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ON FOREIGN RELATIONS

Mr. Chairman, I welcome the committee's invitation to testify on the subject at hand. Following the Supreme Court's recent decisions declaring the legislative veto to be unconstitutional, this hearing, I understand, is convened to consider the questions, "Where do we go from here, specifically with respect to arms export control legislation?"

I have some comments and suggestions to offer the committee on this question, which I will get to in a minute. First, however, I think it is important for the committee also to consider the prior question, namely, "How did we get here in the first place?"

As one who was deeply involved on a staff level in the evolution of arms transfer control legislation over a period of 14 years, I would like to begin by addressing the second question, how did we get here in the first place? The answers to that question will, I believe, help the committee to clarify the question of what is the legitimate basis of congressional authority and involvement in the issue of transfer of American-made arms to foreign countries.

The Congress has a very legitimate and important role to play in this matter, in my judgment. However, my own involvement notwithstanding, I also believe that the laws currently on the books incorporate many of the characteristics of legislation at its worst. There is much room for improvement.

Moreover, I always held the view that the legislative veto was unconstitutional, and in my staff capacity, I consistently opposed inclusion of that device in legislation that I worked on.

From a historical perspective, there are two distinct phases to the evolution of current legislation controlling arms transfers.

The first phase was a direct product of the Vietnam war. It is well known that the Senate Foreign Relations Committee was, in an institutional sense, the principal national focus of opposition to the Vietnam war policies of the Johnson and Nixon administrations.

The committee's national preeminence in that regard was attributable, in my judgment, to the fact that the committee had a unique claim to constitutional legitimacy in its challenge to the war policies of the President. This legitimacy derives from the special authority which the Constitution itself explicitly reserves to the Senate in foreign affairs and as the Senate's duly constituted agent in these matters, the committee's actions could not be dismissed for lack of standing even though the President's lawyers tried many times to use this line of attack.

An important facet of the committee's opposition to the Vietnam war was a determined effort to prevent or limit the spread of U.S. combat involvement to the adjacent countries of Laos and Cambodia, and the committee's jurisdiction over military assistance legislation was a vehicle for the enactment by Congress of legislative controls seeking to achieve those objectives. During that phase of the evolution of legislative controls over arms transfers, no effort was made to use the legislative veto device.

Nonetheless, it is important to bear this phase in mind for at least two reasons. First, it marked the birth of congressional rediscovery of its latent constitutional authority in the foreign policy and war-making arenas.

Second, the mutual distrust, bitterness and vituperation which broadly characterized the congressional-executive struggle over the Vietnam war established an atmosphere which has continued to affect the substance of legislation respecting arms transfer controls and certainly has continued to permeate the atmosphere of confrontation which characterizes implementation of U.S. arms transfer programs, even today in Central America.

The second phase of the evolution of legislation controlling the arms transfer process had its genesis in events of 1972, 1973, and 1974 which had no direct connection with the Indochina war. The geographic focus of the triggering events for this phase was the Mideast and the Persian Gulf.

It is even possible to pinpoint the initial trigger event with considerable precision, that is, President Nixon's visit to Iran on May 30-31, 1972. In his memoirs on page 1264 Dr. Kissinger relates what happens as follows:

The specific decision facing Nixon was the Shah's wish for F-14 or F-15 aircraft and associated equipment. There had been opposition; some Defense Department reluctance to part with advance technology and State Department fears that the sale might be provocative. . . . Nixon overrode the objections and added a proviso that in the future Iranian requests should not be second-guessed.

That proviso against "second-guessing" had momentous consequences.

President Nixon's visit and the secret arms sales decision he took on that occasion occurred against the background of completion of the British withdrawal from the Persian Gulf in 1971 and the evolving Nixon doctrine policy of armed selected allied countries to be regional surrogates of U.S. power. Things rapidly got out of hand, however, following the quadrupling of OPEC oil prices in 1973-74.

Arms sales programs of truly extraordinary dimensions blossomed overnight principally involving Iran, Saudi Arabia, and Kuwait. As these sales were primarily for cash on commercial terms, they largely eluded the legislative controls which had been built into military assistance legislation during the earlier, Vietnam-centered period of congressional activism.

Moreover, the absence of congressional review and control procedures was highly magnified by the concurrent absence of policy review and control procedures within the administration itself due to the "no second-guessing"

decision which President Nixon had taken in Tehran. Few people then or now could argue that multibillion-dollar sales of sophisticated arms to the preindustrial oil exporting states of the Persian Gulf did not have profound implications in a number of areas of legitimate congressional concern. Congress was right on policy grounds, and justified on constitutional grounds, in acting to assert order and control.

Senator Hubert Humphrey took the lead in proposing omnibus legislation to deal with the new problems posed by these multibillion-dollar Persian Gulf arms sales on commercial terms outside the provisions of existing arms sales legislation. In point of fact, the approach originally suggested by Senator Humphrey was reversed 180 degrees in the final legislation, but it was his initiative that gave birth to the Arms Export Control Act which became law in 1976.

In [1974] Senator Nelson, drawing on his experience as a legislative activist in the environmental field, had gotten an amendment attached to the foreign assistance bill which claimed for the Congress for the first time the power to veto individual arms sales by concurrent resolution. This provision was carried over and incorporated into the Arms Export Control Act and remained there until it was invalidated by the recent Supreme Court decisions.

Leaving the constitutional issue aside for the moment, the basic inefficacy and drawbacks inherent in the use of the legislative veto of individual sales as a policy control mechanism were evident from the beginning, in my judgment. In point of fact, not a single sale was ever blocked by the exercise of a legislative veto.

Efforts to use that mechanism were, however, the focus of several major congressional-executive disputes in the arms transfer field as, for example, the sale of Hawk missiles to Jordan, the several sales of planes and missiles to Saudi Arabia and the proposed but never consummated sale of AWACS planes to Iran. From a policy viewpoint the problem inherent in use of the legislative veto to regulate arms sales is that it brought the Congress in at the worst time and in a way which inevitably aggravated both the foreign relations and the executive-congressional relations aspects of the sale in question. Congressional opposition inevitably was interpreted as an affront by the friendly buyer nations involved, and the President understandably resisted this highly public mode of challenge to his policies and authority by the Congress after he had committed himself.

My own alternative was and continues to be that the Congress should adopt the usual legislative procedure of advance annual authorization of the arms transfer program proposed and submitted by the President. For reasons I never fully understood, this approach was resisted by the administration even more vociferously than the legislative veto. I am convinced that a fully workable bill to do this can be drafted with administration cooperation. This is not the occasion to rehash this specific proposal, however. But, if on another occasion, Mr. Chairman, the committee should wish, there are files available on such a legislative approach for its consideration and I would personally be glad to assist the committee in any way appropriate.
