United States Department of State

The Legal Adviser

Washington, D.C. 20520

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TO: The White House Counsel
Assistant Attorney General Cooper
The General Counsel, Department of Defense
The General Counsel, Central Intelligence Agency

FROM: Abraham D. Sofaer ~~AOS~~

SUBJECT: Validity of Oral Instruction to Initiate Covert Action

This memorandum addresses the following questions in the context of the Iran arms transactions: (1) whether an oral instruction by the President to carry out the transactions in question, if given, would satisfy the requirements of Section 662 of the Foreign Assistance Act (the Hughes-Ryan Amendment) and other statutory provisions for the authorization of covert action programs; and (2) if not, what effect that result would have on the legal validity of actions taken pursuant to such an oral instruction or the individual responsibility of persons taking such actions. (Research will continue as necessary on these questions.)

1. Does an oral finding satisfy the statute?

A. Requirements for initiation of covert action activities. Section 662 of the Foreign Assistance Act (the Hughes-Ryan Amendment) provides as follows:

> 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. Each such operation shall be considered a significant anticipated intelligence activity for the purpose of section 501 of the National Security Act of 1947.

Section 654 of the Act provides in part as follows:

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

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

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

Section 501 of the National Security Act does not require a Presidential finding, but does provide in part as follows:

To the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall ---

(1) keep the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives . . . fully and currently informed of all intelligence activities which are the responsibility of, or are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States, including any significant anticipated intelligence activity, except that (A) the foregoing provision shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity, and (B) if the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States, such notice shall be limited to the chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate . . . .

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

Apart from these statutory provisions, procedures for the initiation of covert actions are spelled out in considerable detail in Executive Branch directives and in the agreement between the DCI and the SSCI. Part 3.1 of E.O. 12333 (Dec. 4, 1981) provides in part that:

> . . . The requirements of section 662 of the Foreign Assistance Act . . . and section 501 of the National Security Act . . . shall apply to all special activities as defined in this Order.

Part 3.4(h) defines "special activities" as:

> . . . activities conducted in support of national foreign policy objectives abroad which are planned and executed so that the role of the United States Government is not apparent or acknowledged publicly, and functions in support of such activities, but which are not intended to influence 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.

Existing NSDDs provide detailed procedures for the initiation of covert action programs, including the approval by the President in writing of findings for all "special activities" (not simply those carried out by the CIA), and the review of proposed findings (including legal review) by certain interagency groups prior to their signature.

Finally, the DCI and SSCI reached agreement in 1984, among other things, that the SSCI would be provided with "the text" of new covert action findings, together with a "scope paper" describing planned activities under the finding, prior to implementation of the planned activity, and that the SSCI would be briefed at the same time on the finding, including a discussion of all important elements of the activity, such as operational and political risks and international or domestic legal aspects.

B. Was a finding required with respect to the Iran arms transactions? As a matter of statutory requirement, a finding would only have been required for these activities if they involved the expenditure of funds by or on behalf of the CIA for operations in foreign countries, other than activities intended solely for obtaining necessary intelligence. Therefore, operations not involving the expenditure of appropriated funds, or conducted by another U.S. entity (such as the NSC), or CIA operations conducted within the United States (such as the payment of funds or the transfer of arms to foreign recipients), would not by themselves have triggered the requirement for a finding as a technical matter. The NSDD and the DCI-SSCI agreement do require a finding in those circumstances, and this fact must be weighed in any decision to dispense with a Presidential finding. These documents are not legally binding, however, and political rather than legal consequences flow from a decision to disregard them. We do not know to what extent the facts of the Iran arms situation fit the above exceptions; therefore the rest of this memo proceeds on the assumption that Section 662 did in fact apply to the actions allegedly directed by the President.

C. Would an oral finding by the President satisfy Section 662? Section 662 does not by its terms require that the finding be in writing. A memo by the Office of Legal Counsel of October 25, 1977 states that "there is no legal requirement as to the form by which the President must make his Finding" but that "as a matter of policy and wise practice we believe Findings should normally be in writing to eliminate ambiguities and uncertainties." The reasoning behind these conclusions is not given, and no mention is made in this context of the other statutes cited above.

Section 654 applies to "any case in which the President is required to make a report to the Congress, or to any committee or officer of the Congress, concerning any finding or determination under any provision" of the Foreign Assistance Act and certain other security assistance statutes. A Presidential finding under Section 662 is, of course, a finding under the Act, but it is unclear that the President is required to "report" all such findings.

In its original form, Section 662 did require a report to the two foreign affairs committees. While there is nothing in the legislative history to indicate whether the finding was intended to take a written form, it does indicate that the President was thought to have discretion as to whether his report would be written or oral, and one of the Senate sponsors expressly acknowledged on the floor that oral reporting might be best in certain circumstances for covert action programs. Specifically, the following exchange occurred between Senators Stennis and Hughes:

> Mr. STENNIS. . . . One other matter: the language now says "appropriate report." As long as it was just as the rest of the amendment provides, the President, he would have a matter of discretion whether he would have a written report or whether it would be an oral report to one of his men.
>
> Mr. HUGHES. I would think that as long as the matter was before the committee, the "appropriate report" would be for the determination of the reporting officer by agreement of the committee, and I would think in matters of intelligence or any other necessary covert activity, that might be the best way under certain circumstances.
>
> Mr. STENNIS. The amendment does not require a written report?
>
> Mr. HUGHES. No, it does not. 1/

In any event, in 1981 the section was amended to delete the requirement for a report and substitute the statement that each such activity was to be considered a significant intelligence activity for the purpose of Section 501. The legislative history of this amendment indicates that the intention was not to affect the requirement for a finding, but to eliminate reporting requirements on covert action from the Foreign Assistance Act in deference to the notice provisions of Section 501 of the National Security Act. 2/

It is not clear whether Section 654 applies if the President is required to report to Congress by another statute, but not by the Foreign Assistance Act; the language is ambiguous on this point, and might be read either way. If read to apply only where a report is required by the Foreign Assistance Act, it now clearly does not apply to findings under Section 662. Strong arguments can be made to support this position.

Even if the language is read to apply where reports are required by statutes other than the security assistance statutes, the President is not expressly required to "make a report" to Congress on covert action findings under Section 501 of the National Security Act. That section requires that the President keep the intelligence committees "fully and currently informed", but does not require a "report" as such, or at least does not require a report concerning the Section 662 finding, as opposed to a class of intelligence activities. Nothing in the legislative history of Section 501 supports the view that the requirement to keep committees "fully and currently informed" was necessarily to take any particular form, whether oral or written, and some references suggest that consultation with the committees was contemplated rather than any formal report. 3/

More generally, Section 654 was not drafted with covert action activities in mind. It was intended for security assistance determinations of the kind that are normally overt and part of the public record. It does provide for the possibility of a classified determination, but still requires that notices be published in the Federal Register that a determination had been made, identifying the section of the Act under which it was made. Congress could not have intended that such a requirement apply to covert action programs, and in fact Federal Register notices have never been published when covert actions are initiated. To our knowledge, Congress has never objected to this practice. The 1981 amendment confirms that Congress intended that the procedures of Section 501 be the mechanism by which covert action activities are initiated and made known to the Congress.

This line of argument is consistent with the general acceptance by the Congress of the proposition that intelligence activities conducted pursuant to the National Security Act are not subject to the requirements of the security assistance statutes. For example, Section 403 of the Intelligence Authorization Act of 1986 set up a procedure for the reporting of arms transfers pursuant to intelligence operations that is expressly separate and apart from the procedures of the security assistance statutes, and that recognizes that arms may be so transferred without reference to the requirements of those statutes. The House Report on the bill states as follows:

> At the same time, covert 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 Arms Export Control Act. . . . 4/

Accordingly, a reasonable argument can be made that these statutes do not technically require that such Presidential findings be in writing. As noted above, the NSDD and the DCI-SSCI agreement do require written findings. But these documents have no legal binding effect.

D. If an oral finding is permissible, would an oral Presidential instruction to carry out such activities satisfy Section 662? If an oral finding is possible under Section 662, then it would be satisfied by an oral instruction which indicates the President's determination that the operations in question are "important to the national security of the United States." Past practice suggests that it is the substance of the determination that is essential for this purpose, and not the precise form of words. For example, in satisfying a statutory requirement for a Presidential proclamation "announcing the termination" of the Trusteeship Agreement for the Pacific Trust Territories in connection with the establishment of the Covenant for the Northern Marianas, the President's proclamation instead announced (because it was thought impolitic to announce a unilateral termination as such) that "the Northern Marianas are no longer subject to the Trusteeship" and that the proclamation constituted the statement required by the statutory provision. This was deemed by the Legal Adviser's Office to satisfy the statutory requirement.

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. It would be a matter of judgment as to how far the President's affirmation might stray from the statutory formula and still be effective. In this case the judgment required is so general and so inherent in the decision to authorize the operations in question, that it is relatively easy to satisfy. This is particularly so in this instance because of the detailed and formal consideration apparently given by the President to this particular program, before his alleged oral approval, in which the importance of the national security objectives involved were thoroughly examined.

2. What are the legal consequences if an oral finding does not satisfy the statute?

A. Can an oral instruction amount to acceptable "substantial compliance" with the statute even if a written finding is technically required? If the statute were found to require a written finding, one might nevertheless argue that the President's alleged instruction to carry out the operation, together with indications that he had determined that they were important to the national interest, amount to such "substantial compliance" with the statutory requirement as to render valid the activities authorized. Difficulties exist, however, with this line of argument.

In various areas of the law courts have accepted the doctrine that, under certain circumstances, material satisfaction of a statutory requirement is sufficient to uphold the validity of the actions taken notwithstanding failure to comply with technical requirements. For example, with respect to the common requirement in state law that certain types of contracts be in writing (the so-called "statute of frauds"), a minority of courts and the Uniform Commercial Code have permitted an exception where there is subsequent recorded testimony to the oral contract, 5/ and a majority of courts have permitted an exception in specified circumstances based on full or partial performance of the oral contract. 6/ These exceptions are apparently based on the premise that the purpose of the statute of frauds is to ensure reliable evidence of the contract, and that where other actions provide that evidence, the need for a written contract may be dispensed with.

The same doctrine has been applied by courts in several other areas of the law. However, it is generally not applied to dispense wholly with a writing requirement, but rather to allow flexibility in the terms of the precise language of a statutorily required writing. Examples include statutory provisions requiring notice by a debtor to a creditor of a claim for exemption of the debtor's property from garnishment, requirements for completing a declaration of homestead, requirements as to the terms and conditions included in an injunction bond, and requirements regarding the formalities of a petition for initiative or referendum. 7/

In a 1964 Court of Claims case, the Court relied upon a substantial compliance argument to uphold acceptance of a contract bid that lacked a required written statement of the authority of the bidder's agent. Noting that "the purpose . . . was to alert both the contractor and the Government to the subject of the agent's authority and to require . . . some solid proof sufficient to warrant the defendant's entering into a contractual relationship," the Court determined that the Government had discovered through other written documents that the agent had appropriate authority, and it found that there had thus been substantial compliance with the regulation. 8/

The doctrine of substantial compliance, however, is not universally applied. In some cases, courts have held that statutory requirements must be strictly satisfied. Such a rule has been applied, for example, with respect to statutory provisions regulating appointments and promotions under civil service acts, and requirements for notice by publication or posting of a municipal proceeding to assess the cost of public improvement projects. 9/

We are aware of some apparent precedent for the application of a substantial-compliance rule in the security assistance area. We understand that on at least one occasion funds were obligated by AID prior to submission of Congressional notifications which Section 634A of the Foreign Assistance Act requires to be submitted prior to such obligations. AID has viewed the obligations as nonetheless lawful and effective because AID substantially complied with the statute, in that the notification documents had been completed by the appropriate officials but simply not communicated to Congress; we understand that Congress was informed of these facts but did not further pursue the matter or characterize the appropriations as unlawful. We suspect that other similar incidents have occurred, and are searching L and AID files to find examples.

The Department's regulations implementing the Case-Zablocki Act, 10/ which requires that oral international agreements be reduced to writing and transmitted to the Senate, provide specifically that "deviation or derogation from [the regulations] will not affect the legal validity, under United States law or international law, of agreements concluded, will not give rise to a cause of action, and will not affect any public or private rights established by such agreements." 11/

Section 654 of the Foreign Assistance Act not only requires a written determination, but also expressly provides that no action shall be taken pursuant to any determination prior to the date on which the determination is reduced to writing and signed by the President. This statute therefore arguably is intended not only to provide an accurate evidentiary record of the determination, but also to provide a clear means of alerting Congress to the fact and content of the determination before action is taken under it. Thus, if the requirement of a writing were applicable to findings under Section 662, difficulties would be encountered in arguing that oral Presidential directions, not communicated to Congress until long after the actions authorized were taken, constitute such "substantial compliance" as to render valid the actions taken.

B. Could any possible violation of the statute be cured by a subsequent written finding or ratification? Section 654 requires that certain findings be reduced to writing and signed by the President before actions are taken to implement them. Therefore, subsequent compliance with the statute or ratification of the finding would not logically cure the failure to do so prior to taking action. The only comparable instance in the security assistance area of which we are aware concerns a failure by AID to waive Section 620(q), which prohibits assistance to countries more than six months in arrears on certain types of loans to the USG, prior to obligating certain assistance funds for Jamaica. AID advised the Secretary that retroactive ratification of these obligations would be legally ineffective, because:

> . . . Section 654(b) of the FAA . . . , as well as the legislative history thereunder, makes clear that the Congress intended to limit waiver authority under the FAA to prospective actions rather than to permit retroactive waivers.

(Instead, AID recommended that no action be taken with respect to the past violation, and that efforts be focused on avoiding future violations.)

C. What is the effect of reliance on an oral finding as regards the possible criminal or civil liability of persons acting under that finding? Persons acting under an oral finding may wish to argue that their good-faith reliance on the President's alleged oral finding or instructions, perhaps combined with advice from other officials that such actions were lawful, absolve them from any criminal or civil liability or at least mitigate the penalties imposed as a result.

In the criminal area, the effect of such good-faith reliance may depend on the mental state required by the particular statutes in question. For example, the federal embezzlement statute applies to persons who "knowingly" convert U.S. property to their own use or the use of another; 12/ the federal solicitation statute applies to those who solicit gifts for the USG with the "intention" of converting them to some other use; 13/ and criminal penalties under the Antideficiency Act apply to persons who "knowingly and willfully" authorize obligations in the absence of sufficient available appropriated funds for that purpose. 14/ In general, if the individual's reliance on the oral finding or other representations of officials with apparent authority was such as to negate the mental state required by the statute in question, then there would be relief from criminal liability.

Apart from this, no general exemption from criminal liability exists for reliance on unlawful "superior orders" 15/ or on advice of counsel. 16/ On the other hand, in many jurisdictions a person may avoid criminal liability if he reasonably relies on an official statement contained in a statute, in a judicial decision, in an administrative order or grant of permission, or in an official interpretation by the officer charged with interpretation or enforcement of the law. 17/

With respect to civil penalties under the Antideficiency Act, it is generally accepted that the good faith of the person in question does not excuse a violation, 18/ but may mitigate the consequences of a violation.19/ Specifically, the GAO is empowered by statute to grant relief from liability in certain instances on finding either that: (1) the act in question was "based on official records" and the individual "did not know, and by reasonable diligence and inquiry could not have ascertained, the actual facts," or (2) that "the obligation was incurred in good faith, that the payment was not contrary to any statutory provision specifically prohibiting payments of the character involved, and that the United States received value for such payment." 20/

D. What is the effect of failure to comply with such a statute on the validity of actions taken pursuant to oral instructions? The failure to comply with such a statute does not necessarily render invalid various actions taken pursuant to it. For example, the courts have held that a contract in violation of the Antideficiency Act nonetheless remains valid where the other party did not have notice of the deficiency. 21/ Likewise, the failure to comply with Section 654 would unlikely invalidate any contract or agreement entered into with foreign governments or other persons for services, such as air transport, or for the transfer of funds or items, or affect the title of funds or items transferred.

NOTES

1/ 120 Cong. Rec. 33490 (Oct. 2, 1974) (statement of Sen. Hughes).

2/ The Report of the Senate Select Committee on Intelligence states that the requirements of Section 501 replace former reporting requirements of the Hughes-Ryan Amendment. "There is no change in the Hughes-Ryan requirements for Presidential findings." S. Rep. No. 730, 96th Cong., 2d Sess. 5 (1980), reprinted in 1980 U.S. Code Cong. & Ad. News 4192, 4196.

3/ SSCI Report (note 2 above) at 9-10, 1980 U.S. Cong. & Ad. News at 4200 (SSCI quotes comments of Senator Baker [122 Cong. Rec. 7261 (May 13, 1976)] to describe intent as requirement for "prior consultation").

4/ H. Rep. 99-106, 99th Cong., 1st Sess. 10 (1985), reprinted in 1985 U.S. Cong. & Ad. News at 955.

5/ See Farnsworth, Contracts §§ 6.4-6.9 (1982); UCC § 2-201.

6/ See Farnsworth, supra at § 6.9.

7/ See 31 Am. Jur. 2d, Exemptions § 144 (1967); 40 Am. Jur. 2d, Homestead § 85 (1968); 42 Am. Jur. 2d, Injunctions § 314 (1969); 42 Am. Jur. 2d, Initiative and Referendum § 22 (1969).

8/ American Anchor & Chain Corporation v. United States, 331 F.2d 860 (Ct. Cl. 1964).

9/ See 15A Am. Jur. 2d, Civil Service § 27 (1976); 25 Am. Jur. 2d, Drainage § 49 (1966).

10/ 1 U.S.C. § 112b.

11/ 22 CFR § 181.1.

12/ 18 U.S.C. § 641.

13/ 18 U.S.C. § 663.

14/ 31 U.S.C. § 1350.

15/ See Wharton's Criminal Law § 40 (14th ed. 1978).

16/ Id. at § 42.

17/ Id. at § 77; United States v. Barker, 546 F.2d 940, 955 (D.C. Cir. 1976) (opinion of Merhige, District Judge).

18/ See Principles of Federal Appropriations Law 5-12 (United States General Accounting Office, Office of Legal Counsel, First Edition 1982).

19/ Id. at 5-13.

20/ Id. at 10-46 et seq.; 10-55 et seq..

21/ See Ferris v. United States, 27 Ct. Cl. 542 (1892) ("insufficency does not . . . cancel [the government's] obligations nor defeat the rights of other parties"). See also Ross Construction Corp. v. United States, 392 F.2d 984 (Ct. Cl. 1968) (contractor without knowledge can recover since he "cannot justly be expected to keep track of appropriations where he is but one of several being paid from the fund"); Anthony P. Miller, Inc. v. United States, 348 F.2d 475 (Ct. Cl. 1965).

U.S. Department of Justice

Office of Legal Counsel

December 17, 1986

Office of the
Assistant Attorney General

Washington, D.C. 20530

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Legal Authority for Recent Covert Arms Transfers to Iran

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

I. General Authority for Arms Transfers to Iran

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) the transfer--

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

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

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

(b) As used in this section--

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

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

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

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

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

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

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

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

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

II. Section 501 of the National Security Act

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

III. The Hughes-Ryan Amendment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Action prohibition prior to execution of report

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

(c) Publication in Federal Register

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Other Legal Objections to the Arms Shipments

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

A. Omnibus Diplomatic Security and Antiterrorism Act of 1986.

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

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

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

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

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

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

B. Export Administration Act of 1979.

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

C. Executive Order 12333

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

V. Three-way Transactions Involving Israel

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

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

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

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

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

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

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

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

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

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

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

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

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

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

in the same way.[39]

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

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

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

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

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

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

Conclusion

For the foregoing reasons, we conclude that a covert intelligence or intelligence-related operation, authorized by the President and conducted by members of the NSC staff and/or the CIA, could lawfully have included the sale of arms to Iran. Such an operation would have been carried out pursuant to presidential powers recognized in sections 101 and 102 of the National Security Act. An oral authorization by the President would have sufficed to allow CIA participation under the Hughes Ryan Amendment. The use of Israel's American-supplied weapons, under an arrangement by which Israeli stocks were later replenished, appears not to have violated the conditions under which American weapons are supplied to Israel.

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