Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. agreement	Agreement on Defense Cooperation between the United Arab Emirates and the United States (14 pages)	10/08/1992	P1/b(1)
002. paper	re: Pan Am 103 (1 page)	n.d.	P1/b(1)
003. paper	re: Terrorist Incident Response (1 page)	n.d.	P1/b(1)
004. memo	re: Financial Activities (2 pages)	04/30/1993	P1/b(1)
005a. memo	re: Fed's Legal Authority to Deny Acquisitions (2 pages)	04/30/1993	P5 6107
005b. memo	Virgil Mattingly to Alan Kreczko re: Authority of the Board (12 pages)	04/28/1993	P5 6108
006. cable	re: Hizaballah Terrorist Threat (2 pages)	08/25/1992	P1/b(1)
007. cable	re: No Final Decision (2 pages)	08/25/1992	P1/b(1)
008. cable	re: Comments (2 pages)	08/24/1992	P1/b(1)
009. paper	re: Assessment of the Terrorist Threat (4 pages)	08/14/1992	P1/b(1)
010. paper	re: Coordinating Sub-Group Agenda Items (9 pages)	11/30/1992	P1/b(1)
011. paper	re: Security Structures (11 pages)	02/08/1991	P1/b(1), P5

COLLECTION:

Clinton Presidential Records
National Security Council
Transnational Threats (Richard Clarke)
OA/Box Number: 3786

FOLDER TITLE:

Terrorism [3]

Kelly Hendren
2006-1164-F
kh832

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

6107

April 30, 1993

FROM: ALAN KRECZKO

SUBJECT: Fed's Legal Authority to Deny Acquisitions

Attached is the Federal Reserve's analysis of its authority to deny acquisitions because the applicant engages in conduct inconsistent with the national security of the United States. Its main conclusions:

-- The legal standard is whether the public benefits of the proposed acquisition outweigh possible adverse effects.

  o These terms are followed in the statute by illustrative examples, all of which are financial or economic in nature and relate to the purposes of the statute to prevent harm to competitors or consumers. This would support a narrow reading of the factors relevant to the balancing test.

  o Nevertheless, on balance, the language provides sufficient leeway to include in the balancing test the adverse effects on national security of strengthening a company that engages in activity contrary to U.S. security. This position would be strengthened if the acquisition would directly enhance the capability of the acquiror to act contrary to US national security interests.

-- While the Fed must ultimately do the balancing of benefits and harms, it is not competent to assess the national security issues absent a decision "by the U.S. Government" on such issues.

-- The Board is required to support its decisions with "substantial evidence". The Fed questions whether the current information meets that standard, particularly since it may not be disclosable. (However, Justice attorneys tell me that there have been cases where benefits have been denied on the basis of information not disclosable to the applicant.) The litigation posture would be improved if the Fed had an "adverse national security determination" by a responsible government agency.

-- The other legal hook -- the integrity or competence of the bank's management -- does not appear available in this case, since it does not appear the bank's practices have deviated from generally accepted standards.

-- The Fed lacks authority to terminate existing, licensed operations unless it can find a violation of law or unsound practice in the U.S.

-- The Fed understands that the UK has broad discretion in reviewing foreign bank applications, but does not know whether the UK has used that discretion in cases like this one.

COMMENT

The Fed's analysis is fair, emphasizing the legal uncertainties in the situation. While acknowledging the Bank Holding Act might be used in this case, it makes clear that would require someone else's national security determination. The Fed argues in any event that "it is not clear the BHC Act is the appropriate vehicle for making the determination".

I agree with the Fed's legal analysis. I also agree with their question about the desirability of relying on the BHC Act, even if arguably available. Introducing the "national security" assessment into the equation risks inconsistent and politicized decisions by regulatory agencies on foreign acquisitions. It may be preferable to allow the Fed to assess the license application on traditional banking factors, taking the CIA report into account only to the extent it affects those factors (e.g. the competence or integrity of the management). If the acquisition gives us national security concerns, Exon-Florio provides a better vehicle for addressing them.

6108

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D. C. 20551

COPY

J. VIRGIL MATTINGLY, JR.
GENERAL COUNSEL

TO: Alan Kreczko

FROM: Virgil Mattingly VM

DATE: April 28, 1993

SUBJECT: Authority of the Board under Section 4(c)(8) of the Bank Holding Company Act of 1956

This memorandum discusses whether the Board has the authority to deny an application under section 4(c)(8) of the Bank Holding Company Act ("BHC Act") on the grounds that the applicant engages in conduct that, although apparently not illegal, may not be consistent with the national security interests of the United States.[1/]

1. SECTION 4(c)(8) OF THE BANK HOLDING COMPANY ACT

A. <u>Summary</u>.

Section 4(c)(8) of the BHC Act requires Federal Reserve Board approval before any bank holding company, or foreign bank with U.S. banking activities, may acquire more than 5 percent of the shares of a nonbank company engaged in activities in the United States. The standard the Board must apply in determining whether the acquisition is permissible is whether the activity of the nonbank company is closely related to banking and whether the public benefits of the proposal outweigh possible adverse effects.

Our research has disclosed no foreign relations, trade or other statute that would grant the Board independent authority to deny an application under the BHC Act on grounds that a firm has engaged in activities contrary to the U.S. national security. In each of the relatively few statutes dealing with national security interests, the statute itself, or its implementing orders or regulations, sets forth a detailed scheme of operation under the direction of the executive branch, which allows the executive to take action to protect the national interest. None of these detailed schemes of operation appears to create any formal mechanism by which the Board could obtain either the

[1/] For purposes of this memorandum, it is assumed that the applicant bank holding company is a foreign person but not a foreign government.

COPY

expert opinion of appropriate government officials or the full range of information that would be necessary to make a determination in this area.

While section 4(c)(8) states that the Board must consider whether "benefits to the public" outweigh "possible adverse effects," it also directs the Board to conduct its analysis and base its decision on whether the acquisition at issue or the conduct of the proposed activity itself by the holding company may be expected to produce public benefits or adverse effects. This focus is consistent with the intent of the statute that the Board not allow bank holding companies to expand into nonbanking activities that would result in unfair or decreased competition, unsound banking practices or other adverse effects.

In addition, the terms "benefits to the public" and "possible adverse effects" are each followed by illustrative examples. All of the examples are financial or economic in nature and relate to the purposes of the statute to prevent harm to competitors and consumers of financial services. This raises the issue of whether the Board may consider benefits and adverse effects that go beyond financial, economic or banking matters to include general public policy considerations. The legislative history of the statute is silent on whether the Board may take into account generalized policy considerations such as the national security. We can find no evidence in the statute, its purpose or its legislative history that the BHC Act was designed as a vehicle to adjudicate these types of national security concerns. Moreover, unlike other provisions of the BHC Act, section 4(c)(8) does not establish a mechanism that would allow the Board to gather other expert opinion on the issue. For example, with respect to acquisitions of banks, the Board is required to provide notice of an acquisition to the Justice Department's Antitrust Division in order that the competitive effects of the proposal may be considered. There is no comparable mechanism to allow the Board to obtain the necessary input or advice on matters of public policy that go beyond banking or economic considerations.

On the other hand, over the years, section 4(c)(8) has been construed broadly. Approval of an application under section 4(c)(8) confers a license on a bank holding company to engage in financial activities in the United States. If there was a determination by appropriate government authorities that the activities of an applicant were so contrary to the national security of the United States as to constitute a threat, an argument can be made under the language of section 4(c)(8) itself that the Board, in considering whether to grant the license, may consider that the matter constituting a threat to the national security of the United States is an adverse effect, even if the matter is not unlawful under the laws of the United States or the firm's home jurisdiction. There appears to be nothing in that section's legislative history that would indicate that matters that have been determined to affect adversely U.S. national security interests cannot be taken into account by the Board as part of the balancing of public benefits and adverse effects. In addition, to the extent the conduct of the company is contrary to generally accepted banking standards or practices, such conduct would reflect adversely on managerial integrity and competence and could be taken into account under the managerial standard of the Board's regulation implementing section 4(c)(8).

On balance, we believe that, if there has been a determination by the appropriate authorities that the applicant company has engaged in activities that threaten the national security interests of the United States, there would be sufficient leeway in the "public benefits" and "adverse effects" balancing test of section 4(c)(8) to include all circumstances related to a proposal that may produce adverse effects, such as conferring a benefit on and strengthening the financial position and capability of a company that engages in activities contrary to the U.S. national security. This position would be strengthened to the extent the firm to be acquired was engaged in activities important to the U.S. financial system or its acquisition would enhance the capability of the acquiror to act contrary to the national security of the United States.

We also believe, however, that the Board does not have unilateral discretion under the BHC Act to determine the U.S. public interest in matters relating to national security interests, including whether denial of an application under the BHC Act is an appropriate response to a threat to such interests, nor does the Board have the expertise, facilities or capabilities to gather the information necessary to make such determinations or conduct the required analysis and balancing of such complex matters.

B. <u>Background</u>.

Section 4 of the Bank Holding Company Act ("BHC Act") prohibits the acquisition by bank holding companies of the voting shares of non-banking entities unless the acquisition is specifically exempted. The International Banking Act of 1978 ("IBA"), as amended, makes this provision applicable to foreign banks as if they were bank holding companies.[2] The principal exemption to that prohibition is found in section 4(c)(8), which permits the holding company to own:

> shares of any company the activities of which the Board after due notice and opportunity for a hearing has

---

[2] 12 U.S.C. § 3106(a).

> determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto . . .. In determining whether a particular activity is a proper incident to banking or managing or controlling banks the Board shall consider whether its performance by an affiliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices . . ..

12 U.S.C. § 1843(c)(8).

The determination made by the Board is interpreted as involving two discrete elements.[3] First, the Board must determine whether the non-banking activity in question is "closely related" to banking. The types of activities the Board has found to be permissible under this standard are financial activities, including consumer and commercial financing, credit card business, trust activities, leasing, securities brokerage and limited securities underwriting and dealing activities, and various forms of financial advice. For purposes of the instant case, we are assuming the activity is "closely related" to banking and may be approved as long as the application meets the second part of the test.

Second, the Board must determine whether the performance of the "closely related" activity at issue by the holding company would result in "public benefits" that outweigh "possible adverse effects." This second determination is made by the Board upon individual consideration of the circumstances of each applicant under section 4(c)(8). The purpose of the public benefits test in section 4(c)(8) was to ensure that the entry by bank holding companies into new areas of business would not result in harm to financial markets or market participants and their customers through, for example, unfair competition, undue concentration of resources or unsound banking practices. In other words, Congress intended that bank holding companies not be

---

[3] *See Securities Indus. Ass'n v. Board*, 468 U.S. 207, 217-18 (1984) ("*Schwab*"); *NCNB Corp. v. Board*, 599 F.2d 609, 610-11 (4th Cir. 1979); *Ass'n of Bank Travel v. Board*, 568 F.2d 549, 551-52 (7th Cir. 1978); *Alabama Ass'n of Insurance Agents v. Board*, 533 F.2d 224, 235, 245-47 (5th Cir. 1976); *National Courier Ass'n v. Board*, 170 U.S.App.D.C. 301, 304-05, 516 F.2d 1229, 1232-33 (1975); *Independent Bankers Ass'n of Georgia v. Board*, 170 U.S.App.D.C. 278, 287-88, 516 F.2d 1206, 1215-16 (1975); *Bank America v. Board*, 491 F.2d 985, 988 (9th Cir. 1974).

permitted to expand into nonbanking lines of business unless the Board concluded that the public would not be adversely affected.

The Board has implemented this section in its Regulation Y, which restates the statutory test of public benefits outweighing adverse effects and cites the examples enumerated in the statute. Regulation Y also states that this consideration of whether public benefits outweigh possible adverse effects includes an evaluation of the financial and managerial resources of the applicant, including its subsidiaries. 12 C.F.R. § 225.24. It appears that the firm in question has the financial capability and managerial competence to engage in the proposed activity in a safe and sound manner. We also have no information that the foreign firm is in violation of any relevant law or regulation. If, however, the conduct of the activities that may be contrary to the national security of the United States deviates from generally accepted standards of banking practices, such conduct would reflect adversely on the company's managerial competence and integrity and, on this basis, may be taken into account under the Board's regulation implementing section 4(c)(8).

C. <u>Discussion</u>.

The question presented is whether, in the Board's balancing of the public benefits of a proposal against possible adverse effects, the standards under section 4(c)(8) of the BHC Act are sufficiently broad to permit consideration of the fact that an applicant foreign firm has lawfully engaged in activities outside the United States that are contrary to the national security of the United States.

There are two considerations. First, if the conduct of the applicant that is contrary to the national security of the United States can be determined to be unacceptable from a banking or prudential point of view, this could reflect adversely on the integrity and competence of the company's management, a relevant consideration under section 4(c)(8) and the Board's implementing regulation. In this case, it is not clear that the applicant's management lacks integrity or competence or that it has deviated from standards of banking or financial prudence because it has chosen to take advantage of business opportunities that are permitted under the laws of its home jurisdiction and other jurisdictions in which it operates. Although the Board or the U.S. government may disagree with the business ethic displayed, it is not apparent that the management lacks the ability to operate in conformance with U.S. requirements. In this regard, until the U.S. government made certain actions illegal for U.S. persons, at least according to press reports, some U.S. banks and other firms apparently engaged in the same type of conduct the applicant now engages in outside the United States and that is at issue here.

Second, if a determination was made by the competent U.S. authorities that the actions by the applicant are damaging to the national security, section 4(c)(8) may, in our view, be broad enough to encompass consideration by the Board of that finding in evaluating the public benefits and adverse effects of the proposal. Because a threat to the national security of the United States would constitute a kind of "possible adverse effect[]" to the public, the language of the statute would seem to authorize the Board to take these interests into account in determining whether adverse effects of the proposal outweigh public benefits. This conclusion would rest on the grounds that granting the foreign firm a license to acquire the nonbank company to conduct business in the United States contributes to the foreign firm's financial strength, competitiveness, and ability to deliver products to its customers. Approval of the acquisition would result in adverse effects in the United States because the firm's capacity to continue to engage in the activities that are contrary to U.S. national security interests would be enhanced.

Thus, the effects could be considered adverse effects on the public under the standards of section 4(c)(8) and, if severe enough, could warrant denial in the absence of any countervailing benefits to the public. It should be noted, however, that section 4(c)(8) establishes a balancing test, and denial of the application could itself produce adverse consequences to the U.S. national interest that would need to be taken into account. As discussed below, it is not clear that the Board has the capability to assemble and balance all of the national security considerations and consequences regarding such an action, nor is it clear that the Board and the BHC Act are the appropriate vehicles for making the determination.

The conclusion that adverse effects resulting from national security considerations may be considered under section 4(c)(8) would be even stronger to the extent the proposed acquisition is of a company that is important to the United States's financial system. In addition, the connection to the statutory factors would be clear in situations where the application before the Board involved a request for approval of an activity that could be used directly to support the conduct that was determined to be contrary to the U.S. national security. In the instant case, the proposed activity does not appear to be related to, or to be able to be used in furtherance of, the applicant's conduct that is at issue.

On the other hand, it should be noted that the Board has never had occasion to apply the public benefits test in such a broad fashion. The cases considered by the Board have generally included consideration of only the types of public benefits and adverse effects enumerated in the statute and the applicant's compliance with law. Moreover, a narrow reading of the scope of the public benefits test can be supported by the language of section 4(c)(8) which specifies that it is the performance by the applicant of the particular nonbanking activity that is the subject of the application that must be evaluated in balancing public benefits against adverse effects. In other words, one could argue that the Board's consideration under section 4(c)(8) is limited to an analysis of the particular acquisition and its effects on the public interest and that conduct of the applicant overseas unrelated to the proposed acquisition or activity is not a relevant consideration.

While there is significant legislative history on the meaning of section 4(c)(8) in general and with respect to the specific examples of adverse effects enumerated in the statute, there is little guidance as to whether adverse effects unrelated to banking or economic matters or compliance with law are to be considered a proper part of that section's "public benefits" test. There is nothing in the legislative history that specifically would include a threat to national security or to other non-economic national interests as a proper basis for denying a section 4(c)(8) application. There is also nothing in the legislative history that specifically would exclude such consideration.[4/]

In cases that have considered the public benefits test under section 4(c)(8), courts have recognized that the list of factors relating to benefits and adverse effects is not exhaustive.[5/] The cases, however, have not considered or opined on the nature of other factors that may be taken into account by the Board.

Principles of statutory construction can be used to support a narrow reading of the public benefits test of section 4(c)(8). In this case, the question is whether a general term, *i.e*, "possible adverse effects," is limited by reference to a series of examples, all of which constitute a category, *i.e.*

4/ The legislative history does contain a discussion of each of the specific examples given in the "public benefits" test. *See* H.R. Conf. Rep. No. 1747, 91st Cong., 2d Sess. 16-22 (1970).

5/ "**Nonexhaustive** examples of such benefits (greater convenience, increased competition, and gains in efficiency) and adverse effects (undue concentration of resources, decreased or unfair competition, conflicts of interest, and unsound banking practices) were listed by Congress in the statute." (emphasis added) Alabama Ass'n of Ins. Agents v. Board, 533 F. 2d 224, 246 (5th Cir. 1976).

"economic" or "banking" considerations."[6] The principle of *ejusdem generis*[7] would have us attempt to reconcile specific and general words, so that all words in a statute can be given effect, all words can be construed together and no words will be superfluous. *See Sutherland* § 47.17. For that reason, one might argue that, from a strict statutory construction point of view, section 4(c)(8) would not permit the denial of an application on the grounds of national security that are not related to the conduct of the particular activity for which approval is sought.

The common sense counter-argument to this *ejusdem generis* argument is that when Congress enacted the 1970 amendments to section 4(c)(8), it was more concerned about banking and economic effects than anything else, and therefore mentioned them in the specific examples. If that was the case, it would not be surprising if the legislative history were silent as to whether other types of public interest considerations were to be taken into account. It does not appear to be reasonable to be able to deny an application because of localized competitive effects and yet to be unable to deny an application if the national security of the United States is threatened. On the other hand, one could also argue that Congress could have assumed that, if particular activities of foreign firms were so inimical to the U.S. national interest, the situation would be addressed by other statutes, not by a banking statute administered by a banking agency.

It appears to us that the chief difficulty in this case is that it would be extremely difficult for the Federal Reserve to make a reasoned assessment as to whether denial of this application would be in the public interest in order to address the potential harm to the national security occasioned by the applicant's conduct overseas. A number of factors must be taken into account and balanced in determining whether a firm from a friendly country should be barred from conducting the proposed activity in the U.S. market on the basis of national security interests. The determination of what constitutes the "national security interests" of the United States and how these interests can be best protected is not a determination that the Board is specifically authorized or has the expertise to make. These kinds of decisions are generally committed to other arms of the U.S. government. There is no clear definition of what may constitute a threat to the national interests of the United

---

[6] The examples could be read to encompass a more narrow category than "economic considerations." For example, they could be read to constitute only considerations of a "competitive or prudential nature."

[7] *See Sutherland Stat. Const.* § 47.18 (5th ed. 1992) ("*Sutherland*").

States and any definition may change with circumstances. For example, actions of a foreign company outside the United States may be contrary to stated U.S. government positions. The U.S. executive branch, however, which has statutory authority to prevent foreign acquisitions in the national interest, has rarely prevented a foreign firm from entering and competing in the U.S. market, even when the firm has acted contrary to the U.S. national interest. In the case of Toshiba, which violated U.S. law in a way that clearly threatened national security, the sanctions were limited in scope and duration.[8/]

There are also counter-arguments that denial of the application would not be in the public interest because the firm is a person of a country friendly to the United States, which conducts substantial trade with the United States, with which the United States has various trade and investment treaties, and in which U.S. persons and firms have substantial economic interests that could be vulnerable to retaliation by the foreign country. Denial of the application, for other than prudential, financial or other banking-related reasons, could have serious repercussions bilaterally and in the context of the GATT talks. These reasons may suggest that the Board should appropriately limit its review of applications under the BHC Act to consideration of banking and economic factors.

Finally, the Board is required to support its decisions with "substantial evidence."[9/] The information available to the Board at this point does not constitute substantial evidence because, if challenged, the Board is not permitted to use such information to support its decision in court. Even if the Board were able to use the information, there is a serious question as to whether a court would find that the Board had substantial evidence on which to base a finding of adverse effects outweighing public benefits, in the absence of a determination by the responsible government agencies that the foreign firm's activities were damaging to the national security and that denial

---

[8/] Toshiba Machine Company ("Toshiba Machine") and Kongsberg Trading Company and certain of its affiliates ("Kongsberg") sold technologically advanced milling machines and computer equipment to the Soviet Union in violation of export controls promulgated by the Coordinating Committee for Multilateral Export Controls. The President imposed a three-year prohibition on (i) the importation of all products produced by, and (ii) the procurement of goods and services by the U.S. government from, Toshiba Machine and Kongsberg. The sanctions did not extend to affiliates of Toshiba Machine doing business in the U.S. *See* Exec. Order No. 12661, 54 Fed. Reg. 779 (1988).

[9/] 12 U.S.C. § 1848.

of the application is an appropriate response to the harm to national security.

D. Conclusion.

Section 4(c)(8) is probably broad enough to allow a wide range of factors to be taken into account in considering whether a proposed acquisition will produce benefits to the public that outweigh possible adverse effects. In this case, however, the adverse effects are not clearly defined because there has been no finding by the responsible authorities of the U.S. government that the activities of the foreign firm in question constitute a threat to the national security and that denial of the application is an appropriate response to address that threat.

It appears that, in order for the Board to take such actions into account, there would need to be a decision by the U.S. government that an action taken by a foreign firm adversely affects the U.S. national security and that the firm taking such action should not be permitted to take advantage of opportunities in the U.S. market as a means to deal with the damage to the national security. If there was no such decision by the U.S. government and the Board was to deny an application based on national security grounds, the Board would be in the position of determining U.S. policy in this area, a responsibility that rests elsewhere in the U.S. government.

2. OTHER FOREIGN BANK APPLICATIONS

The case before the Board arises under section 4(c)(8) of the BHC Act which deals with non-bank acquisitions and activities. The Board also has many cases before it by foreign banks to establish banking offices in the United States. The standards governing these applications are different from the test established under section 4(c)(8) of the BHC Act.

Under section 7(d) of the International Banking Act of 1978, as amended ("IBA"),[10] a foreign bank may not establish a branch in the United States without the prior approval of the Board.[11] In making its determination on an application, the

---

[10] 12. U.S.C. § 3105(d).

[11] The statute governs the establishment by a foreign bank of a "branch," "agency" or "commercial lending company" in the United States. A branch is an office that takes domestic deposits and engages in other banking activities. An agency is similar to a branch in all respects except that it cannot accept domestic deposits. A commercial lending company is a state-
(continued...)

Board must find that the foreign bank is subject to supervision by its home country authorities on a worldwide consolidated basis. The Board may also take into account a number of other factors, including consideration of the needs of the community to be served.

The standard under section 7(d) relating to the needs of the community is probably broad enough to encompass many of the same factors as the Board may consider under section 4(c)(8) of the BHC Act. Therefore, in acting on a branch application, the Board could likely take into account as an adverse consideration the fact that an appropriate government authority has determined that the foreign bank engaged in activities outside the United States contrary to the U.S. national security and that, in response, the foreign bank should not be permitted to expand in the United States.

With respect to the Board's ability to terminate the existing U.S. operations of a foreign bank, under section 7(e) of the IBA (12 U.S.C. § 3105(e)), the Board may require a foreign bank to terminate the U.S. operations of a state-licensed branch in two instances: (1) if the foreign bank is found not to be subject to consolidated supervision by home country authorities; or (2) there is reasonable cause to believe that the foreign bank or an affiliate has committed a violation of law or engaged in an unsafe or unsound banking practice in the United States <u>and</u> the continued operation of the bank's branch in the United states would not be consistent with the public interest or the purposes of federal banking statutes (emphasis added).[12/] Thus, in cases of termination, the Board must first find a basis for believing that a violation of law or unsound practice has occurred in the United States before it may consider the public interest factors associated with terminating the branch's operations.

3. LAWS OF OTHER COUNTRIES

You also requested information on the kinds of considerations other countries take into account in licensing foreign banks to operate in their markets. The best information we have is with respect to the United Kingdom.

[11/] (...continued) chartered institution that exercises bank-like powers. For purposes of this memorandum, the term "branch" is used to encompass these other entities as well.

[12/] The Board may recommend to the Comptroller of the Currency that the operations of federally-licensed branches or agencies of a foreign bank be terminated, subject to the same standards as apply to state-licensed offices.

Under the Banking Act 1987, the Bank of England must authorize banks to take deposits. The Bank of England must consider a series of standards, including whether every director, controller or manager of the bank is a fit and proper person for the position he holds. In making this determination, the Bank of England may consider the previous conduct and activities in business or financial matters of the person and in particular any evidence that the person has:

-- committed any offense involving fraud or other dishonesty or violence;

-- engaged in any business practices that appear to the Bank of England to be deceitful or appressive (sic) or otherwise improper (whether unlawful or not) or which otherwise reflect discredit on his method of conducting business;

-- engaged in or been associated with any other business practices or otherwise conducted himself in such a way as to cast doubts on his competence and soundness of judgement.

Except for these factors, the other standards that must be considered all appear to relate to financial factors rather than general public policy concerns. Nevertheless, the Bank of England has wide latitude to exercise its judgment. If an application is denied, the applicant may appeal although we know of no such appeal ever having been made. We also do not know the standard of review that would be applied.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001a. memo	Steven Simon and Alan Kreczko to Anthony Lake re: NSC Views on the House Counterterrorism Bill (3 pages)	08/03/1995	P5	6109
001b. memo	Alan Kreczko to Anthony Lake re: Foreign Sovereign Immunities Act (4 pages)	07/14/1995	P5	6110
001c. memo	Conrad Harper to The Secretary of State re: Anti-terrorism Bill (6 pages)	07/11/1995	P1/b(1)	
001d. memo	Legislative Referral Memorandum #1870 [partial] (1 page)	06/30/1995	P3/b(3)	
002. memo	Legislative Referral Memorandum #1180 [partial] (1 page)	05/03/1995	P3/b(3)	
003. memo	Legislative Referral Memorandum #1131 [partial] (1 page)	04/28/1995	P3/b(3)	

COLLECTION:
Clinton Presidential Records
National Security Council
Transnational Threats (Richard Clarke)
OA/Box Number: 3547

FOLDER TITLE:
Terrorism - Money and Counter-Terrorism Act [2]

Kelly Hendren
2006-1164-F
kh868

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

6109

August 3, 1995

COPY

Natl Sec Advisor has seen

ACTION

MEMORANDUM FOR ANTHONY LAKE

THROUGH: RICHARD A. CLARKE by AK

FROM: STEVEN SIMON by AK
ALAN KRECZKO AK

SUBJECT: NSC Views on the House Counterterrorism Bill

Issue for Decision

Whether to authorize Andy Sens to transmit to OMB the attached statement of NSC views on the House version of the Comprehensive Terrorism Prevention Act of 1995.

Background

The Senate has passed a counterterrorism bill; a version has also been reported out of the House judiciary committee. OMB has solicited comments on the House version (Tab C).

Notwithstanding the legislative movement to date, the bill is in some trouble. Conservatives and liberals have united in opposition to some of the provisions. According to DOJ, Gingrich has told Hyde not to bring it to the floor until he is certain he has the votes to pass it quickly. Therefore, Hyde is likely to hold the bill until he knows the Administration will support it without significant floor fights. Ab Mikva thinks there is some possibility that the House will simply let the bill drift, and turn its attention instead to a crime bill.

Given the situation, DOJ thinks that while we can try to fix some provisions quietly, we need to keep the floor fights to an absolute minimum. At this point, DOJ believes that there are only two items potentially worth a floor fight:

-- (1) failure to require that taggants be included in explosives within a year or so.

-- (2) provisions amending the Foreign Sovereign Immunities Act to permit a wide array of suits against foreign states for torture, terrorism and extrajudicial killing. However, DOJ -- which views this as primarily a foreign policy issue -- would greatly prefer that the State Department (or we) find a way to convince Berman to drop this, as a floor fight will probably be a loser (You are familiar with this provision from Alan's previous memo's (Tab B). We need a clear decision that NSC opposes this provision, and some high-level work with Berman to get him to drop it. A floor fight would be virtually impossible to win).

TL — as you requested, I have an ordinary person's explanation of why we should oppose this provision; I will give it to you tomorrow. @

While agreeing with DOJ on these two major issues, we think there are three other serious flaws in the House version. Given the political pressure to produce counterterrorism legislation and Justice's tendency to focus on procedural legal issues at the expense of the broader policy implications of the bill, it is important that NSC communicate its own views to OMB. In highlighting these provisions, we are not necessarily saying they warrant a floor fight at this point; we simply want to identify them to OMB and DOJ as important issues.

The draft statement of NSC views (Tab A) focuses on four problematic sections:

- The Bryant amendment, which would require prior public notice of the designation of terrorist organizations. We are clearly going to have to accept some judicial review of our designations of terrorist organizations for which fund-raising is prohibited. However, providing prior public notice and comment would give groups a clear warning, enabling them to disguise bank accounts, reconfigure or go underground before law enforcement agencies can act.

- The Frank amendment, which would subject to judicial review the Secretary of State's determination that an applicant for entry into the US is excludable as a representative of a terrorist organization. Visa decisions are not currently reviewable. This new restriction to the existing authority of consular agents and the Secretary of State would tie us in litigation knots in situations where our priority is keeping a potential terrorist out of the country.

- The Berman amendment to the Foreign Society Immunity Act.

- posse commitatus. Drafters in both the House and Senate have tried to capture our objective in permitting a waiver of posse commitatus restrictions during CBW attacks, while keeping the role of the military at a minimum. However, probably inadvertently, the provisions adopted have serious flaws: (1) they impose new procedural barriers to existing authority by which the military can already provide assistance to U.S. law enforcement agencies in a CBW incident; and (2) they remove some substantive authority (regarding searches) that the military already has to provide assistance in CBW incidents. In our view, the little additional authority provided by Nunn's formula (limited seizure authority) is not worth the steps backward in existing authority. DOJ and DOD working levels agree. However, DOJ says the Nunn language was accepted at a political level in DOJ and can only be changed with Nunn's concurrence. We're willing to make a run at Nunn, but if he will not make changes, we are going to need to make an awkward decision on whether it wouldn't be better to drop the posse commitatus provisions altogether.

Finally, our statement to OMB would indicate our support for a provision in the Senate, but not House version, permitting limited counterterrorism assistance to any country, notwithstanding any other provision of law. This narrowly crafted provision would permit us to provide assistance to Pakistan to assist in the apprehension of Kanzi. Our statement would also indicate a provision needing some slight modification to conform to our Refugee Convention obligations.

Concurrence by: Bill Danvers by AK

RECOMMENDATION

That you approve the transmittal to OMB of the attached statement of NSC views on HR 1710.

Approve ____ Disapprove ____

Attachments
Tab A Statement of NSC Views
Tab B Memo from Alan Kreczko to Anthony Lake re FSIA
Tab C Incoming Correspondence from OMB

5378

6110

NATIONAL SECURITY COUNCIL
WASHINGTON, D.C. 20506

July 14, 1995

COPY

ACTION

MEMORANDUM FOR ANTHONY LAKE

FROM: ALAN KRECZKO AK

SUBJECT: Foreign Sovereign Immunities Act

We need guidance on three issues: position; congressional tactics; and fall-back.

Background

The Senate version of the terrorism bill includes a Dole-sponsored provision which would permit Americans to sue States on the terrorism list for acts of terrorism, torture, or extrajudicial killing, in U.S. courts, and, to attach their property here in execution of judgment.

The version reported out of the House Judiciary Committee contains a Berman-sponsored provision which is substantially the same, except that it applies to any state, not just States on the terrorism list.

Each bill is retroactive as well as prospective.

Decisions

1. Position. The State Department has now informed OMB that it opposes both the House and Senate versions of the bill. However, State says it is getting mixed messages about the WH position. We need your concurrence to reaffirm our opposition to both provisions.

Conrad Harper's analysis of the bills and their possible effects is at Tab I. If anything, its "parade of horribles" is too limited. For example, he doesn't include that the bill would permit Vietnam vets to sue here for torture during the Vietnam War, and to attach Vietnamese assets in satisfaction, and what effect that might have on normalization of relations.

In assessing the bill, it is important to recognize that default judgments are likely to be the rule. The assertion of jurisdiction in the bills is unprecedented; foreign states are jurisdiction in the bills is unprecedented; foreign states are not going to show up in U.S. courts to have the reasonableness of their officials' acts judged. This raises the possibility of jury awards against foreign states that we do not believe are responsible for terrorist acts (e.g., against Syria for Pan Am 103), undermining our effort to hold the real perpetrator responsible and complicating our relations with the party found responsible. Moreover, such suits will proceed on the basis of partial information, since we will not release our most sensitive intelligence information for a civil suit.

Finally, the bill could have serious reciprocity implications for us: e.g., USG sued in Mexican courts by family of a Mexican shot crossing the U.S.-Mexican border.

These considerations have led past Administrations (Republican) to oppose legislation along the lines of that proposed by Berman. We should oppose also.

2. Congressional Tactics. State intends to approach Berman to see if he will drop the provision. It is also possible that HIRC will seek sequential referral of this item, because of its foreign policy implications.

However, if these approaches fail, the issue may become whether to seek a floor vote. Hyde may cooperate; he made clear he was uneasy with the Berman provision, although he allowed it to be voted out of committee.

State says the WH has told it no floor votes, given the President's interest in moving the terrorism bill. We think this is a midread of WH Legislative instructions, which were only to avoid marginal floor votes.

3. Fall-back. Given apparent congressional sentiment, we may not succeed in getting the Berman and Dole provisions struck altogether. We need at a minimum to get back to the Senate version, which at least is limited to terrorist-supporting States. We should also seek (1) to cut it back to only acts of terrorism (not extrajudicial killing and torture, which are not as well-defined) and (2) to add a sunset clause. Even such a limited bill would be problematic, however.

State is considering that our first offer (assuming efforts to delete the provisions altogether fail) should be to accept a provision which is limited to suits for aircraft sabotage directed against U.S. aircraft. Their logic is two-fold: (1) the Senate provision is driven by Pan Am 103; there is no chance of getting the provision removed without offering the families a remedy for Pan Am 103; and (2) there is at least some basis to law already permits Americans to sue foreign States for torts committed in the United States; it is a relatively small step to add torts committed against U.S. airplanes.)

In our view, this is the wrong offer. If we can not prevail in securing deletion of the provisions altogether, we would suggest instead that Congress authorize us to vest blocked Libyans assets here and distribute them to those families of the victims who seek compensation now. In our view, this is preferable to establishing a new right to sue foreign States in our courts, even if limited to acts of aircraft sabotage:

-- Creating a right to sue is tantamount to a decision to turn Libyan assets over to the families, since we assume some family members will sue, and easily prevail in U.S. courts in establishing Libyan complicity.

-- Creating a right to sue carries with it the risk of suits against Iran or Syria for Pan Am 103. Vesting Libyan property through a statute, rather than opening up the possibility of court action, is consistent with the view that the Executive branch is better positioned than the courts, which will have only partial information, to determine who was responsible for Pan Am 103.

-- Does not set the precedent of turning over to the courts issues with such serious potential foreign policy implications.

If the Executive branch is not doing enough to assert the rights of Americans, we should do more, but we should not turn that aspect of our foreign policy over to another branch of government.

Concurrence by: Mort Halperin, Mike Andricos, Rand Beers, and David Satterfield

RECOMMENDATION

1. That you agree that we should oppose both the House and Senate versions, and that we can inform both Justice and OMB that this is a major problem in the terrorism bill.

Approve _____ Disapprove _____

2. That, subject to coordination with Pat Griffin, we inform State we do not oppose a floor vote if necessary to get a satisfactory outcome on this provision.

Approve _____ Disapprove _____

3. That our first counteroffer be to vest blocked Libyan assets in the U.S. and make them available to interested families of the victims of Pan Am 103.

Approve _____ Disapprove _____

Attachments
Tab I Conrad Harper's Analysis