

17 March 1988
OCA88-0278

MEMORANDUM FOR THE RECORD

SUBJECT: Hearing on Antiterrorism and Arms Export Amendments
Act, H.R. 3651

1. On 17 March 1988, three subcommittees of the House Committee on Foreign Affairs held a joint, open hearing on the above-captioned bill. The three subcommittees were the Subcommittee on Arms Control, International Security and Science; the Subcommittee on International Economic Policy and Trade; and the Subcommittee on International Operations. Members appearing were Representatives Berman, Fascell, Broomfield, Solomon, Bereuter, Hyde, and Lantos, although all but Berman left shortly after delivering brief remarks. Testifying were Paul Bremer and Allen Holmes of the Department of State, with backup witnesses from the Departments of Defense and Commerce as well as the Agency. [redacted] Associate General Counsel [redacted] Agency's backup witness. Also attending were [redacted]/OCA and myself. Attached are the opening statements and other materials handed out at the hearing.

2. In his opening remarks, Rep. Broomfield questioned the ability of the bill to combat terrorism. He was interested to hear the Administration's view and questioned whether the bill can be amended. He noted that industry is also concerned because of the potential of foreign retaliation against U.S. firms as a result of the bill's coverage of foreign subsidiaries. He hopes Rep. Berman is receptive to amendments.

3. Rep. Berman said the bill reaffirms the prohibition on exports to terrorist states. For the most part, it is not new law, but restated law. It is intended to close loopholes and ensure uniform standards. It does not eliminate the President's discretion. He noted that he has agreed to make some changes. These address the question of the bill's extraterritorial reach, modifying the sanctuary test; the State Department would have discretion to put a country on the terrorist list. The "reason to believe" standard has been changed to a "reason to know" standard. The presumption of denial regarding the legality of licenses has been abandoned. Section 7 has also been changed.

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4. Rep. Solomon said that he is not sure this legislation is the way to go. He commends Rep. Berman for removing solely from the Department of Commerce jurisdiction over exports of national security concern.

5. Rep. Hyde said he is "not indifferent" to the problems with the first draft. The staff is still working on it and he wants to help.

6. Rep. Berman said that the bill recognizes the role of covert operations in arms exports. The Administration position regarding Iran-contra is not that the laws were fine, but the people violated the laws. Rather, the position is that perhaps an action was not permissible under one law, but was under another. He said he would look at the matter of the bill limiting transfers to non-terrorist nations. He wants a sensible, bipartisan bill.

7. In speaking with the staff after the hearing, we learned that the bill will be marked up in two weeks. The staff indicated their willingness to work with the Agency in addressing its concerns. However, they also indicated that the Agency must "pick its poison" in terms of either notifying the House Foreign Affairs Committee or the House Intelligence Committee of munitions transfers it makes, even routine transfers to assets in non-terrorist countries.





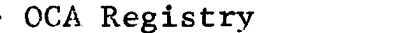
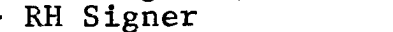
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Attachments

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CONGRESSMAN HOWARD BERMAN

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137 Cannon House Office Building • Washington, D.C. 20515 • 202-225-4695
14600 Roscoe Blvd., Suite 506 • Panorama City, CA 91402 • 818-891-0543

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CONTACT: Gene Smith
202-225-4695

FOREIGN AFFAIRS COMMITTEE HOLDS HEARING ON BEEFED-UP BAN ON ARMS SALES TO TERRORIST NATIONS

WASHINGTON -- The House Foreign Affairs Committee today heard testimony on legislation to bar arms transfers to nations officially found to support international terrorism.

The legislation was characterized by its author, Rep. Howard Berman (D-CA), as "a clean-up after the fiasco that dirtied the reputation of the United States with the embarrassing and unwise arms-for-hostages policy."

The bill, H.R. 3651, closes existing and potential loopholes in present arms export laws. It amends several key statutes to ensure that uniform standards regulate arms exports to terrorist nations and to strengthen notification to the Congress of all arms exports. H.R. 3651 remedies many of the deficiencies in current law highlighted by the report of the Iran-contra Committees.

Original cosponsors of this important bipartisan bill are Rep. Dante Fascell, Chairman of the House Foreign Affairs Committee and Vice-Chairman of the House Iran-contra Select Committee; Rep. Lee Hamilton, Chairman of the House Iran-contra Select Committee; and Rep. Henry Hyde, Republican Member of the Select Committee and Member of the Foreign Affairs Committee. Since its introduction, 50 additional Members of the House have cosponsored the legislation.

INFORMATION MEMORANDUM

H.R. 3651
Antiterrorism and Arms Export Amendments Act

March 17, 1988

During the last year a clear need has developed to reaffirm two fundamental principles of American foreign policy embodied in statute law: 1) the prohibition on the export of military weapons to states which support international terrorism, and 2) the obligation of the executive branch to keep Congress informed of both overt and covert exports of military weapons to foreign governments. While these principles are clear, and while they have been publicly supported by the Reagan Administration and Congress, the implementation of them pursuant to the law remains in doubt.

Rep. Howard Berman has authored the Antiterrorism and Arms Export Amendments Act (the "Act") to reaffirm this country's prohibition on exports of military weapons to terrorist states and to require more detailed and periodic reporting by the executive of arms exports. The Act, introduced on November 18, 1987, with the co-sponsorship of Reps. Dante Fascell, Lee Hamilton, and Henry Hyde, now has more than 50 co-sponsors. It makes little substantive change in the law. The Act is largely a restatement of existing law. Its intent is to close potential loopholes and revise certain existing provisions to ensure that uniform standards are present throughout the U.S. Code. The Act makes no attempt to reform the personnel or structure of the National Security Council or the State, Commerce or Defense Departments. Nor does it seek to revolutionize the manner in which arms exports are approved by the

The Act would amend the Arms Export Control Act, the Foreign Assistance Act of 1961, the Export Administration Act and the Hostage Act of 1868. The legislation includes the following major provisions:

--Section 40 of the Arms Export Control Act, which prohibits exports of arms to terrorist states, would be significantly reinforced. Prohibited transactions are explained in detail, both with respect to U.S. Government activities and private transactions. The President could waive the prohibitions for specific transactions, but only with prior, detailed reporting to Congress (on a classified basis if necessary). A clear line is drawn between overt transfers to terrorist states and arms transfers which are part of approved intelligence activities. The amended Section 40 also would have criminal penalties similar to those found in the Export Administration Act.

--Section 6(j) of the Export Administration Act, which regulates the export of goods and technology of military or "terrorist" value to terrorist states, would be amended to 1)remove the current \$1,000,000 annual threshold amount under which the executive currently does not have to report to Congress exports of such goods and technology to terrorist states, and 2)require validated licenses for all such exports to terrorist states and 30-day prior notification to Congress of the proposed issuance of a validated license.

--Section 620A of the Foreign Assistance Act of 1961, the "antiterrorism" section of that Act, would be amended to conform it with other changes in the law, particularly the revision of Section 40 of the Arms Export Control Act.

--Sections 3(a) and 38 of the Arms Export Control Act and Section 505 of the Foreign Assistance Act of 1961 would be amended to require that before the President consents to the transfer of military weapons from a recipient country to a third country, he must give prior notification to Congress.

--Section 36(a) of the Arms Export Control Act would be amended to require quarterly reports (classified if necessary) from the President of inter-agency transfers of military weapons which will not ultimately be disposed of within the United States.

--The Hostage Act of 1868 would be amended simply to clarify that the President's authority to take action to release hostages cannot be carried out in a manner which would otherwise be prohibited by law.

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STATEMENT OF REP. HOWARD BERMAN

before a joint meeting of the Subcommittees on
Arms Control, International Security and Science
International Economic Policy and Trade
International Operations
of the
Committee on Foreign Affairs

March 17, 1988

During the past year we have all been reminded of two fundamental principles of American foreign policy. They have been traditionally promoted by both the Administration and Congress. These principles are already embodied in statutory law:

First, it is illegal to export munitions to states which support international terrorism, as determined by the Secretary of State.

Second, Congress must be kept informed of both overt and covert exports of munitions to other countries.

The investigations into the Iran-contra affair by the Tower Commission and the Senate and House select committees in 1987 uncovered abuse of these two principles by high-ranking Administration officials and private United States citizens. Administration lawyers issued one legal opinion after another (some oral, others written) justifying actions which common-sense readings of the law found highly suspect. Somehow the law was construed (or ignored) by zealous officials and (I am sure) well-

intentioned patriots to permit what years of bipartisan efforts had determined was contrary to the foreign policy interests of this country.

I should know. In the summer of 1986 my colleague, Henry Hyde, and I authored an amendment to the Arms Export Control Act. It read very simply: "[I]tems on the United States Munitions List may not be exported to any country which the Secretary of State has determined...has repeatedly provided support for acts of international terrorism." The President may waive this prohibition. But he must determine that the export is important to the national interests of the United States. And he must notify Congress. Henry and I pushed this amendment as a logical extension of the Administration's antiterrorism policy, particularly as it was reflected in Operation Staunch against Iran.

The Berman-Hyde amendment became the law of this land, with broad bipartisan support, on August 26, 1986. Two months later the Administration shipped 500 TOW missiles into Iran. The President did not inform Congress. Ensuing months produced conflicting interpretations of our amendment and of other prohibitions in the U.S. Code.

The considerable debate that erupted during the Iran-contra investigations over the meaning and intent of arms export and antiterrorism laws led me to re-examine some of the laws. I looked not only at the Berman-Hyde amendment but at other provisions in three statutes which attempt to regulate exports of arms and certain goods and technology to terrorist states.

What I found was law which over the years has become riddled with overlapping standards that can lead to confusion and misuse. There is no single standard in the law for:

- (1) determining whether a state supports international terrorism;
- (2) identifying which U.S. official should make that determination;
- (3) identifying which arms are subject to restrictions;
- (4) identifying the criteria that empower the President to waive statutory restrictions; and
- (5) adequately informing Congress of arms exports, including covert exports.

It may well be that expert lawyers in the State, Commerce and Defense Departments have constructed an elaborate framework for interpreting these inconsistent provisions. But that does not make good law either for the Administration (witness the Iran-contra affair) or for private American citizens who look to the law for guidance.

H.R. 3651 reaffirms this country's prohibition on exports of munitions to terrorist states and requires more detailed and periodic reporting by the executive branch of certain arms exports. This bill makes little substantive change in existing law. It is more in the character of a restatement of the law. For the most part it is not new law, but restated law.

In fact, ^{the Administration} may testify today that the bill restates much of standing policy now being faithfully enforced by the executive branch. I would applaud such testimony. You certainly should not interpret this bill as a criticism of your efforts to enforce

current law. The intent of H.R. 3651 is to close potential loopholes and restate certain existing provisions to ensure that uniform standards are present in the U.S. Code.

Let me emphasize what H.R. 3651 does not do.

--It does not impose blanket sanctions on terrorist states. Its focus is strictly on arms exports and on certain goods and technology of military or "terrorist" value to terrorist states, items already regulated by current law.

--It does not eliminate the President's discretion. In fact, in some cases it broadens the President's discretion.

--H.R. 3651 does not impose management reform on the Administration. There is no tinkering with the management or structure of the National Security Council or the State, Commerce or Defense Departments.

--It does not revolutionize the manner in which arms exports are approved by the U.S. Government.

What H.R. 3651 does do is make selective amendments (many quite technical) to the Arms Export Control Act, the Foreign Assistance Act of 1961, the Export Administration Act and the Hostage Act of 1868.

--Section 40 of the Arms Export Control Act, the section which prohibits exports of arms to terrorist states, is significantly reinforced. Prohibited transactions are explained in greater detail, both for the U.S. Government and for U.S. persons. The President's waiver authority can be exercised, but Congress must be notified in advance.

--A clear line is drawn between overt and covert arms transfers to terrorist states. If the arms transfer is covert, then it must be reported to Congress in accordance with the National Security Act.

--Sections 3(a) and 38 of the Arms Export Control Act and Section 505 of the Foreign Assistance Act of 1961 would be amended to require that before the President consents to the transfer of military weapons from a recipient country to a third country, he must give prior notification to Congress.

--Section 36(a) of the Arms Export Control Act would be amended to require quarterly reports from the President of inter-agency transfers of military weapons which ultimately are disposed of overseas.

--Section 6(j) of the Export Administration Act, which regulates the export of goods and technology of military or "terrorist" value to terrorist states, would be amended (1) to eliminate the current \$1,000,000 annual threshold amount under which the executive currently does not have to report to Congress, and (2) require validated licenses for all the covered exports and 30-day prior notification to Congress.

--The Hostage Act of 1868 would be amended simply to clarify that the President's authority to take action to release hostages cannot be carried out in a manner which would otherwise be prohibited by law.

Since the bill was introduced last November, extensive discussions have taken place at the staff level to address the concerns of the executive branch, private industry and Members on the other side of the aisle.

There has been so much progress that a substitute bill has been drawn up. It was provided to our witnesses yesterday. (It is also in the folders for Members.) I realize that the executive branch and some of my colleagues have not yet had time to digest the substitute, so I want to point out a few key revisions which respond to our witnesses' concerns:

--The substitute greatly restricts the extraterritorial reach of the prohibitions on arms transfers found in the original bill.

--When a state is put on the terrorist list, the substitute protects the financial interests of suppliers, preserves the validity of presidential consents for third-country transfers, and protects the interests of arms exporters who have export licenses.

--The substitute adopts a stream-lined criterion for classifying a country on the terrorist list. What concerned so many, the "sanctuary test", has now been included simply as an example of the operative test: that a government repeatedly support acts of international terrorism.

--The substitute adopts a "reason to know" standard for prohibitions which apply to United States persons, rather than a "reason to believe" standard found in the original bill.

--The substitute resurrects from current law the "significant contribution to military potential" standard which applies to the exports of goods and technology to terrorist states. The substitute also abandons the presumption of denial for validated licenses which was found in the original bill.

--The substitute does not require quarterly reports from the Department of Defense about inter-agency transfers of arms which are transferred in connection with intelligence activities and are reportable under the National Security Act.

--The substitute permits the President to take a country off the Secretary of State's terrorist list immediately if there is a fundamental change in its government and it ceases supporting international terrorism. This provides the President far greater flexibility than he has under current law.

There will be more discussion as this bill approaches mark-up. We intend to work closely with the Administration so that the bipartisan effort already put into H.R. 3651 can be continued.

I welcome Mr. Bremer and Mr. Holmes and look forward to their testimony today. Thank you, Mr. Chairman.