MEMORANDUM

TO: Judge Walsh
Mr. Barrett
Mr. Bever
Mr. Blaney
Mr. Foster
Mr. Francis
Mr. Gillen
Mr. Mark ✓
Mr. Treanor
Mr. Vhay
Ms. Belcher

FROM: C. J. Mixter CJM

DATE: March 21, 1991

RE: Memoranda on Criminal Liability of Former President Reagan and of President Bush

I have attached copies of the final versions of my memoranda on the criminal liability of former President Reagan and of President Bush.

MEMORANDUM

TO: Judge Walsh

FROM: C. J. Mixter CJM

DATE: March 21, 1991

RE: Criminal Liability of Former President Reagan

You have asked me to analyze the criminal liability, if any, of former President Reagan for matters within your mandate as Independent Counsel under the Ethics in Government Act. In carrying out this assignment, I have considered the information developed by this Office's investigation and that of the Congressional Iran/Contra Select Committees, including the immunized Congressional testimony of Admiral Poindexter and Colonel North, as well as [redacted] (b)(3) GJ This memorandum reflects that analysis.

For ease of comprehension, I have broken the conceivable areas of Presidential exposure into four major groups, each of which begins with a summary of the relevant facts:

This memorandum does not deal with such non-criminal matters as the appropriateness of the policies followed by the Reagan Administration with respect to Iran, the Contras, or consultation with the Congress. Nor, except as a byproduct of Section IV(B) below (discussing whether the White House withheld any material facts from the Iran/Contra Select Committees), does it touch upon the House of Representatives' decision not to bring articles of impeachment against the former President as a result of the Iran/Contra disclosures.

I. Arms Sales to Iran, 1985-1986

Summary of the Facts

In an effort to convince elements in Iran to use their influence to obtain the release of U.S. hostages in Lebanon, and in hopes of creating a better political and intelligence relationship between Iran and the United States, the President and his advisors engaged in an opening to Iran. The principal currency of this Iran Initiative was U.S.-manufactured weapons. The Initiative had two somewhat distinct phases: first, a period beginning in mid-1985, during which the President was informed of, and approved in advance, an Israeli shipment of approximately 500 Israeli-owned TOW antitank missiles to Iran and a later shipment of Israeli-owned Hawk antiaircraft missiles;[1/] and a second phase in which the United States itself transferred weapons to Iran through the Secord/Hakim "Enterprise". This second phase included the shipment of 1,000 TOW missiles sent to Iran in February 1986 and over 200 spare parts for Hawk missile systems sent to Iran in May and August, 1986. In May 1986, the United States also sent approximately 500 TOW missiles to Israel to replenish Israeli stocks depleted by

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[1/] The November 1985 shipment was originally supposed to comprise 120 Hawk missiles (80 to be delivered before the hostages were released, and 40 thereafter). The transaction was aborted after eighteen missiles had arrived in Iran; seventeen of the eighteen Hawks were returned to Israel in February 1986 on the backhaul from the first U.S. TOW shipment.

the August/September 1985 transfer. Finally, in October 1986 the Enterprise obtained a second group of 500 TOW missiles from the United States and delivered them to Israel, and the TOWs that Israel had received in May were shipped to an Iranian "Second Channel".[2/]

The United States was reimbursed for the price of each of the weapons that were taken from U.S. stocks pursuant to Section 601 of the Economy Act, 31 U.S.C. § 1535. As will be discussed more fully in Part II below, during 1986 there was a substantial difference, aggregating roughly $16 million, between the amounts received by the Enterprise for the weapons and the Enterprise's costs, including the price paid to the United States agencies who released the weapons. The cost of the 500 TOW missiles transferred to Israel was paid partially by $1.5 million in Israeli funds, and partially from the excess funds paid by Iran to Secord and Hakim for the Hawk spare parts.

The record is quite clear that President Reagan was briefed, in advance, on each group of weapons sold to Iran. With respect to the November 1985 Hawk shipment in particular, the President also was told what happened to it (see [redacted] see also Poindexter notes of November 25, 1985 National Security Briefing. [redacted] (b)(3) GJ

2/ [redacted]

[redacted] and in December, 1985, the President signed a covert action finding that retroactively covered the CIA's involvement in that shipment.[3/] In January 1986 the President signed two covert action findings that authorized the CIA's role in the 1986 arms sales. There is also no question that throughout the Iran Initiative, the President specifically ordered that the Congress should not be advised of any aspect of the United States' activities, including the three covert action findings, and that no briefing of

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[3/] There is little reason to doubt that the President in fact signed the 1985 Iran Finding, and that he did so during early December, just as Poindexter's replacement of McFarlane as National Security Advisor, announced on December 4 [redacted] was taking place. The task of determining the precise day on which the President signed this document has of course been complicated by Poindexter's destruction of the Finding in November 1986. [redacted]

(b)(3) GJ

Poindexter has consistently identified December 5 as the date when the Finding was signed (see May 2, 1987 Poindexter Cong. Dep. 105-107; July 15, 1987 Poindexter Cong. Tr. 43-44; [redacted] Interestingly, Presidential meeting records that we recently received from the Archivist (see ALU0135169) identify Mr. McFarlane as having been present at the December 5, 1985 National Security Briefing; McFarlane, though, claims to have no recollection whatsoever of the 1985 Finding (see July 2, 1987 McFarlane Cong. Dep. 49-50). Donald Regan, the other person present at the December 5 briefing, also claims no recollection of the President signing the 1985 Iran Finding (see July 30, 1987 Regan Cong. Tr. 243; July 31, 1987 Regan Cong. Tr. 15). [redacted] In any event, because no alternative date to that supplied by Poindexter is suggested by the records, this memorandum will refer to the retroactive Finding as having been signed on December 5, or simply in December, 1985.

Congress actually took place until November 1986, when news of the Initiative leaked into the press.

The President definitely knew that Col. North was involved in meetings with Iranians (see, e.g., February 16, 1990 Reagan Dep. 133), both on his own and in the company of former National Security Advisor McFarlane during the May 1986 Tehran trip. Although the January 17, 1986 Iran Finding makes specific reference to the use of "third parties" in the transactions (see AKW001921), the President has stated that he recalls no reference to any operational role by Secord or Hakim in the Iran Initiative ([redacted] see also February 16, 1990 Reagan Dep. 21). Poindexter, on the other hand, believes that the President was told that Secord was involved in the Iran matter (see May 2, 1987 Poindexter Cong. Dep. 66; June 17, 1987 Poindexter Cong. Dep. 320). As discussed more fully in Section II below, there is no evidence that President Reagan was aware of, or in any way authorized, the differential in price that reaped $16 million for the Enterprise [redacted]

(b)(3) GJ

On these facts, two legal issues emerge with respect to President Reagan: (a) did the President violate any criminal law with respect to the Iran Findings, or by ordering that the Iran arms sales not be reported to Congress; (b) did the arms sales themselves, as authorized by the President, violate any criminal statute. As discussed

more fully below, the answer to each of these questions is "No."

A. Presidential Findings and Covert Action Reporting Requirements

A number of federal statutes[4/] govern the authorization and reporting of covert activities. They are set out in pertinent part below.

Section 662 of the Foreign Assistance Act, 22 U.S.C. § 2422, provides that

> 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.

Section 501 of the National Security Act of 1947, as amended, 50 U.S.C. § 413, provides:

> (a) Reports to Congressional Committees of current and proposed activities
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> 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

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[4/] Unless specifically noted, all references to statutory and administrative provisions describe those provisions as they were in force during 1984-1986.

information and information relating to intelligence sources and methods, the Director of Central Intelligence and the heads of all department, 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 (hereinafter in this section referred to as the "intelligence committees") fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States, including any significant anticipated intelligence activity, 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;

(2) furnish any information or material concerning intelligence activities which is in the possession, custody, or control of any department, agency, or entity of the United States and which is requested by either of the intelligence committees in order to carry out its authorized responsibilities; and

(3) report in a timely fashion to the intelligence committees any illegal intelligence activity or significant intelligence failure and any corrective action that has been taken or is planned

> to be taken in connection with such illegal activity or failure.
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> (b) Failure to inform; reasons
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> The President shall fully inform the intelligence committees in a timely fashion of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, for which prior notice was not given under subsection (a) of this section and shall provide a statement of the reasons for not giving prior notice.

The Fiscal Year 1986 Intelligence Authorization Act, Pub. L. No. 99-169, contained a new provision, Section 502(b), that explicitly linked the transfer of United States weapons and defense services with the covert action notification process. This statute, which was made permanent in October 1986 by Section 602 of the Intelligence Authorization Act for Fiscal Year 1987, Pub. L. No. 99-569, is now codified at 50 U.S.C. § 415. It states that

> (a)(1) The transfer of a defense article or defense service exceeding $1,000,000 in value by an intelligence agency to a recipient outside that agency shall be considered a significant anticipated intelligence activity for the purpose of section 413 of this title.
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> (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 [22

U.S.C.A. § 2301 et seq.], the Arms Export Control Act [22 U.S.C.A. § 2751 et seq.], Title 10 (including a law enacted pursuant to section 7307(b)(1) of that Title), or the Federal Property and Administrative Services Act of 1949 [40 U.S.C.A § 471 et seq.], and

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

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

(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;

(2) the terms "defense articles" and "defense services" mean the items on the United States Munitions List pursuant to section 38 of the Arms Export Control Act [22 U.S.C.A. § 2778] (22 CFR part 121);

(3) the term "transfer" means --

(A) in the case of defense articles, the transfer of possession of those articles; and

(B) in the case of defense services, the provision of those services; and

(4) the term "value" means --

(A) in the case of defense articles, the greater of --

(i) the original acquisition cost to the United States Government, plus the cost of improvements or other

> modifications made by or on behalf of the Government; or
> (ii) the replacement cost; and
> (B) in the case of defense services, the full cost to the Government of providing the services.

During 1985 and 1986, these statutes were supplemented by two administrative provisions. Executive Order 12333, effective December 4, 1981, contains four sections that bear upon the Iran Initiative. First, Part 1.2 defines the National Security Council, whose staff was heavily involved in the conduct of the Initiative, as

> [T]he highest Executive Branch entity that provides review of, guidance for and direction to the conduct of all national foreign intelligence, counterintelligence, and special activities, and attendant policies and programs.

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.

Part 1.8(e) states that the Central Intelligence Agency shall

> Conduct special activities approved by the President. No agency except the CIA (or the Armed Forces of the United States in time of war declared by

> Congress or during any period covered by a report from the President of the Congress under the War Powers Resolution (87 Stat. 855)) may conduct any special activity unless the President determines that another agency is more likely to achieve a particular objective . . . .

Finally, Part 3.1 provides that

> The duties and responsibilities of the Director of Central Intelligence and the heads of other departments, agencies, and entities engaged in intelligence activities to cooperate with the Congress in the conduct of its responsibilities for oversight of intelligence activities shall be as provided in Title 50, United States Code, section 413. The requirements of section 662 of the Foreign Assistance Act of 1961, as amended, and section 501 of the National Security Act, as amended (50 U.S.C. § 413), shall apply to all special activities as defined in this Order.

The second relevant administrative provision was National Security Decision Directive 159, signed by President Reagan on January 18, 1985. NSDD 159 confirms and implements Executive Order 12333; in particular, pages 2-3 require that the President specifically approve by a written finding all covert actions undertaken by any United States Government agency or entity.

All of the above-described statutes and administrative provisions are civil in nature; there is no criminal statute that directly punishes the conduct of a covert action without a Presidential finding, or governs the reporting of "covert activities" or "special activities" to Congress. However, our Office has taken the position that a

charge under 18 U.S.C. § 371[5/] may be premised upon a conspiracy, through deceitful and dishonest means, to violate a federal civil law or to prevent the government from conducting its operations and implementing its policies honestly and faithfully.[6/] Accordingly, I will discuss below whether President Reagan, acting in concert with others,

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[5/] 18 U.S.C. § 371 provides that

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more that $10,000 or imprisoned not more than five years, or both.
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> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

[6/] See Government's October 25, 1988 Memorandum of Points and Authorities in Opposition to Defendant's Motions to Dismiss or Limit Count One in United States v. North, at 7-15. Both in the framing of the March 16, 1988 Indictment to charge only the diversion and obstruction/false statement aspects of the Iran Initiative as a crime, and in our subsequent descriptions of the charges, the Office has previously suggested that the Iran Initiative, as approved by the President, was not criminal. (See, e.g., Government's June 3, 1988 Memorandum of Points and Authorities in Opposition to Defendants' Motions to Compel Discovery in United States v. Poindexter, et al., at 31-32; Government's December 5, 1988 Memorandum Concerning Criminal Activity Arising in the Context of the Iran Initiative in United States v. North, at 2 ("the critical element of North's behavior that makes it criminal is his deceitful acquisition of control over funds generated by the Iran initiative").

violated applicable provisions in a manner that might have become a federal crime through the operation of Section 371.

To begin with the most obvious part of the statutory and administrative framework discussed above, 22 U.S.C. § 2422 is the only statute (as distinct from administrative provisions such as E.O. 12333 or NSDD 159) governing when a finding is required. Section 2422 mandates that there shall be such a finding if the CIA is to undertake a non-intelligence-gathering activity outside the United States. It does not speak to covert actions conducted by any other agency.[1] Based upon my review of the facts, there is no evidence that President Reagan had any reason to believe that Section 2422 had been triggered before December 1985, for the simple reason that he apparently was not told until that time that CIA was playing any role in the Iran Initiative apart from gathering intelligence. (See March 6, 1991 Regan 302 at 6; [redacted] (b)(3) GJ

[1] A proposed overhaul of the covert action statutes, pocket-vetoed by President Bush on November 30, 1990 (see "Bush Kills Budget for Spy Agencies," New York Times, December 1, 1990, at A-11), would have enacted into statute a requirement that the President make a written determination if any component of the government is to undertake a covert action, and would also have placed general responsibility for Congressional notification upon the President. See Intelligence Authorization Act, Fiscal Year 1991, S. 2834, 101st Cong., 2d Sess., § 602.

The December 1985 and January 1986 covert action findings signed by the President represented an effort to comply with Section 2422 after it became apparent that CIA had been, and would be, active in the Iran Initiative. The December 1985 Finding is peculiar in that it was not signed until after the CIA had completed its activities in support of the November 1985 Hawk missile shipment, and explicitly seeks to "ratify" actions taken by CIA before the finding was signed. The December 1985 Finding was prepared by CIA's General Counsel, Mr. Sporkin, to deal with the fact that CIA became involved in the November 1985 Hawk transfer as problems developed with the Israelis' execution of it.[8/]

[8/] Even though there is some support for the notion that a Section 2422 finding need not be in writing (see page 41 below), the fact that the President apparently had no advance knowledge of CIA's role in the 1985 Hawk shipment renders it impossible to characterize the 1985 Iran Finding as the simple recordation of an earlier "oral" or "mental" determination by the President. Thus, the efficacy of that Finding under civil law turns entirely on whether a President may, after the fact, "ratify" CIA activity that he knew nothing about. The "unless and until" language of Section 2422, as well as that section's equation of CIA covert actions with "significant anticipated intelligence activities", make it doubtful that anything other than a forward-looking finding would be permissible under the statute. Mr. Sporkin has admitted that he had no knowledge that the President had been told before the fact of the CIA's actions in support of the November 1985 shipment (see June 24, 1987 Sporkin Cong. Tr. 134), but has testified that the concept of ratification is only inconsistent with the intent of the statute "if it were abused. I don't believe that this was, in this case, was abusive, and I believe it was the correct thing to do." (Id. at 22. See also id. at 221-222.) Attorney General Meese, who was not consulted concerning the 1985 Iran Finding, told the Iran/Contra Select Committees that in his opinion a finding that sought to ratify already-conducted covert activity would have no effect. (See July

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There is no indication that anyone questioned with the President whether a retroactive finding would be appropriate, or otherwise gave the President any reason to doubt the implicit representation by his advisors that such an instrument was permissible under the law. Accordingly, I do not believe that there is any evidence that President Reagan committed an intentional violation of 22 U.S.C. § 2422 in his execution of the Iran Initiative.

There is no question that the President did not follow Executive Order 12333 and NSDD 159 with respect to the Iran Initiative. Despite Mr. Reagan's knowledge that the NSC staff, primarily in the person of Colonel North, were heavily engaged in the implementation of the arms sales to Iran, at no point did the President execute a written determination that authorized that involvement. However, neither the Executive Order nor the NSDD is a federal statute; a Presidential "violation" of either would not be an offense against the United States, and could not be reached by Section 371, unless it were part of a conspiracy through deceitful and dishonest means to interfere with governmental functions. With respect to President Reagan, the element of deceit and dishonesty is wholly lacking with respect to this issue. Simply put, there was no higher Executive official

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8/ (...continued)
29, 1987 Meese Cong. Tr. 267-68.) The January 1986 findings predated any of the 1986 arms transfers, so that they do not present the retroactivity issue.

for the President to deceive, and it is implausible that a President could be found criminally liable for impeding the functions of the government by failing to inform a subordinate about the existence of a government operation. As will be seen below, there was also no criminally-cognizable deception of Congress because the statute governing Congressional notification of covert actions allows on its face for situations in which the Congress will not be informed in advance of such activities, whether conducted by the NSC or anyone else.

Section 501 of the National Security Act, 50 U.S.C. § 413, provides generally that the Director of Central Intelligence and the heads of all departments, agencies and entities involved in intelligence activities shall inform the Congressional intelligence committees of covert actions. However, the statute contains two major caveats. The first limitation is the most obvious: the entire reporting scheme of Section 413(a) is preceded by the phrase "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 . . . ." This language amounts to an explicit recognition of the Executive Branch's traditional view that it has implied Constitutional power, not susceptible to Congressional regulation, to conduct foreign policy. See S. Rep. No. 96-730 at 4-6 (1980); id. at 6 ("Subsection (a) does not

prescribe hard and fast requirements for what may be a gray area resulting from the overlap between the constitutional authorities and duties of the branches"); H.R. Conf. Rep. No. 96-1350 at 15-16 (1980).[9/] The recognition of this "gray area" on the face of the statute itself makes it most unlikely that a criminal prosecution could be premised on a Section 371 conspiracy, involving the President himself, to violate 50 U.S.C. § 413 by failing to inform Congress of a covert action.

The second apparent limitation on the Congressional notice requirement relates to the timing of the notice. 50 U.S.C. § 413(a) contemplates that prior notice of covert actions will be given to the intelligence committees or, "if the President determines it essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States", to "the chairman of 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" (this group is sometimes referred to colloquially as the "Gang of Eight"). However, the very next section, 50 U.S.C § 413(b), states that

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[9/] Relevant portions of both these reports are reprinted in 1980 U.S. Code Cong. Adm. News 4182 et seq. Additional legislative quotations on this issue appear in a November 18, 1986 memorandum from minority HPSCI staff member Tom Smeeton to the Republican members of HPSCI, which we obtained from CIA as document ER 46,262-66.

> The President shall fully inform the intelligence committees in a timely fashion of [covert actions] for which prior notice was not given under subsection (a) of this section and shall provide a statement of the reasons for not giving prior notice.

The relevant Presidential advisors -- including Attorney General Meese, who was first consulted on the Iran matter in early January, 1986 -- have testified that Section 413(b) recognizes that no prior notice will be provided in some circumstances (see, e.g., July 28, 1987 Meese Cong. Tr. 27-29). In their view, particularly when Section 413(b) is read together Section 413(a)'s reference to the Constitutional rights of the Executive, what emerges is at most a requirement that "timely" notice shall be provided to Congress, with the definition of "timely" to be supplied by the Executive. (See July 29, 1987 Meese Cong. Tr. 234-236; June 24, 1987 Sporkin Cong. Tr. 163, 198-204, 205-210.) Thus, they maintain that while it was intended all along that the President would advise Congress of the Iran Initiative at some point (and probably sooner than the eleven months after the fact that eventuated), the President was under no obligation to provide Congress with prior or contemporaneous notice of it (see July 28, 1987 Meese Cong. Tr. 6, 26, 30-31; July 29, 1987 Meese Cong. Tr. 46-47, 119-121, 162-164; June 24, 1987 Sporkin Cong. Tr. 87, 164). Based upon my reading

of the relevant statutes, this position is legally supportable.[10/]

The first Iran Finding, drafted by Mr. Sporkin and signed by the President on December 5, 1985, contained a prohibition on prior notice that is cast in explicitly Constitutional terms:

> Because of the extreme sensitivity of these operations, in the exercise of the President's constitutional authorities, I direct the Director of Central Intelligence not to brief the Congress of the United States, as provided for in Section 501 of the National Security Act of 1947, as amended, until such time as I may direct otherwise. (ER 10,148.)

[10/] Several CIA legal memoranda, written both before and after the Iran Initiative, come to the same conclusion. See March 8, 1985 memorandum for the Deputy Director, Office of Legislative Liaison, from Stanley Sporkin, "Requirements for Notifying Congress Regarding Special Activities", ER 7507-15; November 18, 1986 memorandum for the Director from the General Counsel, "Your Request of 16 November for an Analysis of the Law on Disclosure to Congress", ER 7483-88, ER 46,106-114 and ER 46,251-60; November 19, 1986 memorandum from Kathleen M. Watson to George W. Clarke, Associate Deputy Counsel, "Legality of DCI's Withholding Prior Notice of Agency's Expenditure of Funds for Transportation and Travel Costs Related to the Transfer of Military Equipment to Iran", ER 46,675-79, ER 6135-43. See also December 17, 1986 Memorandum from DOJ's Office of Legal Counsel for the Attorney General, "The President's Compliance with the 'Timely Notification' Requirement of Section 501(b) of the National Security Act", Cong. Ex. EM-70. Indeed, even Congress' most recent effort to overhaul the covert action statutes, while "categorically reject[ing]" the December 17, 1986 OLC memorandum, would still have permitted the President, on "rare occasions", to delay reporting covert actions to Congress and subsequently report "in a timely fashion". See H.R. Conf. Rep. 101-928, 101st Cong., 2d Sess., at 26-27 (1990). This legislation was pocket-vetoed when President Bush failed to sign it by November 30, 1990. See "Bush Kills Budget for Spy Agencies", New York Times, December 1, 1990, at A-11.

It appears that by January 7, 1986, Attorney General Meese and CIA Director Casey, speaking for both himself and Mr. Sporkin, had orally provided President Reagan with at least the conclusion of the statutory argument presented above (see, e.g., July 28, 1987 Meese Cong. Tr. 6, 26; July 29, 1987 Meese Cong. Tr. 45-46).

The same conclusion by the Attorney General -- that withholding notice to Congress lay within the President's powers -- unquestionably was put before Mr. Reagan on January 17, 1986. The memorandum that accompanied the January 17, 1986 Iran Finding, from which Admiral Poindexter briefed the President, identified the Attorney General as one of the advisors who recommended that the President approve the finding, and concludes with the following statement:

> Because of the extreme sensitivity of this project, it is recommended that you exercise your statutory prerogative to withhold notification of the Finding to the Congressional oversight committees until such time that you deem it to be appropriate. (AKW001920.)

The January 17 Iran finding signed by the President contains language commanding that prior notice to Congress not be given:

> due to [the operation's] extreme sensitivity and security risks, I determine it is essential to limit prior notice, and direct the Director of Central Intelligence to refrain from reporting this Finding to the Congress as provided in Section 501 of the National

Security Act of 1947, as amended, until I otherwise direct. (AKW001921.)[11/]

Thus, by the middle of the Iran Initiative, and before the direct sale of weapons from U.S. stocks began, the President was advised by his Attorney General that he could legally withhold notification of Congress concerning the Initiative. Whether the Attorney General's advice, even though supportable, was appropriate as a matter of interbranch relations under civil law lies outside the scope of this memorandum. See, e.g., Associate Counsel Treanor's November 12, 1987 memorandum to you re "Questions Concerning Permissibility of Iranian Arms Sales and Concerning the Legality of Secord's Role and of his Level of Profit" at 24-28 (concluding that failure to notify Congress of Iranian arms sales until November 1986 violated 22 U.S.C. § 2422 and 50 U.S.C. § 413). It is clear, however, that on these facts there would be no basis to find the President guilty of a Section 371 conspiracy to violate 50 U.S.C. § 413, or deceitfully to impede governmental functions by failing to provide Congress with prior notification of the Iran arms sales or of the relevant findings.[12/]

[11/] The identical language appears in the Iran Finding that the President signed on January 6, 1986 (see AKW002065).

[12/] The President also was aware of, and failed to notify Congress concerning, the NSC/DEA operation to ransom the hostages during 1985-1986. Except for the origin of some of the funds used for this covert action (an aspect of the operation that the President does not appear to have known about, see [redacted] July 15, 1987 Regan Cong. Dep. 88-90), this activity does not relate either to the provision of military arms, materiel, or funds to Iran, or to (b)(3) GJ

(continued...)

B. The Legality of the Arms Sales

The second legal issue that arises from the Iran Initiative as authorized by the President is whether the arms sales themselves either were intrinsically unlawful, or triggered Congressional reporting requirements that were not fulfilled. Although (and, perhaps, because) this subject involves a number of close legal calls under a fairly complex group of statutes, I conclude that the Iran arms sales, as authorized by President Reagan, did not violate the criminal law.

The basic legal limitations upon the transfer of U.S.-owned and U.S.-manufactured weapons to third parties are found in the Arms Export Control Act ("AECA"), codified principally at 22 U.S. § 2751 et seq., and the Foreign Assistance Act, 22 U.S.C. § 2301 et seq.[13/] Throughout 1985

[12/] (...continued)
assistance to the Contras. (See December 19, 1986 Order of the Division for the Purpose of Appointing Independent Counsels, D.C. Cir., at 2.) I note in passing, however, that the discussion of 50 U.S.C. § 413 provided above would apply to the failure to notify Congress of the DEA operation as well.

[13/] Broadly speaking, the AECA covers sales of arms for value, and the Foreign Assistance Act governs U.S. government grants of military aid to foreign governments. Because the United States was compensated for all of the weapons that it sent to Iran and Israel pursuant to the Iran Initiative, the AECA is the more important of the two statutes. The government lawyers who evaluated the Iran Initiative in late 1985 and 1986 apparently considered the Foreign Assistance Act possibly applicable because they were not sure whether Israel's inventories of TOW and Hawk missiles were furnished to Israel under that Act or the AECA. The 1987 Report of the Congressional Committees Investigating the Iran-Contra Affair (hereinafter "Iran/Contra Select Committee Report") concludes at page 418 that "All the Hawks and TOWs that Israel
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and 1986, both the Foreign Assistance Act and the AECA provided that a country (such as Israel) that had received U.S.-manufactured defense articles could not retransfer those articles to a third country (such as Iran) without the consent of the President. See 22 U.S.C. §§ 2314(a), 2753(a)(2). The President could not consent to such a retransfer unless the U.S. itself could make the transfer directly to the third country, see 22 U.S.C. § 2314(e), 2753(a), and in the case of items on the Munitions List, unless the recipient country certified that it would not further transfer the weapons without obtaining Presidential consent, see id. The AECA went on to require reports to the Speaker of the House and the Senate Foreign Relations Committee concerning the implementation of re-transfer agreements pursuant to that Act, see 22 U.S.C. § 2753(a). Both the AECA and the Foreign Assistance Act contained limitations upon the types of countries who may receive direct transfers of U.S. arms. See, e.g., 22 U.S.C. §§ 2304(a)(2), 2371, 2753, 2754. The AECA also required that the President provide the Speaker of the House and the Senate Foreign Relations Committee with unclassified certifications identifying the foreign countries involved in any transfer or

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13/ (...continued)
transferred to Iran in 1985 had earlier been obtained from the United States under the AECA." Since, as will be seen below, both statutes contain roughly similar substantive provisions governing a recipient country's ability to retransfer U.S.-supplied weapons to a third country, they will often be discussed in tandem in this memorandum.

re-transfer of "major defense equipment" valued at $14 million or more; these certifications must be submitted 30 days before the transfer becomes effective, although the 30-day waiting period can be waived for a direct transfer by the United States if the President finds that an emergency exists. See 22 U.S.C. § 2753(d). Finally, in 22 U.S.C. 2776(a) the AECA required that 30 days after the end of each quarter, the President must notify Congress of all offers and acceptances of $1 million or more of major defense equipment.

In two significant respects, the legal landscape surrounding foreign arms transfers changed during 1985-1986. First, in November 1985 Congress passed a statute, later codified at 50 U.S.C. § 415 and quoted in full at pages 9-11 above, which brought all transfers of defense articles exceeding $1,000,000 except those undertaken pursuant to the Foreign Assistance Act, the AECA, and the surplus property statute (not applicable here), within the definition of "significant anticipated intelligence activities", and thus within the Congressional notification scheme of the National Security Act, 50 U.S.C. § 413. This new law appears to have resulted from a 1984 exchange of correspondence between Chairman Boland of HPSCI and Director of Central Intelligence Casey, in which Chairman Boland complained of, and Director Casey insisted upon, a National Security Council position that the National Security Act permitted the President to conduct covert transfers of military equipment to foreign nations without regard to the substantive and reporting

requirements of the Foreign Assistance Act and the AECA. See October 22, 1984 letter from Chairman Boland to Director Casey, ER 46,225; December 12, 1984 letter from Director Casey to Chairman Boland, ER 46,217; December 21, 1984 letter from Chairman Boland to Director Casey, ER 46,216; see generally H.R. Rep. No. 99-106 at 9-12 (1986), reprinted in 1986 U.S. Code Cong. & Adm. News at 954-58. The significance of this new law will be discussed in more detail below.

The second relevant change in the arms export laws was the enactment, effective August 27, 1986, of Section 509 of the Omnibus Diplomatic Security and Antiterrorism Act of 1986, now codified (with considerable revisions dating from 1989) at 22 U.S.C. § 2780.[14/] As it was in force in late 1986, this statute provided:

> (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

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[14/] Among other changes, the 1989 revisions to 22 U.S.C. § 2780 added criminal penalties for violation of the section, see 22 U.S.C. § 2780(j), and also added a subsection (h) stating that

> The prohibitions contained in this section do not apply with respect to any transaction subject to reporting requirements under Title V of the National Security Act of 1947.

> 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.

Since 1984, Iran has been classified by the Secretary of State as a country that has repeatedly provided support for international terrorism. See 49 Fed. Reg. 2836 (1984); see also id. at 38,224; 15 C.F.R. § 385.4(d).

For the reasons that are exhaustively discussed at pages 3-14 of Mr. Treanor's November 12, 1987 memorandum to you addressing "Questions Concerning Permissibility of Iranian Arms Sales and Concerning the Legality of Secord's Role and of his Level of Profit", there is essentially no legal way to square the 1986 transfers of U.S.-owned arms to Iran with the provisions of the AECA. As will be seen below, no later than early 1986, President Reagan's advisors had reached the same conclusion. They recommended to the President that the Iran arms sales be conducted under the aegis of a Presidential Finding pursuant to the National Security Act, and the President followed that recommendation. Accordingly, the balance of this section will focus upon three issues: (1) did the President's determination to dispense with the AECA's Congressional notification requirements, and pursue the Iran Initiative under the National Security Act, amount to a scheme deceitfully to prevent the government from conducting its operations and

implementing its policies honestly and faithfully?;[15/] (2) does any criminal liability flow from the President's authorization (well before the January 17, 1986 Finding) of the 1985 Israeli shipments to Iran, as well as the related sale of 500 replacement TOW missiles to Israel in 1986?; (3) what was the impact, if any, of the August 27, 1986 statute forbidding exportation of arms to terrorist countries?

1. Using the National Security Act to Supplant the Arms Export Statutes

The Administration's position that the President may legally sell arms to a foreign country without complying with the Foreign Assistance Act or the AECA is commonly traced back at least as far as a now-famous October 5, 1981 opinion by Attorney General William French Smith. Because this opinion (which took the form of a letter to CIA Director Casey on a still-classified transaction) is quite brief, it is worth quoting verbatim:

[15/] The arms-related portions of the Foreign Assistance Act imposed no criminal penalties for violation of their requirements. Likewise, although the AECA prescribed duties for both United States government officials and private parties, during 1985 and 1986 only the latter were exposed directly to criminal penalties. See 22 U.S.C. § 2778 (creating a regime of "Presidential control of exports and imports of defense articles and services . . . issuance of export licenses; conditions for export . . . " and, in subsection (c), prescribing criminal penalties for violation of that regime or making false statements in registrations, license applications, or required reports). As discussed in Section I (A) above, the family of laws governing the authorization and reporting of covert actions, including 50 U.S.C. § 415, also lacks any criminal enforcement mechanism. Thus, the analysis of Presidential criminal liability set forth below will once again focus primarily upon 18 U.S.C. § 371.

> We have been advised by the State Department's Legal Adviser that the Foreign Assistance Act and the Arms Export Control Act were not intended, and have not been applied, by Congress to be the exclusive means for sales of U.S. weapons to foreign countries and that the President may approve a transfer outside the context of those statutes. Accordingly, I believe the [transaction in question] may be legally completed, based upon a determination by the President that these Acts cannot be used and that the authorities of the Economy Act and National Security Act may be utilized to achieve a significant intelligence objective. In order to satisfy the Congressional reporting requirements imposed on the Secretary of Defense under DoD Appropriations Authorization Acts (10 U.S.C. 133, Note) and on you by the Intelligence Oversight Act of 1980 (50 U.S.C. 413), the House and Senate Intelligence Committees should be informed of this proposal and the President's determinations. (AKW000014.)

At least as early as 1984, Congress was aware of, and had expressed displeasure with, the Executive's view that the broad-scale reporting required by the AECA could be curtailed by use of the National Security Act, which only encompasses reports to the Intelligence Committees. See Boland-Casey correspondence cited at pages 25-26 above. Congress' apparent response to this situation -- the November 1985 addition to the 1985 Intelligence Authorization Act that explicitly brought covert transfers of arms valued at more than $1 million within the reporting provisions reflected in 50 U.S.C. § 403 (see pages 9-11, 25-26 above) -- also had the effect of embedding into statute the Administration's position that the Foreign Assistance Act and the AECA were not the exclusive means by which weapons transfers could be accomplished.

The relationship between the Iran Initiative and the AECA was explicitly discussed in front of the President no later than December 7, 1985,[16/] when Secretaries Weinberger and Shultz advanced it as their legal argument against the Initiative. In response to these AECA-based objections, both CIA legal personnel and, later, the Attorney General were consulted. By December 9, 1985, CIA General Counsel Sporkin and his staff began working with Colonel North to examine the various ways in which arms transfers to Iran might take place (see June 24, 1987 Sporkin Cong. Tr. 35). This process resulted in the production of several draft Presidential Findings which ultimately evolved into the January 6 and

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[16/] Robert McFarlane has testified that the existence of the AECA as a potential roadblock, and the view that the National Security Act provided the appropriate detour, was discussed among the President and his Cabinet advisors before the November 1985 Hawk shipment took place (see July 2, 1987 McFarlane Cong. Dep. 34-37). Because there were no known Cabinet-level meetings about Iran between August, 1985 and December 7, such a discussion would have had to have taken place in the summer of 1985, when no one else seems to remember debates about the legality, as opposed to the policy wisdom, of selling arms to Iran. [redacted] (b)(3) GJ Some corroboration for McFarlane's dating is provided by the Israeli official Kimche, who recalls that McFarlane raised "American arms exportation laws" as a possible impediment to U.S. replenishment of the TOWs that Israel was about to send Iran in August 1985 (see Government of Israel Historical Chronology at 22-23). In addition, North's notes reflect that on November 17, 1985, McFarlane told him to take care of Israel's need to replenish its stocks of Hawk missiles and "See buying agent in N.Y. to keep orders under $14M" (AMX001865) -- an unmistakable reference to the reporting requirements of the AECA. A similar discussion occurs in a paper prepared by Dr. Gaffney of the Department of Defense around November 19, 1985 (see ALZ012546.)

January 17, 1986 documents signed by the President (see id. at 39-77). On January 7, 1986, Associate General Counsel George Clarke wrote a memorandum to Mr. Sporkin that attached and described the William French Smith opinion, a 1983 CIA memorandum indicating that CIA could ship weapons to Iran, and legal memoranda which concluded that neither the Trading with the Enemy Act nor the Neutrality Act barred Presidentially-authorized actions (ER 46,027-28). The final paragraphs of Mr. Clarke's memorandum discuss the AECA and the National Security Act:

> 3. One problem could arise, however, if the equipment to be transferred constitutes articles the U.S. has provided to a second country through the Foreign Assistance/Arms Export Control Acts. The memo at Tab D indicates a country may use material it has received through such U.S. Foreign aid only for self defense and may retransfer it only in certain limited circumstances that require U.S. consent, notice to Congress, and the eligibility of the third country recipient for U.S. Aid. Terrorist activities, among other things, can disqualify a potential recipient.
>
> 4. Finally, as you know, Congress recently passed the Intelligence Authorization Act to require reports of weapons transfers valued in excess of 1 million dollars as significant anticipated intelligence activities "for the purpose of" and, therefore, in accordance with, section 501 of the National Security Act. A copy of the relevant language is at Tab E.

At the 0930 National Security Briefing held on January 7, 1986, Admiral Poindexter re-acquainted President Reagan with the Weinberger/Shultz objections to the Iran Initiative. A decision was made to convene the NSC principals later that day, and on this occasion Attorney General Meese was invited to attend. At the January 7

meeting Secretaries Weinberger and Shultz restated their legal and policy objections to going forward. Mr. Meese has testified that he concluded, on the basis of the William French Smith opinion, that the arms sales could proceed under the National Security Act (see July 28, 1987 Meese Cong. Tr. 5-6, 34-35; July 29, 1987 Meese Cong. Tr. 40-41, 45-46). Either then (see July 28, 1987 Meese Cong. Tr. 35), or at a January 16 meeting held outside the President's presence (see June 24, 1987 Sporkin Cong. Tr. 90), Secretary Weinberger stated that he wished to have his General Counsel check that conclusion. On January 16 Admiral Poindexter, Secretary Weinberger, Attorney General Meese, Director Casey, and Mr. Sporkin again discussed the William French Smith opinion, the appropriateness of the National Security Act avenue, and the issue of Congressional notification. (See July 28, 1987 Meese Cong. Tr. 35; June 24, 1987 Sporkin Cong. Tr. 88-90.) At or about January 16, Attorney General Meese recalls being told either directly by Secretary Weinberger, or indirectly through Admiral Poindexter, that DoD's General Counsel concurred that the National Security Act could be used (see July 28, 1987 Meese Cong. Tr. 35). Mr. Sporkin recalls

hearing of DoD's concurrence through Director Casey on January 17 (see June 24, 1987 Sporkin Cong. Tr. 90).[17/]

On January 17, 1986 the conclusion that the provisions of the AECA could be overridden by a Presidential finding was formally conveyed to President Reagan. The January 17 memorandum from which Admiral Poindexter briefed the President outlines a January 2, 1986 Israeli proposal that they sell military materiel to Iran with the "assurance that they will be allowed to purchase U.S. replenishments for the stocks that they sell to Iran" (AKW001918). The memo goes on to say

> We have researched the legal problems of Israel's selling U.S. manufactured arms to Iran. Because of the requirement in U.S. law for recipients of U.S. arms to notify the U.S. government of transfers to third countries, I do not recommend that you agree with the specific details of the Israeli plan. However, there is another possibility. Some time ago Attorney General William French Smith determined that under an appropriate finding you could authorize the CIA to sell arms to countries outside of the provisions of these laws and reporting requirements for foreign military sales. The objectives of the Israeli plan could be met if the CIA, using an authorized agent as necessary, purchased arms from the Department of Defense under the Economy Act and then transferred them to Iran directly after receiving appropriate payment from Iran.
>
> The Covert Action Finding attached at Tab A provides the latitude for the transactions indicated above to proceed.

[17/] Secretary Weinberger remembers generally that "I had some legal work going on and was pointing out that -- all the objections . . . my advice was that we could sell to a government agency, the CIA, that we did covert operations this way" (June 17, 1987 Weinberger Cong. Dep. 53), although Weinberger continued to be "very unhappy" with the operation (id. at 56).

Thus, by January 17, 1986 the President knew, or was in a position to know, that legal advice on the applicability of the AECA had been sought, and that the legal issue had been resolved in favor of proceeding under the National Security Act.

In my judgment, the 1981 Smith opinion, the 1984 letter debate between Chairman Boland and DCI Casey, and the fall 1985 addition to the Intelligence Appropriation Act supply ample ground to support the narrow conclusion that the National Security Act could be used to authorize covert arms sales without regard to the substantive and reporting requirements of the AECA. Where the Meese/Sporkin analysis broke new ground was in combining this conclusion with their previous determination, discussed in Section I(A) above, that the National Security Act notification provisions could also be deferred -- thereby steering the entire Congressional notification process into a blind alley.[18/] In this respect, their advice was considerably more aggressive than any of the

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[18/] When his attention was drawn to this result of his advice, Mr. Sporkin's response was to stress that he never recommended that no notice, as opposed to deferred notice, would be given of the Iran arms sales (see June 24, 1987 Sporkin Cong. Tr. 86-87, 204), and that the decision on deferral should only be made after consultation among the relevant Cabinet officials (see id. at 86-87, 196). Mr. Sporkin, of course, left CIA for a seat on the federal bench on February 7, 1986 (see id. at 97-98), and thus was in no position to influence the fact that the "deferral" stretched into eleven months. For his part, Attorney General Meese has testified that notification of Congress "was a separate issue" from the use of a finding to override the AECA, and that "everybody there was in agreement" that the President should delay notification of Congress (July 29, 1987 Meese Cong. Tr. 45-46).

authorities that support it. The Smith opinion, quoted in full at page 28 above, ends with the statement that "In order to satisfy the Congressional reporting requirements imposed on [the Director of Central Intelligence] by the Intelligence Oversight Act of 1980 (50 U.S.C. 413), the House and Senate Intelligence Committees should be informed of this proposal and the President's determinations." At least on its face, the Boland-Casey correspondence also does not contemplate a situation in which no Congressional reporting will take place; rather, the entire debate concerns whether the broad reporting mandated by the AECA, or the more restricted reporting to the Congressional intelligence committees that is described in 50 U.S.C. § 413, would be used for certain arms transfers. Finally, it is rather obvious that the 1985 addition to the Intelligence Authorization Act was intended to ensure that at least the intelligence committees would receive prior notice of covert arms transactions, and not to enshrine a mechanism by which no one in Congress would learn of such a transfer until well after it was completed. See H.R. Rep. No. 99-106 at 9-12 (1985), reprinted in 1985 U.S. Code Cong. & Adm. News at 954-57.

However aggressive the Administration's position may have been, from the President's perspective the three salient facts are that by January 1986, apparently-competent legal authorities had been consulted, that their advice had been received, and that their views on the appropriate legal structure of the Iran Initiative would not have appeared

patently frivolous to a layman. Except for the continual "stretching out" of the deferral of Congressional notification through 1986, there is no indication that the President was alerted before November to any facts that would have led him to believe that the Iran Initiative had diverged materially from the legal structure that he and his advisors had approved in January. Accordingly, I see no basis on which President Reagan could be found liable for a conspiracy deceitfully to impede or impair government functions by electing to pursue the 1986 Iran arms sales without complying with the arms export statutes.

2. The 1985 Israeli Shipments and the Replenishment of Israeli Stocks

As should be obvious from the foregoing, the very legal advice that supported the President's authorization of the 1986 arms sales to Iran tends to cast doubt upon the legality of his approval of the 1985 Israeli shipments of U.S.-manufactured TOW and Hawk missiles to Iran. Indeed, Admiral Poindexter's January 17, 1986 memorandum for the President specifically recites that there are "legal problems" associated with "Israel's selling U.S. manufactured arms to Iran" (AKW001918). Yet that is precisely how the Iran Initiative was structured during much of 1985 -- with no consultation with legal counsel, no written Finding, and an unwritten Presidential determination that Congress would not be notified (see [redacted] July 2, 1987 McFarlane Cong. Dep. 34-37). (b)(3) GJ

In addition to approving the Israeli sales themselves, during 1985 the President approved a commitment by the United States to allow Israel to purchase replacements for the 500 TOW missiles that Israel had sent to Iran in September.[19/] The retroactive Iran Finding signed on December 5, 1985 says nothing about either the 1985 TOW shipment or the related replenishment of Israeli stocks.[20/] While the

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19/ [redacted] (b)(3) GJ

20/ The 1985 Finding purported to authorize the following:

> The provision of assistance by the Central Intelligence Agency to private parties in their attempt to obtain the release of Americans held hostage in the Middle East. Such assistance is to include the provision of transportation, communications, and other necessary support. As part of these efforts certain foreign materiel and munitions may be provided to the Government of Iran which is taking steps to facilitate the release of the American hostages.
>
> All prior actions taken by U.S. Government officials in furtherance of this effort are hereby ratified. (ER 10,148.)

Mr. Sporkin, who was responsible for the preparation of the 1985 Iran Finding, has testified that he was not aware of the August/September 1985 Israeli TOW shipment (see June 24, 1987 Sporkin Cong. Tr. 129), and that the "ratification" language in that Finding was not intended to cover the TOW transaction (id. at 130). Whether the retroactive Finding could have covered replenishing Israeli stocks for the November 1985 Hawks is somewhat academic because the transaction failed, all but one of the Hawks were later returned to Israel, and no replenishment was needed. [redacted]

(continued...)

actual shipment of replacement TOWs to Israel did not take place until 1986, the January 17, 1986 Finding is also silent about replenishment for earlier transactions; any effort to stretch the general verbiage of that finding ("Provide funds, intelligence, counter-intelligence, training, guidance and communications and other necessary assistance to these elements, groups, individuals, liaison services and third countries in support of these activities," AKW001921) to cover replenishment is substantially undercut by Admiral Poindexter's accompanying memorandum, which portrays the January 17 Finding as an alternative to precisely that course of action. There are, then, but two ways in which one may defend the legality of the 1985 arms sales: first, to conclude that those sales did not in fact violate the AECA; second, to rely upon other Presidential powers as excusing, or making unnecessary, compliance with the arms export statutes.

Neither the Israeli TOW sale to Iran nor the November 1985 Hawk missile transfer can be reconciled with the substantive provisions of the arms export statutes. Although both transactions satisfied the statutory

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20/ (...continued)

[redacted]

(b)(3)
GJ

requirement that any retransfer of U.S.-manufactured weapons to a third country (Iran) be approved by the President, see 22 U.S.C. §§ 2753 (AECA), 2314 (Foreign Assistance Act), those statutes state that the President may not give his approval unless, among other things, the third country provides written assurances concerning its own subsequent retransfer of the weapons. See 22 U.S.C. §§ 2753(a), 2314(e). There is no indication that the President paid the slightest heed during 1985 to the limitations on retransfers of weapons pursuant to the arms export statutes.[21/]

[21/] It is less clear that the President knowingly violated the Congressional reporting requirements for arms exports with respect to the 1985 arms transactions. Because 22 U.S.C. § 2753(e) says only that Congress must be notified immediately if the President learns about a retransfer that occurred without his consent -- and says nothing explicitly about whether Congress must be notified immediately if the President has consented in advance to a transfer that violates the statutory terms on which consent may be given -- it is perhaps arguable that the reporting requirement of that particular sub-section was not violated. There is, to be sure, no evidence that the President made any report to Congress concerning "implementation" of either Israeli's original retransfer agreement as to the weapons, or the nonexistent retransfer agreement by Iran, see 22 U.S.C. § 2753(a). The dollar value of the August/September 1985 TOW shipment (whether measured by the price to Ghorbanifar of roughly $5 million, the roughly $2 million original cost of 500 TOWs to the United States, or the replacement cost which would have fallen between those figures), would have placed it well below the $14 million threshold at which prior reporting to Congress is required. Under the AECA, the November Hawk transaction should have been reported to Congress in advance, whether one applied the sales price to Ghorbanifar of $300,000 per missile (which equalled the original cost of the weapons to the U.S. (see ALZ012546)), or the replacement unit cost of $437,700 (see id.) to the full 80-missile or 120-missile size at which that shipment was conceived. However, there is no concrete proof that the President was told how many missiles Israel planned to ship, or what their dollar value might be (cf. March 6, 1991 Regan 302 at 6); in the event, any "violation" of AECA's advance

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Is it possible to excuse compliance with the arms export statutes by conceptualizing the 1985 transactions, like their 1986 successors, as having been carried out under the authority of the National Security Act, albeit in a less formal (because uncounselled and unwritten) manner? In a December 17, 1986, Memorandum for the Attorney General entitled "Legal Authority for Recent Covert Arms Transfers to Iran," Cong. Ex. EM-69 (hereinafter "OLC Opinion"), the Office of Legal Counsel of the Department of Justice determined that one could support at least the August/September 1985 TOW shipment under the National Security Act. In OLC's view, the "Israeli sales" could be characterized as Israeli assistance, essentially as a conduit, to a U.S. covert action that the President had complete Constitutional power to conduct.[22/] If one combines

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[21/] (...continued)
reporting requirement would have been rather inchoate because only eighteen missiles were actually shipped, leaving the value of the November Hawk shipment well below $14 million.

[22/] In arriving at its characterization of Israel as a "conduit", OLC made a number of factual assumptions, including the absence of any Israeli profit in the transaction (OLC Opinion at 16 n.38), the supposedly fungible nature of the weapons that Israel shipped to Iran and any replacements that Israel later received from the United States (id. at 16, 17), and the notion that when it shipped the TOWs, Israel did so at the request of the United States as opposed to on her own initiative (id. at 17). As the Iran/Contra Select Committee Report notes at page 418, none of these three assumptions is correct. However, the only one of those assumptions that President Reagan would arguably have known to be false is the third. ([redacted] (b)(3) GJ In the context of the somewhat-confused origins of the Iran Initiative, the distinction among "Israeli-initiated", "cooperative", and "U.S.-initiated" covert actions, standing alone, is in my (continued...)

this characterization of the transaction with the conclusions that no covert action finding is required by statute absent CIA involvement in the activity (see OLC Opinion at 6) and that E.O. 12333 could not be violated by the President himself (see OLC Opinion at 14), or if one takes the more aggressive view that a Presidential finding need never be written down at all (see OLC Opinion at 7-12), one can look at the entire 1985 phase of the Iran Initiative as having been conducted legally under a series of oral determinations by the President. This conclusion is not affected by the November 1985 addition to the 1986 Intelligence Authorization Act -- which defined transfers of arms worth more than $1 million as "significant anticipated intelligence activities"[23/] and thus explicitly brought them into the Congressional notification scheme of 50 U.S.C. App. § 413 -- because an accompanying OLC memorandum takes the position (as did Attorney General Meese and Mr. Sporkin) that the law "should be read to leave the President with discretion to postpone informing the committees until he determines that the success of the operation will not be jeopardized

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22/ (...continued)
judgment too thin a reed on which to support a charge that a President violated the criminal law.

23/ 50 U.S.C. § 415 applies to transfers by "any department, agency or other entity of the United States involved in intelligence or intelligence-related activities" (see §415(b)(1)), which OLC concluded would embrace the NSC (see OLC Opinion at 5 n.10). Thus, for purposes of this statute it would be immaterial whether or not CIA was involved in the transaction.

thereby." (See December 17, 1986 Memorandum for the Attorney General entitled "The President's Compliance with the 'Timely Notification' Requirement of Section 501(b) of the National Security Act," Cong. Ex. EM-70, at 27.)

OLC's after-the-fact conclusions are not a particularly persuasive gloss on how the civil law ought to operate; indeed, at the Iran/Contra hearings neither Mr. Meese nor Mr. Sporkin gave unequivocal support to the casual definition of Presidential findings which the OLC Opinion adopts. (See July 29, 1987 Meese Cong. Tr. 230-31; June 24, 1987 Sporkin Cong. Tr. 121-22, 137-38, 220-21.) The OLC Opinion does, however, illustrate the difficulties, where Presidential action is concerned, in drawing the types of hard-and-fast conclusions as to legal violations that would have to precede any consideration of applying 18 U.S.C. § 371 to these facts. When those difficulties are viewed in the light of the underlying complexity of the arms export statutes and the absence of any evidence of a malicious purpose to violate the law when the President authorized his hostage-release initiative, criminal prosecution on the basis that the 1985 transactions violated the arms export statutes does not appear warranted.

3. The Shipment of Arms to Iran after August 27, 1986

As noted at pages 26-27 above, in August 1986 Congress passed the Omnibus Diplomatic Security and Antiterrorism Act of 1986 (hereinafter "DSAA"). Section 509

of the DSAA provided that absent a Presidential waiver (which must be reported to Congress in advance of any otherwise prohibited transaction), items on the Munitions List could not be exported "to any country which the Secretary of State has determined . . . has repeatedly provided support for acts of international terrorism" -- a condition which had been satisfied as to Iran since 1984.[24/] This legislation became effective on August 27, 1986. By that date, the "U.S." phase of the Iran Initiative, conducted pursuant to the January 17, 1986 Finding (see Section I(B)(1) above), had been underway for seven months. All of the Iran arms transfers except one -- the October 1986 shipment of 500 TOW missiles to the Iranian Second Channel -- had already taken place. The question addressed in this subsection is whether the President's approval of the October 1986 TOW shipment, following the enactment of the DSAA, carries criminal ramifications.[25/]

[24/] Although the President may not be chargeable with anything more than constructive knowledge of the Secretary of State's actual determination that Iran was a supporter of terrorist nations as that determination appeared in the Federal Register, on July 8, 1985 Mr. Reagan had given a speech in which he declared Iran to be part of a "confederation of terrorist states . . . a new, international version of Murder Incorporated." (See New York Times, July 9, 1985, at A12, col. 1.)

[25/] By August 1986, Mr. Sporkin was well out of the Executive Branch; Attorney General Meese apparently was not consulted concerning any relationship between the DSAA and the Iran Initiative at any time before November 1986 (see July 28, 1987 Meese Cong. Tr. 8-10). The only evidence we have of President Reagan's awareness of the DSAA is his Signing Statement regarding the new law, which focuses entirely upon those portions of the statute aimed at enhancing the security

(continued...)

To begin once again with the civil law, the December 17, 1986 OLC Opinion, discussed in the previous section, considered whether the DSAA undermined OLC's conclusion that the 1986 Iran Initiative was lawful (see OLC Opinion at 13-14). OLC determined that the DSAA, like the AECA, was inapplicable to weapons sales conducted pursuant to a Presidential Finding because the President

> 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. (OLC Opinion at 14.)

The OLC Opinion, however, overlooks the interplay between Section 509 of the DSAA and 50 U.S.C. § 415. As OLC correctly notes elsewhere in its analysis (see OLC Opinion at 1-4), Section 415, first enacted in November 1985 and made permanent one year later, recognized that arms transfers could be authorized under the National Security Act. Of particular interest here, Section 415 also provided that

> An intelligence agency may not transfer any defense articles or defense services outside the agency in

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25/ (...continued)
of U.S. citizens abroad and promoting intra-government and international cooperation against terrorism, and does not mention Section 509 at all. (See Statement by President Ronald Reagan Upon Signing H.R. 4151, 22 Weekly Comp. Pres. Doc. 1124, September 1, 1986, reprinted in 1986 U.S. Code Cong. & Adm. News at 1965-66.) [redacted] (b)(3) GJ

> conjunction with any intelligence or intelligence-related activity for which funds were denied by the Congress. See 50 U.S.C. § 415(a)(3).

A substantial argument can be made that the DSAA's flat prohibition upon the shipment of Munitions List items to terrorist states (absent a Presidential waiver, reported to Congress in advance) defines such shipments as "an intelligence or intelligence-related activity for which funds were denied by Congress". If so, then any attempt by the President to authorize such a shipment as a covert action under the National Security Act without notifying Congress would be illegal per se, no matter what one's general views might be on the President's obligation to report covert actions to Congress.

While substantial, this argument is not sufficiently conclusive to serve as the basis for a criminal prosecution of the President. First, giving due regard to the standard rule that the acts of subsequent legislatures are a suspect source in construing prior statutes, the fact remains that when Congress overhauled Section 509 of the DSAA in 1989, the amended statute contained an explicit exemption for transactions that are subject to National Security Act reporting requirements (see page 26 n.14 above). Such a provision would, of course, be completely meaningless if one defined any arms transaction falling within the DSAA as being per se prohibited under the National Security Act pursuant to 50 U.S.C. § 415(a)(3).

Second, and bearing more directly on the issue of criminal intent, Section 509 of the DSAA amended Section 6(j) of the Export Administration Act, 50 U.S.C. § 2405 (j), which deals generally with the U.S. exports to terrorist countries. Section 509(a)'s membership in the family of arms export statutes was confirmed when it was codified at 22 U.S.C. § 2780. If President Reagan understood the Attorney General's legal advice of January 1986 to say that the January 17 Finding overrode the arms export laws (see Section I(B)(1) above), then he could reasonably have understood those laws to remain overridden as long as the Finding remained in effect, no matter how their substantive provisions might change [redacted] (b)(3) GJ [redacted] If, as is rather more likely, the President simply never focused on Section 509 of the DSAA as impacting on the Iran Initiative, then the record on criminal intent would lack the element of deliberateness (or deceitfulness) that is in my judgment essential before one can elevate a civil law violation into a criminal conspiracy under Section 371. Under either scenario, the enactment of the DSAA does not alter my conclusion that the sale of weapons to Iran, as authorized by President Reagan, did not give rise to criminal liability on his part.

II. Military and Paramilitary Assistance to the Contras, 1984-October 1986

Summary of the Facts

Beginning in 1981, the Reagan Administration invested a great deal of effort and political capital in activities directed against the Sandinista government of Nicaragua. Those activities ran the gamut from Presidential rhetoric to financial and military support of armed resistance to the Sandinistas by a number of groups known collectively as the "Contras". In the middle of this spectrum lay such measures as economic sanctions against Nicaragua, diplomatic tactics aimed at isolating Nicaragua from other nations, and the strengthening of the economic, military and intelligence capabilities of the Central American countries that adjoin Nicaragua -- Honduras, El Salvador, and Costa Rica.

The military aspect of this effort, which was run until October 1984 (and again after October 27, 1986) as a covert action by the Central Intelligence Agency, provoked considerable controversy with members of Congress who opposed the Administration's policy. Particularly during 1984-1986, the Administration's opponents were capable of commanding a majority in the House of Representatives, and thus were in a position to deny the President the use of appropriated funds for the support of the Contras.

Between 1981 and 1983, the debate focused more on the purpose than on the fact of United States support to the Contras. The question was whether the goal of that support -- and, by extension, the goal of the Contras themselves -- was solely to bring an end to aggressive behavior by the Sandinista government toward neighboring countries (principally, the Sandinistas' efforts to export their Marxist politics through the shipment of arms to revolutionary elements in those countries), or also included bringing an end to the Sandinista government itself. Beginning in 1981 and continuing through most of 1983, U.S. policy toward Nicaragua, and the covert activities that supported that policy, were characterized publicly and to the Congress as being aimed at halting Nicaraguan aggression, and not at the destabilization of the Sandinistas' rule within Nicaragua. In late 1982, Congress wrote the supposedly-limited objectives of U.S. assistance to the Contras into law in the first of the so-called "Boland Amendments", which prohibited the Administration from using Congressionally-appropriated monies "for the purpose of overthrowing the government of Nicaragua". Pub. L. No. 97-377, § 793 (1982).

The CIA's activities during this period were authorized under an evolving series of covert action findings signed by President Reagan and duly reported to the Congressional intelligence committees. The first, addressed to "Central America" generally, was signed on March 9, 1981 and, in terms of military activity, simply authorized CIA to

"Provide all forms of training, equipment and related assistance to cooperating governments throughout Central America in order to counter foreign-sponsored subversion and terrorism" (AKW032131). This Central America finding -- which apparently remained in force well past 1986 -- was supplemented in December 1981 by a more specific finding that was plainly directed at Nicaragua (see ER 13147). This document authorized CIA to

> Support and conduct . . . paramilitary operations against the Cuban presence and Cuban-Sandinista support infrastructure in Nicaragua and elsewhere in Central America. Work with foreign governments as appropriate to carry out the program.

In the summer of 1983, as Congressional opposition to Contra assistance continued to build, a successor to the December 1981 finding was negotiated between CIA Director Casey and the Senate Select Committee on Intelligence. The product of those discussions was a "Nicaragua Finding," ultimately signed by the President on September 19, 1983, that was highly specific in its description of both the scope of CIA's paramilitary activities and the goals of U.S. policy toward Nicaragua (see Defendant's Exhibit 11 in United States v. Poindexter). In pertinent (and declassified) part, it authorized CIA to

> . . . in cooperation with other governments, provide support, equipment and training assistance to Nicaraguan paramilitary resistance groups as a means to induce the Sandinistas and Cubans and their allies to cease their support for insurgencies in the region; to hamper Cuban/Nicaraguan arms trafficking; to divert Nicaragua's resources and energies from support to Central American

> guerrilla movements; and to bring the Sandinistas into meaningful negotiations and constructive, verifiable agreement with their neighbors on peace in the region.
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> . . . in cooperation with other governments, provide support to opposition leaders and organizations . . . . Provide training, support and guidance to Nicaraguan resistance forces . . . .
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> Seek support of and work with other foreign governments and organizations as appropriate to carry out this program and encourage regional cooperation and coordination in pursuit of program objectives. CIA may support . . . in order to hamper arms trafficking through Nicaragua, support indigenous resistance efforts and pressure the Sandinistas.

The September 1983 Finding went on to state that

> U.S. support to paramilitary activities in Nicaragua will be terminated at such time as it is verified that: (a) the Soviets, Cubans, and Sandinistas have ceased providing through Nicaragua arms, training, command and control facilities and other logistical support to military or paramilitary operations in or against any other country in Central America, and (b) the Government of Nicaragua is demonstrating a commitment to provide amnesty and nondiscriminatory participation in the Nicaraguan political process by all Nicaraguans.
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> The Director of Central Intelligence is directed to ensure that this program is continuously reviewed to assure that its objectives are being met and its restrictions adhered to.

During the same period, growing Congressional opposition to the Contra-assistance program led members of the Reagan Administration to muse about what might be done if