



DEFENSE SECURITY ASSISTANCE AGENCY

WASHINGTON, D. C. 20301

10 NOV 1979

Box 10

In reply refer to:
I-8884/79

Mr. Daniel A. O'Donohue
Deputy Director
Bureau of Politico-Military Affairs
Room 7317
Department of State
Washington, D.C. 20520

Office of the Secretary of Defense 5 U.S.C. § 552
Chief, RDD, ESD, WHS
Date: 01 Sep 2017 Authority: EO 13526
Declassify: ☒ Deny in Full: _____
Declassify in Part: _____
Reason: _____
MDR: 17 -M- 2297

Dear Dan:

We are in receipt of the attached memorandum of September 28, 1979, from PM/SAS relative to our proposal to approve the extension for one year of a lease under the authority of 10 USC 2667 of two radars with associated equipment to the Argentine Government. The US Army leased this property in 1974 prior to the enactment of section 620B of the Foreign Assistance Act of 1961 in 1977. The period of the five-year lease has expired, but the US Army advises that the radars could continue to be used to support upper atmosphere research projects of joint US-Argentina interest.

Section 620B of the Foreign Assistance Act of 1961 prohibits: the furnishing of assistance under specified chapters of Part II of the Act to Argentina, the extension of FMS credits to Argentina, new cash foreign military sales to Argentina, and new export licenses under the ITARs for Argentina after September 30, 1978. The section was narrowly and precisely drafted with the assistance of Mr. Borek in order to avoid legal questions as to the scope of the prohibition. Inasmuch as the lease authority provided in 10 USC 2667 does not fall within the jurisdiction of the security assistance authorization committees, but rather within the jurisdiction of the Armed Services Committees, it should be expected that the Congress did not intend that the section 620B prohibitions extend to any and all military supply relations with the Argentine military authorities regardless of the authorities under which those relations were conducted. The Legal Counsel for this Agency has therefore concluded that the proposed lease extension may be concluded as a matter of law.

I propose to authorize the US Army to extend the lease for an additional year unless the Department of State wishes to interpose foreign policy objections. The Department of

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413.44 Argentina

RC

State's memorandum under reference is merely grounded upon legal objections and, moreover, does not provide a lawful and responsible alternative course of action with respect to the United States Government property in question. If there is an objection grounded upon foreign policy considerations, I must request that the Department of State lend its active assistance to the prompt recovery of custody of the leased property. A course of action that amounts to de facto extension of the lease period without a specified termination date is not legally authorized by 10 USC 2667 in absence of a determination pursuant to subsection (b)(1) nor is it, in my opinion, a responsible means of protecting the United States Government's interest in its property.

Sincerely,

Ernie

Attachment
a/s

ERNEST GRAVES
LIEUTENANT GENERAL, USA
DIRECTOR
DEFENSE SECURITY ASSISTANCE AGENCY

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DEPARTMENT OF STATE

Washington, D.C. 20520

September 28, 1979

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MEMORANDUM

TO: DOD/DSAA - Charles G. Jameson
FROM: PM/SAS - David W. Cox *W/C*
SUBJECT: Lease of Nike-Hercules Radars to Argentina
REFERENCE: Your Memorandum of September 19, 1979
(I-8884/79)

In view of the doubtful legality of extending the lease in question, the Department of State does not clear the memorandum under reference.

Memoranda from the Office of our Legal Adviser are attached for your information.

Attachments:

Memoranda from Mr. Ted Borek dated
September 20 and 21, 1979

Drafted: PM/SAS:DW Cox:tlb
9/28/79:ext. 27774

Clearances: L/PM - Mr. Borek (subg) *W/C*
ARA/ECA - Mr. Adams (subg) *W/C*
PM/SAS - Mr. Farber (draft) *W/C*

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DEPARTMENT OF STATE

Washington, D.C. 20520

September 21, 1979

MEMORANDUM

TO: PM/SAS - Mr. James Farber
FROM: L/PM - Ted A. Borek *tab*
SUBJECT: Leased Radar in Argentina

Having given some additional thought to the subject problem, it occurs to me that one possibility for resolving it would be simply to do nothing upon expiration of the "lease" on September 26, and treat the matter thereafter as a day-to-day possession at sufferance by the Argentine Government. This avenue is by no means unprecedented, in that in my experience at least the Department of Defense has on numerous occasions failed to conclude formal extensions of existing lease or bailment arrangements.

I see ~~at least~~ three advantages to this course. First, we could avoid a legally doubtful action (execution of a lease under 10 U.S.C. §2667). Second, we could avoid a potentially embarrassing episode with the Argentines. Lastly, and perhaps most important, we could avoid a positive act that could be misconstrued by the Argentines as demonstrating sub rosa United States Government support for the Argentine military and as suggesting a device whereby the clear statutory proscriptions on security assistance to that government could be circumvented.

L/PM: TABorek:tab
9/21/79:x20321

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DEPARTMENT OF STATE

Washington, D.C. 20520

September 20, 1979

MEMORANDUM:

TO: PM/SAS - Mr. David Cox D

FROM: L/PM - Ted A. Borek *TAB*

SUBJECT: Proposed Lease of Defense Articles to
the Government of Argentina

We have reviewed the attached papers from the Department of Defense wherein it is proposed to extend, for a one-year period, the lease of certain NIKE HERCULES radar equipment to the Government of Argentina. The existing five-year lease covering this equipment expires on September 26 of this year. The legal authority cited for the lease and its extension is 10 U.S.C. §2667.

10 U.S.C. §2667 was enacted shortly after the close of World War II in order to permit the lease for manufacturing and other commercial purposes of Department of Defense property (principally defense plants) no longer required for war production purposes. Although the history of 10 U.S.C. §2667 is quite clear in this regard, that statute has been relied upon on a number of occasions in the intervening years to support the lease, bailment, or other temporary transfers of possession of Department of Defense personal property to foreign governments in unusual situations where other statutes (including the Foreign Assistance Act of 1961, as amended (the FAA), and the Arms Export Control Act) were not entirely apposite. Reliance on 10 U.S.C. §2667 in such circumstances has largely gone unchallenged by the Congress, although such reliance goes beyond what a rigorous legal analysis of that statute would likely support.

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In the present case, reliance on 10 U.S.C. §2667 must be viewed in the context of section 620B of the FAA. As you know, that provision precludes any form of security assistance under that Act or under the Arms Export Control Act to or for the Government of Argentina. There can be no doubt that in enacting section 620B the Congress had in mind a comprehensive prohibition on support to the military authorities of the Argentine Government. Under these circumstances, reliance on 10 U.S.C. §2667 to avoid the proscriptions of section 620B of the FAA cannot, in our view, be defended. Moreover, the already doubtful availability of 10 U.S.C. §2667 for purposes of this sort suggests that its use in a controversial case such as this could provoke a closer examination by the Congress of past uses of that statute.

For the foregoing reasons, I cannot concur in the proposed extension of the lease of the NIKE HERCULES radar equipment to the Government of Argentina.

Clearance:

L - Mr. Michel (subs.)

cc: L/ARA - Mr. Kozak
L/PM - Mr. Matheson

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~~CONFIDENTIAL~~
SECURITY CLASSIFICATION

OASD/ISA INTRAOFFICE CONTROL SHEET				DATE 19 Sept 79		I-8884/79	
SUBJECT: Lease of NIKE HERCULES Radars to Argentina - FMS Cases AR-R-IINT and IINT.				CURRENT SUSPENSE DATE			
SUMMARY: (Describe briefly the origin, purpose, action recommended and coordination - (Attach original tasking - SD Form 14, etc.))							
<p>ORIGIN: USASAC memo dated 13 Sep 79 requested DSAA approval to extend the lease of NIKE HERCULES radars and related equipment to Argentina for one year.</p> <p>PURPOSE: The purpose of the proposed response is to approve USASAC's request.</p> <p>RECOMMENDATION: That you sign the proposed memorandum next under.</p> <p>COORDINATION: The proposed memo has been coordinated with DSAA/TL, & ISA/IA. While State Legal (Borek) has expressed the view that the Congress did not "intend" to permit other military supply relations, such as leases under 10 USC 2667, to continue with GOA when they enacted Sec 620B FAA, DSAA Legal Counsel is satisfied that the section only cuts off MAP, IMET, ESF, PKO, new FMS credits, new cash FMS, and new export licenses for direct commercial exports after 30 September 1978 and that there is no legal prohibition on 10 USC 2667 leases to GOA, or renewals/extensions thereof.</p>							
SEQ NO.	INTERNAL COORDINATION	INITIAL	DATE	SEQ NO.	INTERNAL COORDINATION	INITIAL	DATE
	ASSISTANT SECRETARY				DASD POL PLANS & NSC AFF		
	EXECUTIVE OFFICER				DEP. POL PLANS & NSC AFF		
	SPECIAL ASSISTANT				DIR, MBFR TASK FORCE		
	RECORDS AND CONTROL				NSC AFF		
	PRINCIPAL DEPUTY ASD				DASD NE, AFR & SA AFF		
	MILITARY ASSISTANT				DIR, NE & SA RGN		
	SALT				DIR, AFR RGN		
	LAW OF THE SEA				DIR, POL ANAL		
	FMR AFFAIRS						
	ADMINISTRATION				DASD EUR-NATO AFF		
					DIR, EURO-NATO AFF		
	DASD EA, PAC & I-A AFF						
	DIR, EA & PAC RGN				DIR, DEF SCTY ASST AGENCY		
X	DIR, I-A RGN		9/27	X	DEF DIR		
	PW / MIA AFF				PLANS & PROGRAMS		
					COMPTROLLER		
	DASD INT'L ECON AFF				OPERATIONS		
	DIR, INT'L ECON AFF				CONG RELATIONS		
	DIR, STRAT TECH			X	LEGAL COUNCIL		9/27/79
COORDINATION OUTSIDE ISA (Continue on reverse)							
NOTE: For memoranda items forwarded to Sec Def/Dep Sec Def, external coordination at the ASD/PDASD level will be shown on the memorandum to be signed by the ASD or PDASD.							
ACTIVITY		NAME AND TITLE			INITIAL	DATE	
		DECLASSIFIED IN FULL					
		Authority: EO 13526					
		Chief, Records & Declass Div, WHS					
		Date: SEP 01 2017					
NAME, DIRECTORATE AND EXTENSION OF ORIGINATING OFFICIAL Mr Jameson/DSAA/TS/79323					SIGNATURE CONFIDENTIAL		

SD FORM 1 MAY 79 161

PREVIOUS EDITIONS OF THIS FORM ARE OBSOLETE. SECURITY CLASSIFICATION OF THIS DOCUMENT BECOMES UNCLASSIFIED