COMMITTEE IS AWARE, BOTH REPUBLICAN AND DEMOCRATIC PRESIDENTS HAVE PROVIDED WRITTEN REPORTS TO THE

CONGRESS WITH RESPECT TO U.S. DEPLOYMENTS ABROAD AS A MEANS OF KEEPING THE CONGRESS INFORMED ON MATTERS OF RELEVANCE TO ITS RESPONSIBILITIES, WHILE RESERVING THE EXECUTIVE BRANCH'S POSITION ON THE TECHNICAL APPLICABILITY AND CONSTITUTIONALITY OF THE RESOLUTION. REPORTS WERE SUBMITTED BY PRESIDENT FORD IN CONNECTION WITH THE INDOCHINA EVACUATIONS AND THE MAYAGUEZ INCIDENT, AND BY PRESIDENT CARTER IN CONNECTION WITH THE TEHRAN RESCUE MISSION. IN THE REAGAN ADMINISTRATION, REPORTS WERE SUBMITTED WITH RESPECT TO U.S. PARTICIPATION IN THE MULTINATIONAL FORCE AND OBSERVERS IN THE SINAI AND THE MULTINATIONAL FORCE IN LEBANON, THE DEPLOYMENT OF U.S. AIRCRAFT IN CONNECTION WITH THE SITUATION IN CHAD, AND THE INTRODUCTION OF U.S. FORCES INTO GRENADA. MORE RECENTLY, A REPORT WAS SUBMITTED CONCERNING THE ENCOUNTER WITH LIBYAN FORCES DURING U.S. MILITARY EXERCISES IN AND NEAR THE GULF OF SIDRA IN LATE MARCH, AND A REPORT WAS SUBMITTED WITH RESPECT TO THE APRIL 14 OPERATION AGAINST LIBYA. INDEED, PRESIDENTS HAVE INFORMED THE CONGRESS OF MANY INITIATIVES WHERE THERE HAS BEEN NO STATUTORY REQUIREMENT WHATEVER.

SECTION 5 OF THE RESOLUTION PROVIDES THAT WITHIN 60 DAYS AFTER A REPORT IS SUBMITTED OR REQUIRED TO BE SUBMITTED, THE PRESIDENT MUST TERMINATE THE USE OF U.S. FORCES UNLESS THE CONGRESS HAS DECLARED WAR OR SPECIFICALLY AUTHORIZED THE USE OF SUCH FORCES, HAS EXTENDED THE 60-DAY PERIOD OR IS

PHYSICALLY UNABLE TO MEET AS A RESULT OF AN ARMED ATTACK ON THE UNITED STATES. THE SECTION ALSO PROVIDES THAT THE PRESIDENT MUST REMOVE U.S. FORCES FROM ENGAGEMENT IN HOSTILITIES ABROAD "IF THE CONGRESS SO DIRECTS BY CONCURRENT RESOLUTION."

THESE PROVISIONS OF SECTION 5 ARE NOT THE FOCUS OF THIS PARTICULAR HEARING, BUT IT IS IMPORTANT TO NOTE TWO POINTS WITH RESPECT TO THEM. FIRST, IT SEEMS CLEAR THAT THE LEGISLATIVE VETO PROVISION OF THE RESOLUTION CANNOT STAND IN THE FACE OF THE SUPREME COURT'S 1983 DECISION IN INS V. CHADHA. SECOND, THE EXECUTIVE BRANCH HAS HISTORICALLY DIFFERED WITH THE CONGRESS OVER THE WISDOM AND CONSTITUTIONALITY OF THE 60-DAY PROVISION OF SECTION 5.

AS PRESIDENT REAGAN MADE CLEAR IN SIGNING THE MULTINATIONAL FORCE IN LEBANON RESOLUTION ON OCTOBER 12, 1983, THE IMPOSITION OF SUCH ARBITRARY AND INFLEXIBLE DEADLINES CREATES UNWISE LIMITATIONS ON PRESIDENTIAL AUTHORITY TO DEPLOY U.S. FORCES IN THE INTERESTS OF U.S. NATIONAL SECURITY. SUCH DEADLINES CAN UNDERMINE FOREIGN POLICY JUDGMENTS, ADVERSELY AFFECT OUR ABILITY TO DEPLOY U.S. FORCES IN SUPPORT OF THOSE JUDGMENTS, AND ENCOURAGE HOSTILE ELEMENTS TO MAXIMIZE U.S. CASUALTIES IN CONNECTION WITH SUCH DEPLOYMENTS. MOREOVER, IT IS WORTH EMPHASIZING THAT THE

PRESIDENT'S CONSTITUTIONAL AUTHORITY CANNOT IN ANY EVENT BE IMPERMISSIBLY INFRINGED BY STATUTE. SECTION 8(D) OF THE RESOLUTION ITSELF MAKES CLEAR THAT THE RESOLUTION WAS NOT INTENDED TO ALTER THE CONSTITUTIONAL AUTHORITY OF THE PRESIDENT. THE PRESIDENT HAS CONSTITUTIONAL POWER, AS COMMANDER-IN-CHIEF AND AS THE NATION'S PRINCIPAL AUTHORITY FOR THE CONDUCT OF FOREIGN AFFAIRS, TO DIRECT AND DEPLOY U.S. FORCES IN THE EXERCISE OF SELF-DEFENSE, INCLUDING THE PROTECTION OF AMERICAN CITIZENS FROM ATTACKS ABROAD. INDEED, FROM THE TIME OF JEFFERSON TO THE PRESENT, PRESIDENTS HAVE EXERCISED THEIR AUTHORITY UNDER THE CONSTITUTION TO USE MILITARY FORCE TO PROTECT AMERICAN CITIZENS ABROAD.

I WOULD ALSO MENTION THAT I BELIEVE THERE ARE SERIOUS CONSTITUTIONAL PROBLEMS WITH SECTION 8(A) OF THE RESOLUTION, WHICH PURPORTS TO LIMIT THE MANNER IN WHICH THE CONGRESS MAY IN THE FUTURE AUTHORIZE THE USE OF U.S. FORCES. I DO NOT BELIEVE THAT ONE CONGRESS BY STATUTE CAN SO LIMIT THE CONSTITUTIONAL OPTIONS OF FUTURE CONGRESSES.

RECENT CASES

THE WAR POWERS RESOLUTION WAS ENACTED IN THE SHADOW OF U.S. INVOLVEMENT IN THE VIETNAM WAR. IN MORE RECENT YEARS, HOWEVER, ISSUES HAVE BEEN RAISED UNDER THE RESOLUTION BY

SITUATIONS THAT BEAR NO RESEMBLANCE TO THE VIETNAM WAR AND, IN FACT, MAY NOT EVEN HAVE BEEN AT ALL WITHIN THE CONTEMPLATION OF THE DRAFTERS OF THE RESOLUTION.

IT IS A REGRETTABLE REALITY IN TODAY'S WORLD THAT AMERICANS ABROAD ARE INCREASINGLY SUBJECTED TO KIDNAPPINGS AND ATTACKS BY TERRORISTS WHO SEEK TO FURTHER THEIR POLITICAL ENDS THROUGH SUCH MEANS. THE HIJACKING LAST YEAR OF TWA FLIGHT 847, WITH THE MURDER OF NAVY DIVER STETHEM, IS A WELL-KNOWN RECENT EXAMPLE. IN THAT CASE, WE HAD NO REASON TO BELIEVE THAT THE GOVERNMENT OF LEBANON HAD ENCOURAGED OR OTHERWISE SUPPORTED THE TERRORISTS; IT WAS SIMPLY UNABLE TO CONTROL THEM. IN SUCH A SITUATION, THE PRESIDENT MAY DECIDE TO DEPLOY SPECIALLY-TRAINED ANTI-TERRORIST UNITS IN AN EFFORT TO SECURE THE RELEASE OF THE HOSTAGES OR TO CAPTURE THE TERRORISTS WHO PERPETRATED THE ACT. DOES THE WAR POWERS RESOLUTION REQUIRE CONSULTATION AND REPORTING IN THIS KIND OF SITUATION?

THE RESOLUTION SHOULD NOT, IN GENERAL, BE CONSTRUED TO APPLY TO THE DEPLOYMENT OF SUCH ANTI-TERRORIST UNITS, WHERE OPERATIONS OF A TRADITIONAL MILITARY CHARACTER ARE NOT CONTEMPLATED AND WHERE NO CONFRONTATION IS EXPECTED BETWEEN OUR UNITS AND FORCES OF ANOTHER STATE. TO BE SURE, THE LANGUAGE OF THE RESOLUTION MAKES NO EXPLICIT EXCEPTION FOR

ACTIVITIES OF THIS KIND, BUT THERE IS ALSO NOTHING IN THAT LANGUAGE THAT MAKES CLEAR THAT SUCH UNITS ARE "FORCES EQUIPPED FOR COMBAT" OR THAT THEIR ACTIONS AGAINST TERRORISTS ARE "HOSTILITIES" AS CONTEMPLATED BY THE RESOLUTION.

THERE IS, MOREOVER, NO INDICATION IN THE LEGISLATIVE HISTORY THAT THE CONGRESS INTENDED THE RESOLUTION TO COVER ANTI-TERRORIST DEPLOYMENTS. ANTI-TERRORIST UNITS ARE NOT CONVENTIONAL MILITARY FORCES. A RESCUE EFFORT OR AN EFFORT TO CAPTURE OR OTHERWISE DEAL WITH TERRORISTS IS NOT A TYPICAL MILITARY MISSION WHERE THE FORCES OF A FOREIGN NATION ARE NOT INVOLVED, AND OUR ANTI-TERRORIST FORCES ARE NOT EQUIPPED TO CONDUCT SUSTAINED CONDUCT IN SUCH CIRCUMSTANCES. 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 KIDNAPPERS AND KILLERS. WHEN USED, THESE UNITS WILL NORMALLY DIRECT THEIR ACTIVITY TOWARD NON-GOVERNMENTAL TERRORIST GROUPS; THEY ARE NOT EXPECTED TO CONFRONT THE MILITARY FORCES OF A SOVEREIGN STATE. IN A REAL SENSE, ACTION BY AN ANTI-TERRORIST UNIT, LIKE ACTION DIRECTED AGAINST PIRACY, CONSTITUTES A USE OF FORCE THAT IS MORE ANALOGOUS TO LAW ENFORCEMENT ACTIVITIES BY POLICE IN THE DOMESTIC CONTEXT THAN IT IS TO THE "HOSTILITIES" BETWEEN STATES CONTEMPLATED BY THE WAR POWERS RESOLUTION.

I MIGHT NOTE, IN THIS CONNECTION, THAT OTHER TYPES OF CASES, SUCH AS THE MOVEMENT OF WARSHIPS INTO OR THROUGH FOREIGN TERRITORIAL WATERS, THE DEPLOYMENT ABROAD OF SECURITY PERSONNEL SUCH AS MARINE EMBASSY GUARDS, AND TRANSITS OF COMBAT AIRCRAFT THROUGH FOREIGN AIRSPACE, HAVE GENERALLY BEEN CONSIDERED TO BE OUTSIDE THE SCOPE OF THE RESOLUTION, EVEN THOUGH THE TEXT OF THE RESOLUTION AGAIN PROVIDES NO EXCEPTION. THE RATIONALE FOR REGARDING THE RESOLUTION INAPPLICABLE IS AT LEAST AS STRONG IN THE CASE OF LIMITED, ANTI-TERRORIST DEPLOYMENTS AS IT IS IN THESE OTHER CASES, ABSENT THE INVOLVEMENT OF A FOREIGN STATE.

EVEN IF IT COULD BE ARGUED THAT THE RESOLUTION WAS APPLICABLE TO THE DEPLOYMENT OF SPECIAL ANTI-TERRORIST UNITS, THE FACT IS THAT CONSULTATIONS MAY NOT -- AND GENERALLY WILL NOT -- BE POSSIBLE IN SUCH CASES IN ANY EVENT. THE EXISTENCE AND PURPOSE OF THESE UNITS ARE WELL-KNOWN TO THE CONGRESS; INDEED, THE CONGRESS FUNDS THEIR ACTIVITIES. THE NEED FOR SWIFTNES AND SECRECY THAT IS INHERENT IN THE NATURE OF THOSE ACTIVITIES IS SO EXTRAORDINARY THAT CONSULTATIONS PRIOR TO DEPLOYMENT MIGHT WELL JEOPARDIZE THE LIVES OF OUR HOSTAGES AND THEIR LIBERATORS.

ISSUES UNDER THE WAR POWERS RESOLUTION HAVE ALSO BEEN RAISED WHERE U.S. FORCES HAVE ENGAGED IN A MILITARY EXERCISE IN CONFORMITY WITH INTERNATIONAL LAW BUT UNDER CIRCUMSTANCES

IN WHICH HOSTILE ACTION MIGHT BE TAKEN IN RESPONSE TO THE EXERCISE. THE INCIDENT IN THE GULF OF SIDRA IN LATE MARCH ILLUSTRATES THE SITUATION. DOES THE RESOLUTION REQUIRE THE PRESIDENT TO CONSULT AND REPORT IN THIS KIND OF CASE?

SOME FACTUAL BACKGROUND WILL HELP TO PUT THIS QUESTION IN PERSPECTIVE. THE UNITED STATES IS COMMITTED TO THE EXERCISE AND PRESERVATION OF NAVIGATION AND OVERFLIGHT RIGHTS AND FREEDOMS AROUND THE WORLD. THAT IS THE PURPOSE OF THE FREEDOM OF NAVIGATION PROGRAM. A DELIBERATE DECISION WAS MADE DURING THE CARTER ADMINISTRATION TO DISCOURAGE OR NEGATE UNLAWFUL CLAIMS TO EXTENDED JURISDICTION IN THE OCEANS. THAT POLICY WAS AFFIRMED IN 1982 UNDER PRESIDENT REAGAN, AND IN 1983 THE ESSENCE OF THE POLICY BECAME PUBLIC IN A STATEMENT ON U.S. OCEAN POLICY. THAT STATEMENT MADE CLEAR THAT THE UNITED STATES WOULD CONTINUE TO WORK WITH OTHER COUNTRIES TO DEVELOP AN ACCEPTABLE OCEANS REGIME. IT ALSO MADE CLEAR THAT THE UNITED STATES WOULD PROTEST THE UNILATERAL ACTS OF OTHER STATES DESIGNED TO RESTRICT THE RIGHTS AND FREEDOMS OF THE INTERNATIONAL COMMUNITY IN THE USE OF THE OCEANS, AND THAT THE UNITED STATES WOULD EXERCISE AND ASSERT THOSE RIGHTS AND FREEDOMS ON A WORLDWIDE BASIS. SUCH EXERCISE PROVIDES VISIBLE AND POWERFUL EVIDENCE OF OUR REFUSAL TO ACCEPT UNLAWFUL CLAIMS. THE UNITED STATES HAS ACCORDINGLY PROTESTED AND EXERCISED RIGHTS AND FREEDOMS WITH RESPECT TO CLAIMS OF

VARIOUS KINDS: UNRECOGNIZED HISTORIC WATERS CLAIMS, TERRITORIAL SEA CLAIMS GREATER THAN 12 NAUTICAL MILES, AND TERRITORIAL SEA CLAIMS THAT IMPOSE IMPERMISSIBLE RESTRICTIONS ON THE INNOCENT PASSAGE OF ANY TYPE OF VESSELS (SUCH AS REQUIRING PRIOR NOTIFICATION OR PERMISSION). SINCE THE POLICY WAS ESTABLISHED THE UNITED STATES HAS EXERCISED ITS RIGHTS AGAINST THE OBJECTIONABLE CLAIMS OF OVER 35 COUNTRIES, INCLUDING THE SOVIET UNION, AT A RATE OF ABOUT 30 TO 40 PER YEAR.

THE UNITED STATES HAS FOLLOWED THIS POLICY PRECISELY IN CONNECTION WITH LIBYA. WHEN QADHAFI CAME TO POWER IN LIBYA, IT WAS NOT LONG BEFORE PRIVATE FIRMS SAW THEIR INTERESTS EXPROPRIATED. THEN, ON OCTOBER 9, 1973, QADHAFI BROADENED THE SCOPE OF HIS INTERESTS AND ASSERTED HIS CLAIM TO OWNERSHIP OF THE GULF OF SIDRA. THE UNITED STATES VIGOROUSLY PROTESTED THAT ASSERTION ON FEBRUARY 11, 1974, AND IN THE YEARS SINCE THEN WE HAVE EXERCISED OUR RIGHTS IN THAT AREA ON NUMEROUS OCCASIONS.

THE WAR POWERS RESOLUTION WAS NOT INTENDED TO REQUIRE CONSULTATION BEFORE CONDUCTING MANEUVERS IN INTERNATIONAL WATERS OR AIRSPACE IN THE CONTEXT OF THIS GLOBAL FREEDOM-OF-NAVIGATION PROGRAM. WE ARE AWARE OF NO PREVIOUS SUGGESTION THAT THE RESOLUTION WOULD REQUIRE CONSULTATION IN

SUCH SITUATIONS. THIS QUESTION WAS MOST CAREFULLY CONSIDERED IN CONNECTION WITH THE SIDRA EXERCISE IN MARCH, AND THE DECISION WAS MADE THAT THE CONDUCT OF THOSE OPERATIONS DID NOT PLACE U.S. FORCES INTO HOSTILITIES OR INTO A SITUATION IN WHICH IMMINENT INVOLVEMENT IN HOSTILITIES WAS "CLEARLY INDICATED BY THE CIRCUMSTANCES." THE UNITED STATES HAS CONDUCTED ITS EXERCISES NOT ONLY IN SIDRA BUT AROUND THE WORLD, NOT ONLY IN MARCH BUT FOR YEARS -- AND IN MOST INSTANCES WITHOUT HOSTILE RESPONSE. WE HAVE IN FACT BEEN IN THE GULF OF SIDRA AREA 16 TIMES SINCE 1981, AND WE HAVE CROSSED QADHAFI'S SO-CALLED "LINE OF DEATH" 7 TIMES BEFORE THE OPERATION LAST MARCH. ONLY ONCE BEFORE DID QADHAFI RESPOND WITH MILITARY ACTION, AND IN THAT INSTANCE HE WAS SINGULARLY UNSUCCESSFUL. WHILE WE MUST ALWAYS BE AWARE OF THE RISKS AND BE PREPARED TO DEAL WITH ALL CONTINGENCIES (AND WERE OBVIOUSLY WELL PREPARED IN THE RECENT SIDRA CASE), WE HAVE EVERY RIGHT TO EXPECT THAT NEITHER LIBYA NOR ANY OTHER COUNTRY WILL TAKE HOSTILE ACTION AGAINST U.S. FORCES WHILE THEY ARE LAWFULLY IN AND OVER AREAS OF THE HIGH SEAS. THE THREAT OF A POSSIBLE HOSTILE RESPONSE IS NOT SUFFICIENT TO TRIGGER THE CONSULTATION REQUIREMENT OF SECTION 3, WHICH REFERS ONLY TO HOSTILITIES AND TO SITUATIONS IN WHICH IMMINENT INVOLVEMENT IN HOSTILITIES IS "CLEARLY INDICATED" BY THE CIRCUMSTANCES.

WHERE A PEACEFUL, LAWFUL EXERCISE DOES IN FACT RESULT IN HOSTILE ACTION TO WHICH U.S. FORCES MUST RESPOND IN IMMEDIATE SELF-DEFENSE, SUCH ENGAGEMENT SHOULD NOT NORMALLY BE CONSTRUED AS CONSTITUTING THE INTRODUCTION OF U.S. ARMED FORCES INTO A SITUATION OF ACTUAL OR IMMINENT HOSTILITIES FOR THE PURPOSE OF THE REPORTING REQUIREMENT OF SECTION 4 OF THE RESOLUTION. NO REPORT WAS SUBMITTED IN THE CASE OF THE 1981 SIDRA INCIDENT, IN WHICH TWO LIBYAN AIRCRAFT WERE SHOT DOWN AFTER THEY FIRED AT U.S. AIRCRAFT. SIMILARLY, DURING THE PERIOD IN WHICH U.S. PEACEKEEPING FORCES WERE DEPLOYED IN THE BEIRUT AREA IN 1983, MANY INCIDENTS OCCURRED IN WHICH HOSTILE FORCES ATTACKED AND U.S. PEACEKEEPING FORCES RESPONDED IN IMMEDIATE SELF-DEFENSE, YET NO SEPARATE WAR POWERS REPORTS WERE SUBMITTED FOR EACH OF THESE INCIDENTS. THE FACT IS THAT THERE IS NO PRECISE FORMULA FOR DETERMINING THE APPLICABILITY OF THE RESOLUTION IN SUCH CASES. OF COURSE, A DIFFERENT SITUATION MIGHT BE PRESENTED IF U.S. FORCES WITHDREW FROM AN AREA AND SUBSEQUENTLY RETURNED TO UNDERTAKE FURTHER MILITARY ACTION.

AS A PRACTICAL MATTER, HOWEVER, THIS QUESTION MAY WELL BE ACADEMIC. IN THE CASE OF THE MARCH INCIDENT IN THE GULF OF SIDRA, FOR EXAMPLE, REGARDLESS OF THE ISSUE OF THE TECHNICAL APPLICABILITY OF THE WAR POWERS RESOLUTION, THE ADMINISTRATION PROVIDED CONGRESS WITH ALL THE INFORMATION IT

COULD REASONABLY HAVE EXPECTED TO RECEIVE. AS SOON AS HOSTILE LIBYAN ACTIONS OCCURRED, THE ADMINISTRATION TOOK EVERY POSSIBLE STEP TO ENSURE THAT CONGRESS WAS IMMEDIATELY AND FULLY INFORMED AND WAS KEPT INFORMED THROUGHOUT THE REMAINDER OF THE EXERCISE. IN PARTICULAR, NUMEROUS CALLS WERE IMMEDIATELY MADE TO CONGRESSIONAL LEADERS TO INFORM THEM OF THE EVENTS; EXTENSIVE BRIEFINGS WERE CONDUCTED FOR THE BENEFIT OF ALL INTERESTED MEMBERS OF CONGRESS, AT WHICH EXPERTS FROM THE DEPARTMENTS OF STATE AND DEFENSE PROVIDED ALL PERTINENT INFORMATION AND RESPONDED TO ALL QUESTIONS ASKED BY MEMBERS; AND THE PRESIDENT SENT A WRITTEN REPORT TO THE CONGRESS DESCRIBING THE EVENTS OF MARCH 24 AND 25, THE ACTIONS TAKEN BY THE U.S. FORCES AND THE LEGAL JUSTIFICATION FOR THOSE ACTIONS.

THE THIRD KIND OF SITUATION IN WHICH WAR POWERS CONSIDERATIONS HAVE BEEN RAISED RECENTLY IS THAT IN WHICH U.S. FORCES TAKE LEGITIMATE ACTION IN SELF-DEFENSE IN CIRCUMSTANCES IN WHICH THOSE FORCES HAVE NOT THEMSELVES COME UNDER DIRECT ATTACK. THE CLEAREST EXAMPLE IS SEEN IN THE APRIL 14 OPERATION, IN WHICH U.S. FORCES UNDERTOOK MILITARY ACTION AGAINST FIVE TERRORIST-RELATED TARGETS IN LIBYA IN ORDER TO PRE-EMPT AND DETER LIBYA'S UNLAWFUL EXERCISE OF TERRORIST FORCE AGAINST THE UNITED STATES AND ITS NATIONALS. DOES THE WAR POWERS RESOLUTION APPLY TO A CASE OF THIS KIND?

THE USE OF U.S. FORCES TO CONDUCT A MILITARY STRIKE AGAINST THE FACILITIES OF A HOSTILE, SOVEREIGN STATE IN ITS OWN TERRITORY WOULD APPEAR TO FALL WITHIN THE SPECIFIC TERMS OF THE CONSULTATION REQUIREMENT OF SECTION 3 OF THE RESOLUTION. IN THIS CONTEXT, HOWEVER, THE CRITICAL ELEMENT IS FLEXIBILITY. AS INDICATED EARLIER, SECTION 3 EXPRESSLY ENVISIONS THE POSSIBILITY THAT IN SOME INSTANCES THE PRESIDENT MIGHT HAVE TO ACT WITHOUT ANY CONSULTATIONS AT ALL. IN ANY EVENT, HE MUST SEEK TO FULFILL THE CONSULTATION REQUIREMENT IN A MANNER APPROPRIATE TO THE CIRCUMSTANCES, AND THE NEED FOR SWIFTESS AND SECRECY IN CARRYING OUT A MILITARY OPERATION IS A VITAL FACTOR TO BE WEIGHED IN DETERMINING THE NATURE AND TIMING OF CONSULTATIONS THAT MAY BE APPROPRIATE IN A GIVEN SITUATION.

IN THE CASE OF THE APRIL 14 OPERATION, EXTENSIVE CONSULTATIONS OCCURRED WITH CONGRESSIONAL LEADERS. THEY WERE ADVISED OF THE PRESIDENT'S INTENTION AFTER THE OPERATIONAL DEPLOYMENTS HAD COMMENCED, BUT STILL SEVERAL HOURS BEFORE MILITARY ACTION OCCURRED. CONGRESSIONAL LEADERS HAD AMPLE OPPORTUNITY TO CONVEY THEIR VIEWS TO THE PRESIDENT BEFORE ANY IRREVOCABLE ACTIONS WERE TAKEN (IN FACT, NO ONE WHO WAS CONSULTED OBJECTED). THE PRESIDENT TOOK A LARGE RISK IN CONDUCTING THESE CONSULTATIONS. AT LEAST ONE CONGRESSIONAL

LEADER TOLD THE PRESS THAT THE PRESIDENT WAS TO MAKE AN ADDRESS ON THE EVENING OF APRIL 14, AND THIS LED TO RUMORS OF IMMINENT MILITARY ACTION THAT COULD HAVE JEOPARDIZED THE SUCCESS OF THE OPERATION.

THE CONSULTATIONS IN THIS CASE WERE CONSISTENT WITH THE PROVISIONS OF THE WAR POWERS RESOLUTION. THEY WERE ALSO CONSISTENT WITH AND IN MANY RESPECTS EXCEEDED THE CONSULTATIONS CONDUCTED ON PREVIOUS OCCASIONS. FOR EXAMPLE, PRESIDENT FORD'S MEETING WITH CONGRESSIONAL LEADERS TO DISCUSS THE MAYAGUEZ OPERATION OCCURRED AT A POINT IN TIME MUCH CLOSER TO THE ONSET OF MILITARY ACTION THAN WAS THE CASE HERE; AND WHILE THE COMPTROLLER GENERAL WAS CRITICAL OF THOSE CONSULTATIONS, HE ULTIMATELY FOUND THAT HE COULD NOT SAY THAT, IN THE SITUATION SURROUNDING THE RESCUE OF THE MAYAGUEZ, THE PRESIDENT HAD FAILED TO COMPLY WITH SECTION 3 OF THE WAR POWERS RESOLUTION. PRESIDENT CARTER, AS I NOTED EARLIER, DID NOT CONSULT AT ALL WITH RESPECT TO THE TEHRAN RESCUE MISSION.

IF MILITARY ACTION IN CIRCUMSTANCES SUCH AS THOSE DESCRIBED WOULD CONSTITUTE THE INTRODUCTION OF U.S. FORCES INTO ACTUAL OR IMMINENT HOSTILITIES FOR THE PURPOSE OF THE CONSULTATION REQUIREMENT OF SECTION 3 OF THE RESOLUTION, SUCH ACTION WOULD ALSO TRIGGER THE REPORTING REQUIREMENT OF

SECTION 4. IN THE CASE OF THE APRIL 14 OPERATION, IT SHOULD BE NOTED IN THIS RESPECT, THE PRESIDENT SUBMITTED A FULL REPORT CONSISTENT WITH THE WAR POWERS RESOLUTION. AS THE PRESIDENT NOTED IN HIS REPORT, THE ACTIONS TAKEN WERE PURSUANT TO HIS AUTHORITY UNDER THE CONSTITUTION, INCLUDING HIS AUTHORITY AS COMMANDER IN CHIEF. THAT AUTHORITY IS MOST COMPELLING IN A SITUATION SUCH AS THIS, WHERE THE USE OF FORCE IS ESSENTIAL TO DETER AN IMMEDIATE AND SUBSTANTIAL THREAT TO THE LIVES OF AMERICANS ABROAD.

CONCLUSION

IT SEEMS FAIR TO SAY, IN CONCLUSION, THAT IT IS NOT CLEAR HOW THE WAR POWERS RESOLUTION, WHICH WAS ORIGINALLY DESIGNED TO PROVIDE AN APPROPRIATE ROLE FOR THE CONGRESS WITH RESPECT TO U.S. INVOLVEMENT IN HOSTILITIES WITH OTHER STATES, SHOULD APPLY TO THE USE OF U.S. FORCES IN OTHER KINDS OF SITUATIONS IN RECENT YEARS. SOME SUCH SITUATIONS -- THE DEPLOYMENT OF ANTI-TERRORIST UNITS -- WOULD SEEM TO FALL COMPLETELY OUTSIDE THE SCOPE OF THE RESOLUTION. OTHER SITUATIONS -- THE CONDUCT OF PEACEFUL, LAWFUL EXERCISES WHICH RESULT IN A HOSTILE RESPONSE -- PRESENT A HYBRID SITUATION IN WHICH THE RESOLUTION DOES NOT REQUIRE CONSULTATIONS BUT, SOME MIGHT ARGUE, DOES REQUIRE A REPORT. STILL OTHER CASES -- THE

USE OF U.S. FORCES IN A LEGITIMATE PREEMPTIVE STRIKE -- CAN MORE CLEARLY BE SAID TO TRIGGER BOTH THE CONSULTATION AND THE REPORTING REQUIREMENTS, BUT WITH FULFILLMENT OF THE FORMER NECESSARILY VARYING TO A LARGE DEGREE WITH THE PARTICULAR CIRCUMSTANCES.

A CONSIDERATION OF THE APPLICATION OF THE WAR POWERS RESOLUTION TO SITUATIONS SUCH AS THESE DOES MORE THAN RAISE DIFFICULT AND INEVITABLY CONTROVERSIAL ISSUES OF INTERPRETATION. ON A BROADER LEVEL, IT ALSO HIGHLIGHTS SOME OF THE SIGNIFICANT NEGATIVE ASPECTS OF THE WAR POWERS RESOLUTION, WHOSE EFFECTS ON THE CONGRESS ARE PERHAPS EVEN GREATER THAN ON THE EXECUTIVE. WHEN IT IS ALLEGED THAT A PRESIDENT HAS FAILED TO COMPLY WITH THE RESOLUTION IN ANY MATERIAL RESPECT, THE CONGRESS FEELS OBLIGED TO TAKE UPON ITSELF THE TASK OF CREATING A RECORD OF COMPLIANCE -- AN UNSEEMLY EXERCISE THAT DEMEANS THE GREAT POWERS THAT CONGRESS IN REALITY POSSESSES. MOREOVER, THE CONGRESS'S PERCEIVED NEED TO DEFEND THE RESOLUTION'S VIABILITY, EVEN IN SITUATIONS WELL BEYOND THE CONTEMPLATION OF ITS DRAFTERS, CAUSES IT TO SHIFT ITS CONCERN, DELIBERATIONS AND POLITICAL LEVERAGE AWAY FROM EVALUATING THE MERITS OF MILITARY ACTIONS TO TESTING THEIR LEGALITY, AND TO FOCUS ON FORMAL AND INSTITUTIONAL ISSUES RATHER THAN THE SUBSTANCE OF OUR POLICY. OUR HISTORY AMPLY DEMONSTRATES THAT CONGRESS HAS ADEQUATE MEANS TO

-20-

PROVIDE AN EFFECTIVE CHECK ON PRESIDENTIAL POWER TO EMPLOY
MILITARY FORCE. BUT THE WAR POWERS RESOLUTION TRIVIALIZES
THE ROLE OF CONGRESS -- AND IN THAT PROCESS WE ARE ALL THE
LOSERS.

THANK YOU.

Q. Do you support the recent proposal by Senators Dole and Denton which would authorize the President to use force in counter-terrorist operations and essentially exempt them from War Powers requirements?

A. We agree very much with what we understand to be the purpose of this proposal, which is to make clear that the President does have authority to use force against terrorists who attack or threaten to attack Americans, and that the President is not required to engage in prior consultation where it is not possible to do so consistent with the overriding need to protect innocent lives and the safety of our armed forces. We believe these propositions are already clear from a proper reading of the Constitution and the War Powers Resolution, and we have therefore not thought that a statutory provision along the lines proposed by Senator Dole is necessary. However, we appreciate his intentions in making this proposal.

Q. Why do you say that the President has no obligation to consult with Congress before using force against terrorists abroad? Isn't that precisely what Section 3 of the War Powers Resolution says?

A. No. In the first place, as I have explained, we do not agree that actions against terrorist individuals or groups are covered by the War Powers Resolution. Such actions are much more like law enforcement actions than the "hostilities" which Congress had in mind when it adopted the Resolution.

There would, of course, be a different situation if U.S. Armed Forces were introduced into actual or imminent hostilities with the forces of a foreign government during the course of a counter-terrorist operation. But even in such a case, Section 3 only requires that consultation occur "in every possible instance", and in our view this would include cases where consultation is, in the President's judgment, precluded by some imperative need to maintain absolute security to ensure the success of the mission and protect innocent lives. President Carter made this decision in the case of the Tehran rescue attempt, and although no President would do so lightly or routinely, I believe any President of any political persuasion would come to the same decision under similar compelling circumstances.

Drafted:L:MJMatheson:edk
4/23/86, 647-8460, Wang 2041L

Q. The President sent two written reports to Congress concerning the recent encounters between U.S. and Libya. Were these reports under the War Powers Resolution? Were they reports of involvement in hostilities under Section 4(a)(1) or of introduction of combat-equipped forces under Section 4(a)(2)?

A. As you know, the Executive Branch -- under both Republican and Democratic Presidents -- has doubted the constitutionality of several aspects of the War Powers Resolution, and has therefore never been prepared to admit that its reports to Congress were required by the Resolution or submitted under it. Instead, Presidents have stated in their reports that they were acting consistent with the Resolution, or bearing it in mind, or simply omitted any reference to the Resolution. Recent Presidents have also declined to cite a particular subsection of the Resolution as being the relevant one.

With that background, I hope you will understand if I decline to take a step on my own that Presidents have not wanted to take. The two recent reports were provided in the interests of keeping the Congress informed on matters of legitimate concern to it. I think no other explanation of justification for their submission is really necessary.

Q. But how can Congress discharge its responsibilities under the Resolution if the President will not tell us whether or not Section 4(a)(1) applies, or whether U.S. forces have been introduced into hostilities?

A. The President is not obliged under the Resolution to tell the Congress that U.S. forces have been introduced into hostilities, nor to cite Section 4(a)(1), and in fact both Democratic and Republican Presidents have declined to do so. All the Resolution requires is that the President report on the facts of the situation and the basis for the actions he has taken. With that information, the Congress is of course free to draw its own conclusions and to proceed as it thinks appropriate.

There are good reasons not to get into this process of labelling each situation as hostilities or otherwise at the time a report is made. The facts of a situation or its likely outcome may be very unclear at the time of the report. There will typically not have been enough time to understand and resolve all the legal and foreign policy implications of a formal pronouncement that we have become involved in hostilities. Most important, a pronouncement to this effect will typically have the result of focusing attention on the worst features of the Resolution -- those which purport to force Congress to decide within an arbitrary and limited period of time whether to authorize the President to enter hostilities or to compel him to withdraw from the situation. It is not in the interest of either the Congress or the President or, most important, the United States to put ourselves into that Constitutional straight-jacket.

Q. Can you elaborate on the Administration's view as to whether the War Powers Resolution applied to the U.S. operations in the Gulf of Sidra?

A. First, we do not agree that consultation with Congress was required prior to the commencement of the operation. As the Administration's reply to Chairman Fascell (by William Ball, Assistant to the President for Legislative Affairs) made clear, we do not believe that the Resolution was intended to require consultation before conducting peaceful naval maneuvers in international waters or airspace. We considered this question carefully before the operations began, and concluded that the operations did not place U.S. forces into a situation in which imminent involvement in hostilities was clearly indicated by the circumstances. We had conducted a series of operations in this area previously, mostly without hostile response, and we had every right to assume that Libya would not take hostile actions against us while we were lawfully in and over areas of the high seas. Therefore, while we were certainly prepared to deal with Libyan hostile action, and fully aware of the possible risks, it was not a situation, as described in Section 3 of the War Powers Resolution, where hostilities were clearly indicated.

Second, as soon as hostile Libyan actions occurred, we began notifying Congressional leaders as to what was taking

place, and kept them informed throughout the remainder of the exercise. Specifically, numerous calls were made to Congressional leaders to inform them of the events and to invite further briefings; extensive briefings were conducted for the benefit of all interested members, at which experts from State and Defense provided all pertinent information and responded to all questions asked by members of Congress; and on March 26 the President sent a written report to Congress describing the events of March 24 and 25, the actions taken by U.S. armed forces, and the legal basis for those actions. In short, we recognize that we have a responsibility to keep Congress fully and currently informed on such matters, and took every step we could to fulfill that responsibility.

Third, it is an interesting theoretical question as to whether the events of March 24 and 25 constituted an introduction of U.S. armed forces into a situation of actual or imminent hostilities for the purpose of the reporting requirements in Section 4 of the Resolution, and opinions of War Powers experts may well differ. It has never been clear whether the Resolution applies to actions taken in immediate self-defense by U.S. forces engaged in peaceful operations. For example, no War Powers report was filed in the case of the 1981 Sidra incident in which two Libyan aircraft were shot down after the Libyan fighters fired at our aircraft.

Similarly, many incidents occurred during the period in which U.S. peacekeeping forces were deployed in the Beirut area in 1983, where hostile forces attacked and our peacekeeping forces responded in immediate self-defense, yet no separate War Powers reports were filed for these many separate incidents. In the case of our operations on March 24 and 25, U.S. forces only launched weapons in immediate response to hostile actions by Libyan missile installations or patrol boats. These specific, limited engagements did not get out of our control, and did not jeopardize our forces in light of the control we were able to exercise. It is far from clear that such actions in self-defense constitute an introduction of U.S. forces into hostilities.

Finally, the question of the applicability of the War Powers Resolution is only academic with respect to our recent operations. The fact is that we provided Congress with far more information than it could have expected to receive under the reporting provisions of the Resolution, including a full written report. (The provisions of the Resolution relating to Congressional approval for involvement in hostilities for periods greater than 60 days are irrelevant here, since the U.S. exercise has already been completed.) In other words, there is really nothing of practical consequence to argue about at this point. We have involved Congress fully in this case as

NATIONAL SECURITY COUNCIL
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ACTION OFFICER: NORTH DUE: April 26, 1986

- Prepare Memo For President
- Prepare Memo For Poindexter / Fortier
- Prepare Memo MCDANIEL to PLATT
- Prepare Memo McDaniel to Chew
- Prepare Memo McDaniel to Elliott

CONCURRENCES/COMMENTS* PHONE* to action officer at ext. 3345

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- INFORMATION McDaniel Pearson Secretariat
 Rodman Lehman _____
 Poindexter (advance) Fortier (advance)

COMMENTS

IF ASKED

14 May 1986

PRESS GUIDANCE ON SYRIA

-- The Syrians have been approached publicly and privately for information about and assistance in returning our hostages in Lebanon.

-- We have yet to see any results of these overtures, which have been ongoing for more than a year.

-- We have no reason to doubt the ^{reports we have seen of on the} ~~information provided by the~~ British and German ^{investigations} ~~authorities~~ of Syrian involvement in the attempt to bomb an El Al airliner in London and a terrorist bombing in Berlin.

-- We ^{do not intend to comment} ~~intend to provide no~~ further details on this ^{London} ~~information~~ ^{Berlin and London} ~~incident~~ because of the ongoing legal process in both Britain and Germany.

Craig

NEP

NEA PRESS GUIDANCE

THURSDAY, MAY 15, 1986

SYRIA: ASSASSINATION OF HOSTAGES

Q: A spokesman for the Islamic Jihad reportedly has announced that they have executed an unidentified number of hostages following reports that Syria, at Washington's behest, has launched intensive efforts to free the hostages. What further information do you have?

A: -- I HAVE NO OTHER INFORMATION THAN THE PRESS REPORTS.

--WE TAKE THE OCCASION, HOWEVER, TO ONCE AGAIN CONDEMN THE CRIMINAL ACTIONS OF THE INDIVIDUALS AND ORGANIZATIONS WHO HAVE PLANNED AND PARTICIPATED IN THE KIDNAPPING OF HOSTAGES IN LEBANON. WE CALL FOR THE IMMEDIATE AND UNCONDITIONAL RELEASE OF THESE INNOCENT VICTIMS.

--THE CONTINUED CAPTIVITY OF THESE INNOCENT PEOPLE IS CONTRARY TO ALL CIVILIZED NORMS AND FLIES IN THE FACE OF THE RELIGIOUS TENETS THEIR CAPTORS PURPORT TO PROFESS.

Q: Are we, in fact, putting pressure on Syria to help?

--SECRETARY SHULTZ SPOKE TO THIS QUESTION YESTERDAY.

--WE WELCOME EFFORTS BY ANY RESPONSIBLE PARTY TO HELP OBTAIN THE RELEASE OF THE AMERICAN AND ALL OTHER HOSTAGES IN LEBANON.

THE SYRIANS HAVE BEEN APPROACHED PUBLICLY AND PRIVATELY FOR INFORMATION ABOUT AND ASSISTANCE IN RETURNING OUR HOSTAGES IN LEBANON.

WE CONTINUE OUR OVERTURES TO THEM, WHICH HAVE BEEN ONGOING FOR MORE THAN A YEAR.

WE HAVE RECEIVED REPORTS OF THE INVESTIGATION FROM THE UK AND THE FRG ON THE SYRIAN ROLE IN THE LONDON AND BERLIN CASES. WE ARE CONFIDENT THEY WILL GET TO THE BOTTOM OF IT. WE ARE NOT YET IN A POSITION TO DRAW ANY DEFINITIVE CONCLUSIONS.

(IF PRESSED) WE DO NOT INTEND TO COMMENT FURTHER ON THE BERLIN AND LONDON INCIDENTS BECAUSE OF THE ONGOING LEGAL PROCESS IN BOTH BRITAIN AND GERMANY.

(IF PRESSED)-- THE STATEMENTS SPEAK FOR THEMSELVES.

Drafted:NEA/P:KHeffron
5/15/86 x5478 (0031L - p.10)

Cleared:NEA/P:DCofman
NEA/ARN:AGlaspie
NEA:RSuddarth
S/CT:DLong
CA/OCS:JAdams

2

Ben Elliot

STATEMENT ON US-UK SUPPLEMENTARY EXTRADITION TREATY

Last June representatives of the United States and the United Kingdom signed a supplementary extradition treaty designed to make clear that persons accused of crimes of violence in one of our two countries could not escape justice by fleeing to the other country and claiming some political motivation for their offense. Too often in the past, terrorists who had kidnapped, killed and maimed in Britain had fled to the United States and been protected by our courts on the ground that their offenses were "political".

Recent events have underlined more clearly than ever the need for the civilized international community to stand together in the fight against terrorism. Ensuring that terrorists will be brought to justice is a key weapon in that fight. Our joint declaration on terrorism at the Tokyo summit emphasized that there can be no justification whatsoever for terrorist acts, and recognized the need for "improved extradition procedures . . . for bringing to trial those who have perpetrated acts of terrorism."

- 2 - This is the first attempt to amend an extradition protocol; it will be followed by negotiations with other nations with whom we have extradition treaties

Unfortunately, the United States Senate has refused -- for nearly a year now -- to approve our supplementary extradition treaty with the United Kingdom. ^{TP} Our friends around the world see this as a test of whether the United States operates under a double standard, demanding the surrender of terrorists in other countries who claim they acted for political reasons, but granting safe-haven to terrorists who flee to the United States and offer the same excuse. The Senate's refusal to approve this treaty undermines our ability to get other countries to extradite terrorists we are trying to apprehend -- like Abu Abbas, admitted mastermind of the Achille Lauro hijacking, who recently threatened publicly to perpetrate further acts of terrorism against Americans.

Some of the ~~Democratic~~ members of the Senate Foreign Relations Committee have prepared a "substitute" treaty. Their version would allow terrorists who murder policemen or soldiers -- the very people who protect the rest of us from terrorism -- to avoid extradition on the ground that their heinous actions were "political" in nature. At the same time, this substitute treaty would create wide loopholes through which even terrorists who attack civilians could escape justice. This proposal would not in any way contribute to our battle against international terrorism. It is simply unacceptable.

I find it especially shameful that the Senate is unwilling to help the people of the United Kingdom, including northern Ireland, fight their terrorist threat at the same time that we ask -- and receive -- invaluable British assistance in responding to terrorist threats from Libya and elsewhere.

Our Supplementary Extradition Treaty with the United Kingdom is not a radical new departure or a threat to civil liberties. Its concept is based on that of the European Convention for the Suppression of Terrorism, concluded ten years ago, and since ratified by many European countries -- including states like Denmark, Sweden, Switzerland, and the Netherlands which have ~~X~~ strong and demonstrated commitments to human rights.

prompt
1 Senate approval of the treaty would be a significant step in fighting terrorism under the rule of law. We can no longer shirk our responsibility to put our own house in order in the international campaign against terrorism. We

~~CONFIDENTIAL~~



U.S. Department of Justice
Federal Bureau of Investigation

Washington, D.C. 20535
May 16, 1986

MEMORANDUM TO: Colonel Oliver North
National Security Council

Ambassador Robert B. Oakley
State Department

[REDACTED]

Department of Defense

[REDACTED]

Office of Chairman, Joint Chiefs of Staff

[REDACTED]
324
324

This is to advise that I will be out of Washington for the period May 17-22, 1986. During that time Deputy Assistant Director Anthony Daniels, 324-[REDACTED] (home [REDACTED]) will be my primary alternate and Special Agent [REDACTED] Assistant Section Chief, Terrorism Section, 324-[REDACTED] (home [REDACTED]), will be the secondary alternate.

During the period May 25, 1986 through June 15, 1986, I will be in Europe. During this period of time, Assistant Director Floyd Clarke, 324-[REDACTED] (home [REDACTED]), will be my primary alternate and Inspector [REDACTED] 324-[REDACTED] (home [REDACTED]) will be the secondary alternate. Inspector [REDACTED] is Chief of the Terrorism Section. During my trip to Europe, I will be [REDACTED]. I could be reached during this period through my secretary [REDACTED] 324-[REDACTED] FBI Headquarters switchboard and the appropriate FBI Legal Attache.

OR

Oliver B. Revell
Executive Assistant Director
Investigations

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WITHDRAWAL SHEET AT THE FRONT OF THIS FOLDER.

THE MULTI-NATIONAL COUNTER-TERRORIST STRIKE FORCE:
AN IDEA WHOSE TIME HASN'T COME

The idea for a multi-national strike force to combat terrorism has been percolating around Europe and in the U.S. for several years now. The concept has immediate appeal to internationalists, especially to arm-chair counter-terrorist (CT) experts frustrated by recent European and African denials of entry to U.S. CT forces. The U.S. attempt to get its CT forces to Malta to assist with the Egyptair hijacking is a case in point. If the CT force were itself international, so the argument goes, there wouldn't be any host-country refusals to allow the CT force into the country to get at the terrorists, because the host countries would be coopted by virtue of their own membership in the multi-national strike force.

The Vice President's Task Force on Combatting Terrorism considered the proposal in some detail because of its strong advocacy by certain individuals. Nonetheless, the concept falls apart very quickly once the operational difficulties of forming, training, and employing a multi-national strike force are considered.

Counter-terrorist forces by the very nature of their tasks require an exceptionally high degree of training, internal cooperation, and must use very sensitive intelligence. "Taking down" a hijacked aircraft, in which hostage lives depend on proper actions being taken in mere seconds, is not the sort of military operation that can be executed by a hastily thrown together, ad hoc force. (Again, the Egyptair take down by the Egyptian 777 commando unit is a case in point.) No matter how well trained the individual members or components of such a force, success in high-risk CT operations also depends on the ability of the CT unit to perform well as an integrated team.

The real-world problems of such a multi-national CT strike force are formidable: language barriers, different equipment, different tactics and techniques, different levels of training and skills, incompatible logistics systems, security clearances, command and control, varying legal authorities for commitment of forces, etc. Additionally, such sticky questions as "Who's in charge?" and "Who gets blamed in the event of a failure?" arise.

Even beyond these operational obstacles, which might be offset in part by innovative organization, training, and leadership, there remains the fundamental flaw of the entire concept: the supposed political advantage of such a force -- coopted participation by all members -- could just as readily be turned on its head. Each member country, jealously protecting its sovereignty, might well insist on specific approval of each mission. Thus, the bottomline could well be that a multi-national CT strike force would be hamstrung by the de facto veto right of each member country on any deployment/employment decision.

Much more promising, both operationally and politically, are bilateral efforts to increase CT cooperation between particularly close allies, such as the British. While discussion of a multi-national CT strike force at the Summit is useful in extending the dialogue on terrorism, it should not be seen as a panacea for the problem of international terrorism.

ANNEX VI

Summary of Hostages Still in Captivity in Lebanon

<u>Name</u>	<u>Date/Place Kidnapped</u>	<u>Claimant Group</u>
Fr. Lawrence Jenco U.S. Priest	8 Jan 85 West Beirut	Claimed by Islamic Jihad
Terry Anderson U.S. Journalist	16 Mar 85 West Beirut	Claimed by Islamic Jihad
Marcel Fontaine French Diplomat	22 Mar 85 West Beirut	Claimed by Islamic Jihad
Marcel Carton French Diplomat	22 Mar 85 West Beirut	Claimed by Islamic Jihad
*Alec Collett UK Journalist	26 Mar 85 Khaldah	Claimed by ROSM
Jean Paul Kaufmann French Journalist	22 May 85 West Beirut	Claimed by Islamic Jihad
Michel Seurat French Researcher	22 May 85 West Beirut	Claimed by Islamic Jihad
David Jacobsen Director of AUB	28 May 85 West Beirut	Claimed by Islamic Jihad
Thomas Sutherland Dean, AUB	10 Jun 85 West Beirut	Claimed by Islamic Jihad
Alberto Molinari Italian Businessman	11 Sep 85 West Beirut	Possibly "Radical Muslim Group" w/ties to Syria
Chae Sung Do Korean Diplomat	31 Jan 86 West Beirut	Fighting Revolutionary Cells
Philippe Rochot French TV Journalist	8 Mar 86 West Beirut	Claimed by Islamic Jihad
Georges Hansen French TV Journalist	8 Mar 86 West Beirut	Claimed by Islamic Jihad

*Possibly executed in April, 1986. Body not found.

Aurel Cornea French TV Journalist	8 Mar 86 West Beirut	Claimed by Islamic Jihad
Jean-Louis Normandin French TV Journalist	8 Mar 86 West Beirut	Claimed by Islamic Jihad
Brian Keenan Irish - AUB Teacher of English	11 Apr 86 Beirut	Claimed by Islamic Jihad
John McCarthy British TV Journalist Acting Bureau Chief, World News	17 Apr 86 West Beirut	Conflicting Claims
Camille Sontag French -AUB Teacher	7 May 86 West Beirut	Unclaimed

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Craig Coy
FYI

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

October 3, 1986

MEMORANDUM FOR MEMBERS OF THE NSC STAFF

FROM: RICK SAUNDERS ^{RUS}

SUBJECT: An Introduction to Security Assistance

I have drawn together a brief description of the security assistance program and provide it for your information.

Security assistance is an extremely arcane field, complicated by complex procedures and extensive jargon. The attached guide just scratches the surface. Nevertheless, I hope that it will be a useful source of information.

Please let me know if you have any questions on security assistance matters. I will do my best to help.

Attachments

- Security Assistance Programs
- Key Players
- Governing Legislation
- Special Provisions, Authorizations, and Requirements
- Security Assistance References
- Statistical Overview

SECURITY ASSISTANCE PROGRAMS

Security assistance is a sub-element of the overall foreign aid program. It includes both military and economic aid. Its legal authorities are contained in the Foreign Assistance Act of 1961 (FAA) and the Arms Export Control Act (AECA). Security assistance contains six components: Foreign Military Sales (FMS) credit, Guaranteed Reserve Fund (GRF), Military Assistance Program (MAP), International Military Education and Training (IMET), Peacekeeping Operations (PKO), and the Economic Support Fund (ESF).

TYPES OF SECURITY ASSISTANCE PROGRAMS

Foreign Military Sales (FMS) Credit: Under authorities contained in Sections 22-24 of the AECA, the President may sell defense articles, services, and training to foreign governments and organizations in furtherance of U.S. foreign policy interests. These sales may be financed by (1) cash from the purchasing country, (2) direct FMS credit, (3) FMS guaranteed loans, or (4) MAP funds (see below). Most FMS credit (FMSCR) is offered at rates equal to the current cost of money to the U.S. Treasury. Some loans are at a concessional interest rate (but still no less than 5%) up to a limit set by Congress. The repayment of the principal and interest of FMS direct loans to Egypt and Israel is forgiven (in effect grants). All aspects of FMS credit activity are on budget (budget authority, outlays, and receipts). Items sold under FMS are priced to cover the U.S. Government's full costs plus a 3% surcharge to run the program.

Military Assistance Program (MAP): This is a grant program providing financing to foreign nations for purchase of defense articles, services, and training. Initially, the MAP program provided equipment; now it provides financing. Originally, most U.S. military aid was on a grant basis. In the late 70s, emphasis shifted almost entirely to FMS credit, but grant aid is now regaining importance because of the serious economic problems facing a number of poor Third World nations.

International Military Education and Training (IMET): The smallest security assistance program (but the one reaching the largest number of recipients), IMET pays for training of foreign military personnel both in the U.S. and overseas. IMET is a grant program. It is intended both to expose foreign military personnel to U.S. democratic and humanitarian values and to increase the military skills and professionalism of recipients. (Training can also be purchased through FMS.)

Economic Support Fund (ESF): ESF consists of grants or loans at concessional interest rates to provide balance of payments assistance, project aid, commodity import assistance, or other contributions to a nation's economic infrastructure. Administered by AID, ESF contributes to international security efforts by improving friendly nation's economic health and allowing them to allocate more of their own resources to defense.

Peacekeeping Operations (PKO): That portion of security assistance devoted to programs such as the Multinational Force and Observers (MFO), and the U.S. contribution to the United Nations Forces in Cyprus.

Commercial Sales: Some countries purchase U.S. military equipment and services directly from U.S. companies. Before selling items on the State Department's Munitions Control List, a company must obtain an export license from State. Some commercial sales are financed with FMS credit or MAP, but these are transactions closely scrutinized for compliance with arms export policies.

SECURITY ASSISTANCE: KEY PLAYERS

DEPARTMENT OF STATE: Executive Orders 11958 and 12163 provide the principal responsibility for supervision and general direction of security assistance programs to the Secretary of State. Offices and agencies with security assistance functions within State include:

Under Secretary for Security Assistance, Science, and Technology (State/T): Principal adviser and focal point for foreign assistance matters within State. Integrates the security assistance and economic assistance budget proposals into State's foreign assistance budget request. Manages the allocation and reallocation of foreign assistance funds and advises the Secretary on arms transfer matters.

Bureau of Politico-Military Affairs (State/PM): In conjunction with "T," assists the Secretary in supervising military assistance and sales programs (FMS, MAP, and IMET). PM's Office of Security Assistance and Sales (PM-SAS) prepares the security assistance budget request and manages day-to-day security assistance matters for the Department. PM's Office of Munitions Control is responsible for licensing commercial sales of arms and military equipment.

AGENCY FOR INTERNATIONAL DEVELOPMENT (AID): AID plans and manages ESF, as well as development assistance, food aid, and humanitarian relief. AID prepares the ESF budget.

ARMS CONTROL AND DISARMAMENT AGENCY (ACDA): Participates in the security assistance review process. ACDA evaluates the regional impact of arms transfers and publishes an annual report on world military spending and arms transfers.

DEPARTMENT OF THE TREASURY: Participates in the interagency review of the security assistance program with a particular focus on the terms and provisions of credit policy and debt.

DEPARTMENT OF DEFENSE: The Department of Defense has primary responsibility for evaluating the requirements for military aid and managing the military aid program. DoD also plans long-term regional military requirements and integrates security assistance plans into coalition strategy. Offices within Defense that carry out these responsibilities include:

Assistant Secretary of Defense (International Security Affairs): Supervises security assistance programs for countries other than NATO. OASD/ISA (Security Assistance) develops Defense Department security assistance policies and programs.

Assistant Secretary of Defense (International Security Policy): Supervises security assistance programs for NATO and other European programs.

Defense Security Assistance Agency (DSAA): Manages DoD's security assistance programs. Conducts international logistics and sales negotiations with other countries. Serves as DoD focal point for liaison with U.S. industry on security assistance activities. Manages the FMS credit financing program. Develops and promulgates security assistance procedures. DSAA is the principal "operator" of military assistance.

Security Assistance Organizations (SAO's): All DoD elements located in a foreign country to support security assistance. The SAO manages logistics, finances, and contracts at the country level. The chief of the SAO is responsible to the ambassador, the commander of the appropriate unified command, and the director of DSAA. Legislation limits SAO's to six personnel, unless special approval is obtained.

Services: Provide support for the security assistance program to include personnel, training, equipment, and information on pricing and scheduling of security assistance goods and services.

CONGRESS: See attached list of key committees and chairmen.

FOREIGN AID -- CONGRESSIONAL COMMITTEES

Authorization

Appropriation

Senate

Committee on Foreign Relations -- foreign economic, military, technical and humanitarian assistance. Multilateral banks.

- Lugar, Chairman
- Pell, Minority

Committee on Banking, Housing and Urban Affairs

- Eximbank, export promotion.
- Garn, Chairman
- Proxmire, Minority

Committee on Agriculture, Nutrition and Forestry - Food Aid, CCC export promotion programs.

- Helms, Chairman
- Zorinsky, Minority

House

Committee on Foreign Affairs - foreign bilateral aid (not MDB's).

- Fascell, Chairman
- Broomfield, Minority

Committee on Banking, Finance, and Urban Affairs

- multilateral banks, Eximbank.
- St. Germain, Chairman
- Wylie, Minority

Committee on Agriculture -- food aid (with HFAC); CCC programs.

- de la Garza, Chairman
- Madigan, Minority

Subcommittee on Foreign Operations

- Kasten, Chairman
- Inouye, Minority

Subcommittee on Foreign Operations.

- Obey, Chairman
- Kemp, Minority

GOVERNING LEGISLATION

The Arms Export Control Act (AECA). (P.L. 90-629, as amended, 22 U.S.C. 2751) establishes U.S. arms export policy; provides the President authority to export arms and to control the export of arms; and places certain conditions, restrictions, and required procedures on arms exports. (See next section)

The Foreign Assistance Act of 1961 (FAA). (P.L. 87-195, as amended, 22 U.S.C. 2151) establishes policy for U.S. military assistance and authorizes the President to provide defense articles and services and military education and training to foreign countries on a grant basis. It also includes several provisions that grant the President special authority or restrict his authority to export arms in certain circumstances. (See next section)

Foreign Assistance Authorization Acts, when passed, provide appropriation authorization for international security and economic assistance programs. These acts set program levels, provide policy guidance, and amend the AECA and the FAA.

Foreign Assistance Appropriations Acts, when passed, appropriate funds for security and economic assistance programs, including credits for arms sales.

THE EXECUTIVE AND CONGRESS:
SPECIAL PROVISIONS, AUTHORITIES, AND REQUIREMENTS

Earmarking: Congress, in either the authorization or appropriation process, may " earmark " funds for certain countries or purposes. Traditionally, the largest earmarks have been for Israel and Egypt, although funds have also been reserved for Greece, Turkey, the Philippines, Ireland, and Pakistan. In other cases, Congress places an upper limit on the size of security assistance programs in certain countries.

Special Emergency Drawdown Authority (Section 506, FAA): The President can direct the drawdown of defense articles, training, and services to an aggregate value of up to \$75 million in any fiscal year if he determines that an unforeseen emergency creates a security assistance requirement that cannot be met under the normal provisions of the AECA. Congress must be notified before materials can be drawn from existing U.S. military stocks. The law directs that the Services be reimbursed from future foreign assistance budgets. However, \$110 million of 506 transfers have not been reimbursed.

Special Presidential Waiver Authority: According to Section 614(a) of the FAA, the President may authorize the furnishing of up to \$250 million of assistance and up to \$750 million of military sales without regard to other laws when he determines and reports to Congress that such action is vital to U.S. interests. (He can break earmarks.) Congress must be consulted before the President makes his final determination.

Advanced Congressional Review of Proposed Sales or Transfers: A complex system of Congressional notifications exists to support Congress' desires to review and monitor arms sales. DSAA, with the concurrence of State and NSC, must notify Congress prior to finalizing agreements for the sale or transfer of defense articles or services valued at \$50 million or more, design or construction valued at \$200 million or more, or major defense equipment (defined in the Munitions List) of \$14 million or more. Under Section 36(b), AECA, Congress must be notified at least 30 days in advance of any final agreement. In addition, DSAA has agreed to provide Congress with an additional 20 days advanced notice. Traditionally, only days when Congress is actually in session are counted in meeting the 50-day notification requirement, although no hard and fast rule seems to exist. The statutory notification requirement for NATO, Japan, Australia, and New Zealand is only 15 days with no prior notification requirement. Similar notification requirements exist for direct commercial sales and third country transfer of U.S.-origin arms.

SECURITY ASSISTANCE REFERENCES

Congressional Presentation for Security Assistance Programs (CPD). Prepared annually by State in support of the security assistance budget request. The document gives size, purpose, and rationale for each country program, as well as statements of the general goals of the Administration's security assistance policy. A good policy overview.

Security Assistance Management Manual (SAMM). Published by DSAA, SAMM is the most extensive and detailed source of information on the mechanics of DoD's implementation of the security assistance program. It contains particularly useful tables listing Congressional notification requirements.

The Management of Security Assistance. Published as a textbook by the Defense Institute for Security Assistance Management, it contains a detailed survey of current security assistance programs, as well as extensive discussions of FMS and MAP case management.

Legislation on Foreign Relations Through 1985. Published by GPO for Congress, this is a compilation of all current foreign affairs legislation. It contains fully amended versions of the Foreign Assistance Act, the Arms Export Control Act, and annual foreign affairs authorizations.

RECENT SECURITY ASSISTANCE BUDGET FIGURES

(millions of dollars)

	<u>FY85 Actual</u>	<u>FY86 Post Sequester</u>	<u>FY87 Request</u>
FMS	4,940	4,967	5,661
MAP	805	748	996
IMET	56	52	69
ESF	<u>6,048</u>	<u>3,547</u>	<u>4,094</u>
	11,849	9,314	10,820

Regional Distribution of Security Assistance

(FY86 Post Sequester)

	<u>ESF</u>	<u>IMET</u>	<u>MAP*</u>	<u>FMS</u>	<u>Total</u>
<u>NEA</u>	2,246	9.8	69	3,405	5,730
(Israel)	(1,148)	-	-	(1,723)	(2,871)
(Egypt)	(780)	(1.7)	-	(1,244)	(2,026)
<u>EUR</u>	222	9.3	273	1,266	1,770
<u>AR</u>	659	13.4	218	17	907
<u>AF</u>	289	10.0	97	-	396
<u>EAP</u>	130	9.5	43	279	462

* Note MAP figures do not include \$48 million in general costs.