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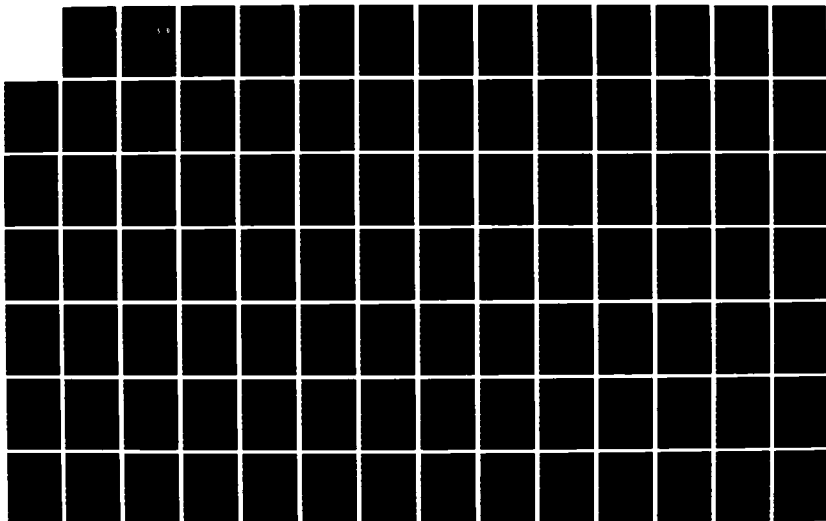
A CONSTITUTIONAL AND CRIMINAL LAW ANALYSIS OF PRESIDENT 1/2
REAGAN'S ORDERING AMERICANS OUT OF LIBYA(U) ARMY
MILITARY PERSONNEL CENTER ALEXANDRIA VA D F CANNER

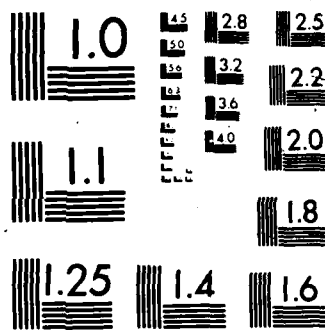
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A Constitutional and Criminal Law Analysis
of President Reagan's Ordering Americans Out of Libya

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20. ABSTRACT (Continue on reverse side if necessary and identify by block number) An analysis of the constitutionality of a criminal prosecution for a refusal to obey President Reagan's order for Americans to leave Libya under the International Emergency Economic Powers Act (IEEPA).		

A Constitutional and Criminal Law Analysis
of President Reagan's Ordering Americans Out of Libya

By

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I. Introduction

In the future, Libya will be remembered by most Americans for Moammar Gadhafi, 1/ terrorism, and the United States' bombing of Tripoli and Benghazi. 2/ Such associations are likely to obscure the world events that led up to the bombing raid as well as an associated development in American criminal law. Already fading into the shadows is the fact that the bombing raid was preceded by barely three months by the imposition of economic sanctions against Libya by President Reagan 3/ in response to terrorist attacks at airports in Rome, Italy and Vienna, Austria. 4/ Under the guise of a delegation of authority from Congress to control foreign trade during a national emergency, 5/ the President virtually ordered all Americans living and working in Libya to leave or face fines up to \$50,000 and/or imprisonment up to 10 years. 6/

This paper will examine the criminal law aspects of this executive order. Specifically, it will examine the order in light of the

1. The name has been spelled many ways in English including Qaddafi, Gaddafi, Kaddafi and Khadafy in attempts to transliterate phonetically from the Arabic script which the man uses exclusively for his signature. In June, 1986, however, he sent letters to several Americans with a typed signature block: Moammar Gadhafi. (See Post Adopts New Spellings of Libyan's Name, Wash. Post, Jun. 12, 1986, at A38, col. 1.). This spelling has been widely adopted by the western press and will be used throughout this text including quotations (regardless of source) for consistency.

2. See infra "The United States Bombing Raid on Libya", p. 36 this text.

3. See infra "President Reagan's Response", p. 6 this text.

4. See infra "The Rome and Vienna Airport Attacks", p. 5 this text.

5. See infra "The Statutory Basis", p. 11 this text.

6. See infra "Executive Orders and Treasury Regulations", p. 9 this text.

separation of powers concept, the right to travel, the prohibition against bills of attainder and ex post facto laws, and the requirement for a due process taking of property. Statutes and case law will be reviewed in an attempt to determine whether a criminal prosecution for violation of this order would be constitutional. Although there are no criminal indictments currently filed, 7/ an attempt will be made to predict the probable outcome of prosecutions of three scenarios: the traveler who wishes to visit Libya for a short, non-commercial trip; the oil technician, already in Libya who wants to stay for a prolonged period to work at producing oil for Libya; and the American already in Libya who wishes to stay for a prolonged period due to marriage to a Libyan national and/or a job unrelated to supporting the Libyan industrial base such as a school teacher.

American criminal law will be the primary focus of this thesis but the subject matter is intertwined with international events. At times this analysis will be critical of United States actions. It is intended, however, to point out the weaknesses as well as the strengths from a criminal law aspect; not to absolve Gadhafi for his role in the attacks on the Rome and Vienna airports or any other terrorist incident.

II. Background

A. Generic Arab Terrorism

There probably have always been terrorist activities, but in the early 1980's Americans began to be numbered among the casualties in terrorist incidents aimed at forcing Israel to provide a homeland for

7. Telephone interview with Dennis M. O'Connell, Director of the Office of Foreign Assets Control, Treasury Department (May 23, 1986) [hereinafter cited as O'Connell interview].

displaced Palestinians. For example:

- Apr. 18, 1983 - A truck bomb kills 17 Americans at the United States Embassy in Beirut, Lebanon.
- Oct. 23, 1983 - A truck bomb kills 241 Americans at the United States Marine Headquarters in Beirut.
- Dec. 12, 1983 - A truck bomb kills five Americans at the United States Embassy in Kuwait.
- Jun. 14, 1985 - TWA flight 847 is skyjacked and one American is killed.
- Oct. 7, 1985 - The Italian cruise ship Achille Lauro is hijacked and one wheelchair-bound American is shot.
- Nov. 23, 1985 - An Egyptian airliner from Athens is hijacked and one American is killed.
- Dec. 27, 1985 - Terrorist attacks at the Rome and Vienna airports kill five Americans. 8/

Most of these incidents are an outgrowth of the United States involvement in and identification with Israel's invasion of Lebanon in 1982. 9/

Prior to President Reagan's ordering Americans out of Libya, we knew little about the specific groups involved in these incidents or their specific causes. Thanks to the media we could recognize Yassir Arafat's less than handsome visage and we were aware of the "Palestinian problem", but little else. Terrorism had a generic quality; "Arabs" in general were responsible. These were the same "Arabs" we

8. Key Events - Countdown to Retribution, U.S. News & World Report, Apr. 28, 1986, at 22-23.

9. Address by the Honorable George W. Ball, Seventh Annual National Convention of the American - Arab Anti-Discrimination Committee (Sep. 5, 1985) (published by Americans for Middle East Understanding, New York) [hereinafter cited as George Ball address]. For United States involvement see also S. Mallison & W. Mallison, Armed Conflict In Lebanon, 1982: Humanitarian Law In A Real World Setting 84-99 (2nd rev. ed. 1985).

had learned to hate a decade before during long waits at service stations during the oil crisis. A Middle East born media specialist has described American media coverage as, "a very negative montage. . . . Either an Arab is a bloody terrorist or else he is the fat rich sheik who has been threatening the West's jugular vein whenever the price of oil goes up." 10/

Perhaps the best example of this generic terrorism perception is related to the December 27th attacks on the Rome and Vienna airports and comes from a man who should have known better. Immediately after the attacks Israeli Defense Minister Yitzhak Rabin blamed Yassir Arafat's Palestinian Liberation Organization (PLO). 11/ However, Arafat immediately denied responsibility and evidence soon indicated another group headed by Abu Nidal. At this point Avi Pazner, spokesman for the Israeli Foreign Ministry, refused to make any distinction between Arafat's mainstream Fatah organization and Abu Nidal's group:

Okay, Abu Nidal is anti-Fatah, but he is also PLO. We have to take that claim with a grain of salt. There is no doubt whatsoever that parts of the PLO are connected to these attacks. I don't exonerate Arafat, because parts of his organization were responsible. 12/

It is inconceivable that a man in Pazner's position could be unaware of the facts. Abu Nidal's terrorist group is not part of the PLO. Nidal once was a follower of Arafat but over time he became disenchanted with Arafat's growing moderation. Nidal formed his own group (Black June)

10. Grove, The Colonel's Demon Cloak, Wash. Post, Apr. 17, 1986, at C 1, col. 5, C 14, col. 4.

11. Clairborne, Israel Threatens to Retaliate, Wash. Post, Dec. 28, 1985, at A 1, col. 1, col. 3.

12. Id. at A 13, col. 1.

eleven years ago when his plot to kill Arafat was discovered. Arafat has sworn to kill Nidal also. All of this was published in the popular press just two days after Pazner's statement. 13/ For what ever reason, the perception of generic Arab terrorism had been extended a little longer.

B. The Rome and Vienna Airport Attacks

Although there was initial confusion as to who was responsible for the terrorist attacks on the airports at Rome and Vienna, 14/ those attacks were to become the end of the generic terrorism perception and the basis for President Reagan's ordering Americans out of Libya. The attacks were shocking for a number of reasons. Over one hundred people were injured, and twenty died, including five Americans. 15/ One of the American dead was an eleven year old girl. 16/ Although the attacks were focused on the El Al (Israeli Airline) counters in both airports, 17/ the carnage was indiscriminate among the innocent holiday travelers. The two attacks were well coordinated despite being separated by long distances. A note in the pocket of one of the captured terrorists indicated that Nidal's group was retaliating for Israel's bombing raid on Arafat's headquarters in Tunis three months previously. 18/ Finally,

13. Dickey, New Horrors Fuel Abu Nidal Legend, Wash. Post, Dec. 19, 1985, at A 20, col. 1.

14. Dickey, Airport Terrorist Attacks Unleash Deadly Guessing Game, Wash. Post, Dec. 28, 1985, at A 11, col. 1.

15. Key Events, supra note 8.

16. Jenkins, 16 Die In Attacks on Rome, Vienna Airports, Wash. Post, Dec. 28, 1985, at A 1, col. 6.

17. Id.

18. Jenkins, Gurman's Note Vows to Avenge Tunis Raid, Wash. Post, Dec. 29, 1985, at A 1, col. 5.

Libya's Gadhafi praised the attacks as "heroic acts" although he said they resulted from the 1982 massacre of Palestinians at Beirut refugee camps. 19/

The Rome and Vienna attacks were particularly frightening and something had to be done. Initially the United States cautioned Israel against any retaliation like the Tunis raid. 20/ However, a few days later White House spokesman, Larry Speakes, reversed our position and said it would be "fine with us" if Israel took military action against those responsible for the attacks. 21/ At the same time, the Reagan administration accused Nidal's group of perpetrating the Rome and Vienna attacks and Libya of supporting Nidal. 22/ Israel, however, did not react. Eleven days after the attacks President Reagan did react.

III. President Reagan's Response

A. The January 7 Speech

On January 7, 1986, the President of the United States began a news conference with a prepared statement significant in its tone as well as its content:

On December 27, [1985], terrorists, as we know, attacked Rome and . . . Vienna international airports -- the latest in a series of atrocities which have shocked the conscience of the world. It is clear that the responsibility for these latest attacks lies squarely with the terrorist known as Abu Nidal and his organization. The number of his

19. Clairborne, Rabin Cites Abu Nidal In Airport Terror Raids, Wash. Post, Dec. 30, 1985, at A 1, col. 4, A 14, col. 4.

20. Cannon & Oberdorfer, U.S. Seeks to Temper Response By Israel, Wash. Post, Dec. 29, 1985, at A 1, col. 5.

21. Cannon & Oberdorfer, U.S. Clears An Israeli Retaliation, Wash. Post, Dec. 31, 1985, at A 1, col. 6.

22. Id.

victims increased by 19; among them five Americans including . . . Natasha Simpson, an 11-year-old girl. Many others from around the world were wounded.

We shall make every effort to bring Abu Nidal and other terrorists to justice. But these murderers could not carry out their crimes without the sanctuary and support provided by regimes such as Col. [Moammar] Gadhafi's in Libya.

Gadhafi's long standing involvement in terrorism is well documented -- and there is irrefutable evidence of his role in these attacks. The Rome and Vienna murders are only the latest in a series of brutal terrorist attacks committed with Gadhafi's backing. Gadhafi and other Libyan officials have publicly admitted that the Libyan government has abetted and supported [in other attacks] the notorious Abu Nidal terrorist group which was directly responsible for the Rome and Vienna attacks.

Gadhafi called them "heroic acts." I call them criminal outrages by an outlaw regime. By providing material support to terrorist groups which attack U.S. citizens, Libya has engaged in armed aggression against the United States under established principles of international law, just as if he [sic] had used its own armed forces.

* * *

[President Reagan pointed out that he had repeatedly urged the world community to penalize Gadhafi for his support of terrorism; that the United States previously had taken a series of steps to curtail trade with Libya; and that these actions have proved insufficient.]

* * *

Accordingly, I signed today an executive order stating that the policies and actions of the government of Libya constitute a threat to the national security and foreign policy of the United States

Under the authority vested in me by the Constitution and laws of the United States, I have taken measures to end virtually all direct economic activities between the United States or U.S. nationals and Libya. These measures . . . impose a total ban on direct import and export

trade with Libya, except for humanitarian purposes. They prohibit commercial contracts and other transactions with Libya, including travel related activities other than those needed for journalism or to carry out this order.

I call on all Americans in Libya to leave immediately. Those who violate these orders should know they will be subject to appropriate penalties upon their return to the United States. Let the government of Libya understand that it is fully responsible for the welfare of those Americans still in Libya. . . .

Our differences are not with the people of Libya, but with Col. Gadhafi and his regime. . . .

Gadhafi deserves to be treated as a pariah in the world community. We call on our friends in Western Europe and elsewhere to join with us in isolating him.

* * *

[W]e call upon other nations to join us in denying [Libya] the normal economic and diplomatic privileges of the civilized world.

If these steps do not end Gadhafi's terrorism, I promise you that further steps will be taken. 23/

In response to questions during the press conference, President Reagan was understandably reluctant to detail the "irrefutable evidence" linking Gadhafi to the Rome and Vienna airport attacks for fear of revealing intelligence sources. However, he did say, ". . . we know the location of training camps for terrorists and we also know that Abu Nidal has moved his headquarters there into Libya." He admitted that Gadhafi had denied supporting Nidal in the Rome and Vienna attacks but noted that Gadhafi had praised the attacks as "heroic actions." The

23. Transcript of President Reagan's News Conference, Wash. Post, Jan. 8, 1986, at A 16, col. 1 (emphasis added) [hereinafter cited as Transcript, Jan. 8].

President suggested that the denial was not believable and that it was prompted by movement of the American aircraft carrier Coral Sea from Naples, Italy for routine maneuvers off the coast of Libya shortly after the attacks in Rome and Vienna. 24/ No one questioned penalizing Americans that do not comply with the President's order to leave Libya.

B. Executive Orders and Treasury Regulations

Reagan's speech was an elaboration of Executive Order 12,543 which he had signed earlier that same day. 25/ That order relied primarily on the President's authority under the International Emergency Economic Powers Act (IEEPA) 26/ and the National Emergencies Act. 27/ In accordance with those statutes the order declared a national emergency in the following manner:

I, Ronald Reagan, President of the United States of America, find that the policies and actions of the Government of Libya constitute an unusual and extraordinary threat to the national security and foreign policy of the United States and hereby declare a national emergency to deal with that threat. 28/

The order then prohibits importation of Libyan goods or services into the United States; exportation of American goods, services, and technology to Libya; granting credits or loans to Libyans; purchase of Libyan

24. Id. at A 16, col. 2.

25. Exec. Order No. 12,543, 51 Fed. Reg. 875 (1986). Libyan assets in the United States or in the control of Americans abroad were frozen the next day by Exec. Order No. 12,544, 51 Fed. Reg. 1,235 (1986).

26. The International Emergency Economic Powers Act tit. II, § 201, 50 U.S.C.S. § 1701-1706 (1981, with 1986 Supp.) [hereinafter cited as IEEPA].

27. The National Emergencies Act, 50 U.S.C.S. § 1601-1651 (1981, with 1986 Supp.).

28. Exec. Order No. 12,543, 51 Fed. Reg. 875 (1986).

goods by Americans for export to another country; and any transaction relating to transportation to or from Libya. 29/

In addition to these trade related restrictions, the order contains restrictions of interest to individual Americans. The order prohibits Americans from performing "any contract in support of an industrial, or other commercial or governmental project in Libya." 30/ It also prohibits, "[a]ny transaction by [an American] relating to travel . . . to Libya, or to activities by any such person within Libya" except for journalists. 31/ The prohibition against any transaction relating to "activities" of Americans within Libya may appear to be rather obscure but it was intended to be an extremely broad restriction as indicated by the President's delegation of authority to the Secretary of the Treasury to prohibit,

[t]he transfer of anything of economic value by any [American] to the Government of Libya, . . . or to any Libyan national or entity owned or controlled, directly or indirectly, by Libya or Libyan nationals. 32/

Finally, the order prohibits, "[a]ny transaction by any [American] which evades or avoids, or has the purpose of evading or avoiding, any of the prohibitions set forth in this Order." 33/

The Executive Order does not specifically order Americans out of Libya; it just prohibits such a broad spectrum of commercial

29. Id.

30. Id.

31. Id.

32. Id.

33. Id.

transactions that it makes it impossible for Americans to travel to Libya, work for pay there, or even to simply live there. This point is driven home by the regulations promulgated by the Foreign Assets Control Office of the Treasury Department to implement the Executive Order. Subsection 550.207 states in part, "This section prohibits the unauthorized payment by a U.S. person of his own travel or living expenses to or within Libya." ^{34/} The Treasury regulations also note that violators are subject to civil penalties up to \$10,000 and criminal penalties up to \$50,000 and/or 10 years imprisonment under IEPA. ^{35/}

C. The Statutory Basis

Both Executive Order 12,543 and the Treasury regulations specifically cite IEPA as the basis for the President's authority to order Americans out of Libya. The President's powers under IEPA are far reaching. The statute provides that in times of national emergency:

the President may . . .

- (A) investigate, regulate, or prohibit --
 - (i) any transaction in foreign exchange,
 - (ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,
 - (iii) the importing or exporting of currency or securities; and

34. Libyan Sanctions Regulations, 51 Fed. Reg. 1,354 (1986) as amended by 51 Fed. Reg. 22802 (1986) (to be codified at 31 C.F.R. pt. 550, § 550.207).

35. Id. at § 550.701.

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding withholding, use transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, and property in which any foreign country or a national thereof has any interest; by any person, or with respect to any property, subject to the jurisdiction of the United States. 36/

IEEPA does not define the term "transactions" nor does it distinguish between personal and business transactions. However, this section of IEEPA was taken almost verbatim from an earlier statute dealing with the emergency powers of the President, the Trading With the Enemy Act (TWEA). Under TWEA, prohibited "trade" was defined, amongst other things, to "Pay . . . any debt or obligation." 37/ Even so, a careful analysis of both TWEA and IEEPA leaves the impression that Congress was thinking in terms of authorizing the President to control commercial trade during national emergencies.

D. The Significance of President Reagan's Response to the Rome and Vienna Airport Attacks

President Reagan's speech clearly demonstrated our nation's frustration with not only the terrorists that elude our grasp but also their supporters. The news conference, however, had several significant aspects far more serious than just an expression of frustration. The President ordered Americans out of Libya and threatened to enforce the order with criminal penalties. In essence the Executive Branch of the government, not Congress, has attempted to

36. IEEPA, supra note 26, at § 1702 (emphasis added).

37. Trading With the Enemy Act 50 U.S.C.A. app. § 1-44 (1968, with 1986 Supp.) [hereinafter cited as TWEA]. Section 1702 of IEEPA was taken from § 5(b) of TWEA. A definition of "trade" appears in § 2 of TWEA.

create the crimes of traveling to, working in, or even living in Libya. Rather than controlling these activities directly, the President has used the indirect means of prohibiting the economic transactions related thereto. The President has taken these actions with reference to a delegation of authority from Congress to control commercial trade during national emergencies. In order to satisfy the statute's requirement for a national emergency, President Reagan focused on the deaths of Americans that were innocent bystanders to terrorist attacks aimed at Israeli interests. Then the President equated the alleged support of these anti-Israeli terrorists with armed attacks on the United States.

President Reagan's ordering Americans out of Libya relies on novel and roundabout supporting rationale. It raises questions of separation of powers and the constitutionality of any criminal prosecution for disobedience of the order. There are additional issues involved with the hidden agenda of Reagan's order. If, as analyzed later, 38/ the true purpose of the President's order was to force American oil technicians to leave Libya, thereby crippling Libya's oil production and Gadhafi's ability to fund terrorists, then Reagan's criminalization of even living in Libya is grossly overboard and causes unnecessary hardship for many other Americans. Finally, although foreign policy has been the traditional province of the Executive Branch, did Congress intend IEEPA to authorize criminal penalties for the involuntary drafting of American civilians as tools of coercive foreign diplomacy?

38. See infra "The American Oil Technician - A New Weapon of Coercive Foreign Diplomacy", p. 45 this text.

IV. The Requirement for a National Emergency

As previously noted, IEEPA gives the President sweeping authority to regulate or prohibit foreign trade under section 1702. ^{39/} That delegation of authority, however, has preconditions specified in section 1701 which states in part:

(a) Any authority granted to the President by section [1702] may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat, (b) . . . and may not be exercised for any other purpose. ^{40/}

The statute does not define any of the terms in this section but some guidance can be obtained by examining previous incidents where IEEPA was utilized and contrasting them to Libya.

A. Past National Emergencies

The first time IEEPA was utilized, it was in connection with the Cuban missile crisis and carried over from its initial exercise under the nearly identical provision under TWEA. ^{41/} The stationing in Cuba of Soviet missiles with sufficient range to reach the continental United States probably is the clearest example of a threat to our national security and a true "national emergency".

In 1979 and 1980 President Carter invoked IEEPA in regards to the hostage crisis in Iran. ^{42/} The large number of hostages, the

39. See supra note 36 and accompanying text.

40. IEEPA, supra note 26, at § 1701.

41. Cuban Assets Control Regulations, 31 C.F.R. pt. 515 (1985). See also Regan v. Wald, 104 S.Ct. 3026 (1984).

42. Iranian Assets Control Regulations, 31 C.F.R. pt. 535 (1985). See also Dames & Moore v. Regan, 453 U.S. 654 (1981).

length of time they were held, and the manner in which they were used to coerce the United States as a nation certainly qualifies as a threat to our foreign policy, if not our national security, sufficient to be called a "national emergency."

President Reagan utilized IEEPA twice in 1985. In May, 1985 he relied on IEEPA in order to prohibit trade between the United States and Nicaragua. 43/ Nicaragua has been menacing its neighboring countries, is hostile to the United States, and has a land bridge to our border. However, Nicaragua's military forces are Lilliputian in comparison to those of the United States and are more of an annoyance than a threat to our national security or our foreign policy in the region. This is reflected in the controversy in Congress over the amount and nature of the aid to be given forces opposing Nicaragua.

In September and October, 1985 Reagan imposed limited economic sanctions on South Africa under authority of IEEPA. 44/ These actions were taken in response to South Africa's continued refusal to amend that country's policy of racial discrimination known as apartheid. Although the President had a laudable objective, it is difficult to characterize apartheid as a "national emergency" for the United States even under the heading of foreign policy. Frankly, this may have been the beginning of the Reagan administration's preoccupation with the power rather than the preconditions under IEEPA.

43. Nicaraguan Trade Control Regulations, 31 C.F.R. pt. 540 (1985).

44. Exec. Order No. 12,532, 50 Fed. Reg. 36,861 (1985) and Exec. Order No. 12,535, 50 Fed. Reg. 40,325 (1985).

B. The Question of a National Emergency With Respect to Libya

It is apparent from section 1701 of the statute and, for the most part, from past incidents of its use, that the precondition of "national emergency" under IEEPA requires a specific foreign threat to the national security, foreign policy, or economy of the United States. The difficulty with claiming a national emergency with respect to Libya is that Libya is only indirectly linked, if at all, to the terrorists at the Rome and Vienna airports. Moreover, as pointed out previously, those attacks were aimed at Israel, not the United States. ^{45/} Indeed, as will be shown later, Gadhafi had aimed his terrorist activities at everyone except the United States up until President Reagan's response to the Rome and Vienna attacks. ^{46/} The attention which Abu Nidal has received is somewhat misleading. Under IEEPA, it must be shown that Libya is the source of the threat and that Libya aimed the threat at the United States.

1. United Nations Resolution 3314

An analysis of Libya as an aggressor is aided by the definition of aggression adopted in United Nations Resolution 3314. ^{47/} The first Article defines aggression in terms of armed force, but Article 3 details a number of acts which may qualify as acts of aggression. The last one appears to apply to Libya:

45. See supra notes 17 and 18 and accompanying text.

46. See infra "Looking Beyond the Rome and Vienna Airport Attacks," p. 20 this text.

47. G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, 143, U.N. Doc. A/9631 (1975).

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein. 48/

2. Did Gadhafi Support the Rome and Vienna Attacks?

Reagan's speech charged that Gadhafi supported the Abu Nidal terrorist group that attacked the Rome and Vienna airports. In his press conference Reagan said that "irrefutable evidence" of that support lay in the fact that Nidal has moved his headquarters to Libya and that we know where the training camps are located. 49/ Abu Nidal has operated out of Libya in the past but he also has had his headquarters in Iraq and Syria at various times. It has been observed that he has little loyalty to former host countries. While in Iraq he attacked Syria, and while in Syria he attacked Iraqi diplomats in Syria. 50/ It was also noted that although Gadhafi denied support of the Rome and Vienna attacks, he had praised them after the fact as "heroic actions." 51/ Later, Robert Oakley, head of the U.S. State Department's counter-terrorism office, revealed that we have satellite photographs of the training camps but did not publish them because they would have shown nothing but "a group of tents. We would have

48. Id.

49. Transcript, Jan. 8, supra note 23, at A 16, col. 1, and col. 2.

50. Pulling the Strings - and the Trigger U.S. News & World Report, Jan. 13, 1986, at 30, 31.

51. Transcript, Jan. 8, supra notes 23, at A 16, col. 1.

said, 'There are terrorists in those tents.' Gadhafi would have said, 'They're Boy Scouts.'" Oakley also admitted, "We have no smoking pistol" with respect to the Rome and Vienna attacks. 52/

The only tangible evidence consisted of two Tunisian passports confiscated from guest workers in Libya which were found on the terrorists. 53/ However, Karl Blecha, Austrian Interior Minister, said there was no proof of direct Libyan involvement with these terrorist attacks and that the two terrorists who survived the Vienna attack, "said they had not been in Libya and had not been trained there." 54/ Ironically it appears that the terrorists that attacked the Vienna airport were trained in Syrian-controlled Lebanon and traveled to Europe through Damascus. Again Robert Oakley reluctantly admitted that Syria has a history of supporting Abu Nidal and continues to do so at reduced levels. He suggested that sanctions also might be imposed on Syria. 55/

At the time of this writing (six months after Oakley's statement) no sanctions have been imposed against Syria nor lifted from Libya despite the terrorists's assertion of Syrian, not Libyan, support. Syria's President Hafez Assad, of course, has been the United States' main hope for a peacemaker in the Middle East and negotiator for the release of American hostages still in Lebanon. Nor has there been any new evidence connecting Libya with the Rome and Vienna attacks. While

52. Watson, Flake or Fox?, Newsweek, Jan. 20, 1986, at 14, 18.

53. Id.

54. Id.

55. Id.

the President was understandably reluctant to reveal too much at the time of his press conference, there is no longer reason for such reticence now that we have exposed our intelligence sources with regards to the bombing of the La Belle discotheque in Berlin. 56/ Based on the facts, the only possible conclusion is that we have not proved Gadhafi supported Nidal's attacks of December 27th. If we base our allegation on Gadhafi's after-the-fact praise of the attacks, we open ourselves to reprisals every time our President praises the Contras in Nicaragua, the guerrillas in Afghanistan, or any other armed group that shares our view of how the world should be.

3. Was the "United States" Attacked?

Notice that both Article 3 (f) and (g) of Resolution 3314 require that the aggression be against another "State." 57/ Israel, not the United States was the target "State" of the December 27th attacks. As noted previously, the El Al airline counters at both the Rome and Vienna airports were the focus of these attacks and one of the terrorists carried a note claiming retaliation for Israel's anti-Palestinian acts. 58/ Nidal may have changed his allegiance to different host countries, but he is not confused about his group's goals. Nidal has said, "Our political line is clear: To rid humanity of Zionism and its imperialist base in Palestine." 59/ The Americans killed in the Rome and Vienna airports

56. Woodward, 'Intelligence Coup' Implicated Libya, Wash. Post, Apr. 22, 1986, at A 1, col. 2.

57. G.A. Res. 3314, supra note 47.

58. See supra notes 17 and 18 and accompanying text.

59. Pulling the Strings, supra note 50.

were tragically innocent bystanders, but even a direct attack on U.S. nationals abroad does not amount to an attack on the "State" of the United States. Recently when Palestinian terrorists took over the Achille Lauro cruise ship, only one person died, an American. Even though that one U.S. national was singled out, we did not claim that it was an attack against the United States. The same is true even where the U.S. national that is attacked is an official representative of the United States:

It is well known that United States ambassadors have been attacked in some countries and, on occasion, killed. On no occasion has the United States Government regarded this as an attack on the United States. 60/

Reagan's assertion that the attack on Natasha Simpson and others is an attack on the United States is not only contrary to previous United States policy, it is contrary to established principles of international law embodied in U.N. Resolution 3314.

C. Looking Beyond the Rome and Vienna Airport Attacks

Abu Nidal's terrorist attacks on the Rome and Vienna airports may not be a proper basis for President Reagan to utilize his powers under IEEPA, but Gadhafi has a long history of supporting numerous other terrorist activities around the world. Perhaps Reagan's action can be justified under the theory of anticipatory self-defense against future Libyan - sponsored terrorist attacks. Although Reagan's speech dwelt on the Rome and Vienna attacks, he did say that it was only "the latest in a series of atrocities" and made it clear that his action was taken to prevent future incidents. 61/ Moreover, the Executive Order which actually

60. S. Mallison & W. Mallison, Armed Conflict In Lebanon, 1982: Humanitarian Law In A Real World Setting 24 (2nd rev. ed. 1985).

61. Transcript, Jan. 8, supra note 23.

imposed the sanctions did not refer to the Rome and Vienna attacks at all; it found that "the policies and actions of the Government of Libya constitute an unusual and extraordinary threat to the national security and foreign policy of the United States." 62/

1. Gadhafi's Record of International Terrorism

The list of atrocities linked with Gadhafi is indeed lengthy. In 1972, Libya gave sanctuary to the terrorists who killed eleven Israeli athletes at the Munich Olympics. In 1973, Libya provided guns to terrorists who killed 35 in Rome. In 1975, Gadhafi provided sanctuary for the gunmen who seized hostages at the Vienna meeting of OPEC (Organization of Petroleum Exporting Countries). In 1980, Libya invaded Chad and France responded militarily. In 1983, Gadhafi plotted to overthrow the Sudanese government, trained Nicaraguan pilots, gave the Sandinistas aircraft, invaded Chad again, and planned to kill Jordan's King Hussein. 63/ In 1984, a British policewoman was killed by a shot fired from inside the Libyan Embassy in London and Gadhafi was tricked into announcing the death of a former Libyan prime minister who evaded Libyan assassins in Egypt. 64/ There is evidence that Libya partially funded the Point Salines airstrip in Grenada, which was constructed by Cuban workers, and has materially supported the overthrow of the governments in Cameroon, Niger, the Central African Republic, Sudan, Malaysia, Indonesia and the Philippines. 65/ A semi-official Egyptian

62. Exec. Order No. 12,543, supra note 28.

63. A Record of Turmoil, U.S. News & World Report, Jan. 20, 1986, at 16.

64. Watson, supra note 52, 18.

65. R. Cline & V. Alexander, Terrorism as State-Sponsored Covert Warfare 17 (1986).

weekly magazine has published a list of 10 camps in Libya training terrorists from Palestinian organizations, Italian Red Brigades, Basque Separatists, the IRA (Irish Republican Army), as well as Gadhafi's own terrorists. 66/ The Libyan Secretary of Information, Muhammad al-Zuwayy, has provided a concise summary, "We assert to the world that we provide material, moral, and political support to every liberation revolution in the world." 67/

2. The Concept of State-Sponsored Terrorism

Clearly Gadhafi has been and continues to be a menace to minimum world public order even if he did not support the Rome and Vienna attacks. This has prompted some writers to suggest a new theory of "state-sponsored terrorism" defined as:

The deliberate employment of violence or the threat of use of violence by sovereign states (or sub-national groups encouraged or assisted by sovereign states) to attain strategic and political objectives by acts in violation of law. These criminal acts are intended to create overwhelming fear in a target population larger than the civilian or military victims attacked or threatened.

The main goal of this state-sponsored terrorism (now at the end of the twentieth century) is to undermine the psycho-social stability and political governability of pluralist states with representative governments, particularly if they are friendly to the United States. 68/

Michael Stohl has espoused a similar theory of "State terrorism" which he defines as "the purposeful act or threat of violence to create fear and/or compliant behavior in a victim and/or audience of the act or

66. R. Cline & V. Alexander, Terrorism: The Soviet Connection 68-70 (1984).

67. Id. at 69.

68. R. Cline & V. Alexander, supra note 65, at 32 (emphasis added).

threat." 69/ Although his primary thesis is that the so-called acceptable "coercive diplomacy" practiced by Western nations is "state terrorism," Stohl clearly condemns Gadhafi's actions as a whole as "State terrorism" also. 70/

3. Gadhafi's Record With Respect to the United States

The key to these new theories of state-sponsored terrorism is that there is a target audience as well as a target of the aggressive act. Although this theory broadens the traditional target of an act of aggression and therefore broadens the possibility of anticipatory self-defense, there still must be some indication that Gadhafi intended to include the United States in the target audience of his state-sponsored terrorism.

The incidents listed under "Gadhafi's Record of International Terrorism", 71/ however, did not involve any American victims. Indeed a U.S. State Department "White Paper" issued the day after Reagan's speech to justify the President's actions against Libya provides an interesting explanation that is not entirely consistent with the President's reasoning. According to former Congressman Paul N. McCloskey, Jr.:

The White Paper identifies more than 60 major terrorist attacks outside Israel and the occupied West Bank in the last eight years - 30 of them in 1984 and 1985 alone - but lays responsibility for them . . . at the door of . . . Abu Nidal

* * *

69. Stohl, International Dimensions of State Terrorism, in The State as Terrorist: The Dynamics of Governmental Violence and Repression 43 (M. Stohl & E. Lopez eds. 1984).

70. Id. at 43-58.

71. See p. 21 this text.

The State Department points out that Abu Nidal's stated purpose is to prevent the peace process from succeeding, that his particular focus in assassinations since 1984 has not been against Israelis or Americans but against Jordanians and Palestinians willing to recognize Israel. 72/

Some Americans have died in terrorist incidents; but the incidents with American victims listed under "Generic Arab Terrorism" 73/ have not been proven to be the result of Gadhafi targeting Americans. State Department statistics show that terrorism from all sources, not just from Libya, has killed far more non-Americans than Americans. In 1985, there were 2,223 casualties worldwide but only 162 were Americans. 74/ Over the last five years Americans have accounted for less than 10 percent of terrorism's victims. 75/ Although Middle East terrorism tends to get all the headlines, Americans are much more likely to be victims of terrorism in Latin America or Europe. From 1980 to 1985 there were 369 terrorist incidents involving American victims in Latin America but only 84 in the Middle East. 76/ Finally, State Department statistics show that the worldwide terrorism danger for Americans has not increased significantly compared to fifteen years ago. 77/

Clearly one must look beyond the generic Arab terrorism perception and examine history more closely for clues to Gadhafi's view of the

72. McCloskey, Rethinking Arafat, The Washington Report on Middle East Affairs, Feb. 24, 1986, at 1, col. 2.

73. See p. 2 this text.

74. Ignatius, Terrorism By the Numbers, Wash. Post, Apr. 13, 1986, at C 5, col. 1, col. 2.

75. Id. at col. 2.

76. Id. at col. 1.

77. Id.

United States. During the first four years of his regime, Gadhafi criticized Soviet actions in the Middle East and made violent anti-communist speeches. According to John K. Cooley there may have been two occasions when the CIA (Central Intelligence Agency of the United States) helped prevent Gadhafi's overthrow in the mid 1970's. 78/ In the late 1970's Gadhafi tried to curry favor with the United States by offering a loan to the brother of then President Jimmy Carter. Unlike other Arab governments which nationalized the holdings of Western oil firms in their countries, Libya allowed U.S. companies to own at least a share of the fields and to operate them. Gadhafi has also treated the Americans in Libya well, allowing them to send most of their dollar earnings home to America unlike other foreign workers. 79/ It is clear that at least the American oil workers in Libya were not harassed nor threatened even after President Reagan's January 7 news conference. 80/ In an attempt to bolster Reagan's position, the U.S. State Department released several documents on January 8, 1986. They list 58 terrorist incidents linked to Gadhafi; only two even mention the United States. The State Department papers conclude, "The main targets of Libyan terrorist activities have been expatriate Libyan dissidents and leading officials of moderate Arab and African governments." 81/ One analyst has

78. Ottaway, Gadhafi's Love Hate View of U.S., Wash. Post, Jan. 9, 1986, at A 1, col. 4, A 14, col. 1.

79. Id. at A 14, col. 2.

80. Dickey, American Workers "Not Hassled" In Libya, Wash. Post, Jan. 8, 1986, at A 1, col. 3; Randal, Americans, Reluctantly Obeying Reagan Order, Leave Libya, Wash. Post, Jan. 31, 1986, at A 1, col. 2.

81. Woodward, Don't Make the Libya Problem Worse, Wash. Post, Feb. 2, 1986, at C 1, col. 1, C 4, col. 3.

even said, "Gadhafi loves America [and its technology]. He's stung by our rejection." 82/

On the other hand there are more than just two incidents involving the United States. In 1973, Libyan fighters fired on a U.S. reconnaissance plane flying 83 miles off Libya's coast. In 1979, Gadhafi gave a speech which resulted in Libyans burning the U.S. Embassy in Tripoli. In 1981, two Libyan jets attacked U.S. planes over the Gulf of Sidra and Gadhafi threatened to send hit squads to Washington, D.C. 83/ The two incidents mentioned in the State Department papers released January 8 include the terrorist murder of a Libyan student in Colorado known for anti-Gadhafi rhetoric and a plot by 17 Libyans to kill anti-Gadhafi dissidents in the United States that was thwarted by the FBI in May 1985. 84/ Other plots which were stopped include planting explosives in a U.S. Embassy club in Sudan and an attempt to kill the U.S. Ambassador in Cairo. 85/ Gadhafi praised the bombing of the U.S. Marine headquarters in Lebanon in a speech on March 28, 1985, "The lesson is that America was kicked out of Lebanon when an individual Arab was able to kill 300 Americans." 86/ On a broader scale Gadhafi boasted on June 11, 1984, "We are now in a position to export terrorism, arson, and liquidation to the heart of America - and shall do so if necessary." 87/

82. Ottaway, supra note 78, at A 1, cols. 3-4.

83. A Record of Turmoil, supra note 63.

84. Woodward, supra note 81, at C 4, col. 2.

85. Id. at C 4, col. 4.

86. R. Cline & V. Alexander, supra note 65.

87. Id.

It is important to keep in mind that all of the above incidents, occurred before President Reagan's speech of January 7, 1986. As indicated in "Introduction," 88/ however, we tend to think of Gadhafi and the United States in a much more direct confrontation today. With the exception of the incidents listed in the immediately preceeding paragraph, the current American perception of Gadhafi is largely based on events subsequent to Reagan's actions of January 7. Immediately after the President's speech, Gadhafi threatened to send suicide groups to the American homeland if the implied military threat in the last sentence of the speech was carried out. 89/ On March 24th and 25th 1986, U.S. naval forces skirmished with Libyan forces in the Gulf of Sidra and beat them decisively. 90/ Gadhafi retaliated with the bombing of the La Belle discotheque, a favorite entertainment spot for United States soldiers stationed in Berlin, West Germany. 91/ There is no doubt that the United States became a direct target for Gadhafi's terrorism after the Gulf of Sidra incident in March, 1986, but that was not the case before President Reagan's speech in January, 1986. Perhaps the most revealing facts came to light during the attempt to prove Gadhafi was responsible for the La Belle discotheque bombing by publicizing intercepted messages between Gadhafi and his diplomatic personnel in West Berlin. United States officials said that the day after the Gulf of Sidra incident Gadhafi sent out a call for retaliation

88. See p. 1 this text.

89. Watson, supra note 52, at 15.

90. Wilson, U.S. Planes Retaliate for Libyan Attacks, Wash. Post, Mar. 25, 1986, at A 1, col. 3.

91. See infra, "The Bombing of the La Belle Discotheque", p. 35 this text.

and that the March 25th secret message was the first-time Gadhafi had issued a general order through Libyan diplomats to attack Americans. 92/

In summary, the United States became the direct target of Gadhafi's state sponsored terrorism, but only after President Reagan's speech in January, 1986 and the Gulf of Sidra incident in March 1986. Prior to January, 1986, which is the key time for judging whether there was a national emergency for the United States and the legitimacy of President Reagan's use of IEEPA, the United States was not the target of Libya's terrorism. On balance, however, one would have to conclude that the United States was included in Gadhafi's target audience under the expanded theory of aggression of "state-sponsored terrorism" prior to January, 1986. The Rome and Vienna airport attacks may not have been linked to Gadhafi or aimed at the United States, but some of the previously examined incidents and rhetoric 93/ were clearly intended to attract our attention. The distinction between the United States being the target of violent acts or being included in the target audience of terrorist acts is meaningful in evaluating whether or not a "national emergency" existed. For example, President Reagan did not mention Gadhafi's threat or actions of 1981 in his January, 1986 speech to justify his actions under IEEPA. During his news conference the President was asked if he took seriously Gadhafi's [presumably 1981] threats to make Washington, D.C. the target of hit squads. The President unfortunately played for the laugh:

Well, I wish he was planning to do that himself. I'd be happy to welcome him. [Laughter]

92. Oberdorfer, The Three Scenarios of Confrontation, Wash. Post, Apr. 20, 1986, at A 1, col. 3, A 25, col. 5.

93. See supra notes 83-87 and accompanying text.

But, no, I -- how can you not take seriously a man who has proven that he is as irrational as he is in things of this kind. I find he's not only a barbarian, but he's flaky. [Laughter] 94/

Despite his attempt to insert seriousness between two jokes, it is obvious that President Reagan did not equate Gadhafi's threats with a national emergency in January, 1986.

V. The Reagan Administration's Justifications

If there was not a national emergency with respect to Libya in January, 1986, why did President Reagan act against Libya?

A. The Underlying Motivation

The underlying motivation for Reagan's actions against Libya surfaced in his response to a rather stinging question at his January, 1986 news conference which implied his ineffectiveness:

Mr. President, you have said that your policy toward terrorists is swift and effective retribution. And after the Achille Lauro case you said, "you can run but you can't hide." But isn't this one more case where there is no retribution and where the people behind the terrorism have in effect been able to hide? 95/

The President's reply focused on the fact that most terrorist incidents had been suicide missions where the perpetrators died with the victims. He did not answer the question. Although he attempted to conclude on a positive note by claiming 126 terrorist missions had been aborted, Reagan's frustration showed through with his admission, "I know it appears that we sit here and are not doing anything." 96/ For that matter the question itself reflected America's frustration with the

94. Transcript, Jan. 8, supra note 23, at A 16, col. 3.

95. Id. at A 16, col. 2 (emphasis added).

96. Id.

inability to deal with terrorists and the President knew it. A Lou Harris poll showed that 72 percent of Americans surveyed said countries supporting terrorism should be threatened with invasion. 97/ Lloyd N. Cutler, architect of president Carter's economic sanctions against Iran, later commented on Reagan's sanctions on Libya:

We resort to sanctions mostly to satisfy our own public opinion and convince ourselves that we are doing something when stronger measures -- such as military action -- would be too risky or counterproductive. 98/

Moreover, this frustration of Reagan's has developed into a personal Reagan/Gadhafi confrontation over the years according to one columnist:

President Reagan seems to have his own fixation on Gadhafi and to have singled him out as a prime example of irresponsible leadership and state-sponsored international terrorism that the West must crush. 99/

If, in fact, Reagan has a fixation, it is all the more dangerous because the other half of the confrontation is unstable and unpredictable. Gadhafi was seen exhibiting bizarre behavior on a trip to Spain in 1984. 100/ A CIA psychological profile written two years before that trip said that:

Gadhafi is judged to suffer from a severe personality disturbance -- a "borderline personality disorder" ... under severe stress he is subject to episodes of

97. Watson, supra note 52, at 15.

98. Oberdorfer, Specialists Expect Sanctions to Have Limited Effect on Libya, Wash. Post, Jan. 9, 1986, at A 14, col. 1.

99. Ottaway, supra note 78, at A 1, col. 2.

100. Id. at C 4, col. 1.

bizarre behavior when his judgment may be faulty. 101/

It does not take much to provoke such an unstable person. A CIA intelligence estimate in March, 1985 states:

We believe Gadhafi would directly target U.S. personnel or installations if [he] ... believed the U.S. was engaging in a direct threat to his person or was actively attempting to overthrow his regime. 102/

Reagan was obviously aware of Gadhafi's instability when he called him "flaky." Despite this, the President imposed sanctions and implied a military threat would be next. 103/ It is not surprising that Gadhafi responded with a conditional threat to send suicide squads to the United States. The fact that Libyans rushed deployment of Soviet made SA5 antiaircraft missiles into positions off the Gulf of Sidra further attest to the fact that Gadhafi predictably took Reagan's implied threat seriously. 104/ The question is, did we deliberately provoke this reaction? Lloyd N. Cutler said that the economic sanctions against Libya, "will have virtually no effect." 105/ George Shultz said the same thing about the economic sanctions against South Africa and other Reagan administration officials have made the same observation about the sanctions against Nicaragua. 106/ If we do not think economic sanctions work, what were we hoping to achieve by your actions

101. Id. at C 4, col. 1.

102. Id. at C 1, col. 2.

103. See infra "Reagan's Military Threat," p. 37 this text and accompanying notes.

104. Hiatt, Libyans Hurrying Deployment of Missiles, U.S. Officials Say, Wash. Post, Jan. 8, 1986, at A 19, col. 1.

105. Oberdorfer, supra note 98.

106. Id.

on January 7th? One reporter noted:

The most likely outcome, White House officials admit, is that Gadhafi will be goaded into yet another assault on Americans -- and that will give the administration exactly the opportunity it needs to stage a military attack. In fact, some officials are so keen for a fight that they openly worry that Gadhafi might thwart them by temporarily lying low. Reagan strategists believe they must strike within the next six to nine months or else miss the tide of outrage against Libya's support of terrorism. 107/

1. The Gulf of Sidra Skirmish

The above comment by unidentified White House officials in January, 1986 proved prophetic. There was more rhetoric than action on either side for almost three months following the President's speech. Then in the latter part of March, 1986 United States naval forces comprising three carrier battle groups conducted freedom of navigation exercises in the Gulf of Sidra. As in 1981, American planes operated over international waters but did cross Gadhafi's so called "line of death" and into an area extravagantly claimed by Libya as territorial waters. On March 24, six Libyan missiles were fired at the American planes and U.S. forces retaliated by destroying two Libyan missile boats and attacking a radar site at Surt linked with the missile attack. 108/ The next day two Libyan missile boats made a sudden, high speed turn towards U.S. Navy ships and American forces retaliated by destroying one of them, damaging the other, and again attacking the Surt site. 109/

107. Anderson, Get Tough: The Reagan Plan, Newsweek, Jan. 20, 1986, at 16, 17.

108. Wilson, supra note 90.

109. Wilson and Hiatt, Navy Again Strikes Libyan Boats, Radar; Gadhafi Is Warned, Wash. Post, Mar. 26, 1986, at A 1, col. 5.

It is estimated that Libya suffered 30 casualties; 110/ the United States did not suffer any personnel or equipment losses.

Libya was fortunate that its forces were not more effective. The free navigation exercise was planned with the realization that it might provide a military confrontation with Gadhafi. 111/ If Americans had been killed during the exercise, the plan, code named "Prairie Fire", called for attacking Libyan naval and air bases. If the Libyan attack was sufficiently substantial, the plan called for bombing key industrial targets too. 112/ This explains why we sent three aircraft carriers, 27 escort ships, and 240 planes into the Gulf of Sidra to exercise our right to free navigation. 113/

After the United States' forces left the Gulf of Sidra, Gadhafi publicly threatened to attack military bases in Italy or Spain or anywhere else that might give aid to the Sixth Fleet. 114/ Later it was revealed that a coded message from Tripoli to Libyan diplomatic missions, or People's Bureaus, had been intercepted by United States intelligence services. The message was issued March 25, 1986, the second day of the Gulf of Sidra skirmish, and called for attacks on Americans. 115/

110. Dickey, Libya Silent on Casualties, Wash. Post, Mar. 28, 1986, at A 1, col. 6.

111. Hoffman and Cannon, Terrorism Provided Catalyst, Wash. Post, Mar. 25, 1986, at A 1, col. 1.

112. Wilson and Hoffman, U.S. Ends Naval Exercises Off Libya, Wash. Post, Mar. 28, 1986, at A 1, col. 4, A 20, col. 5.

113. Wilson, supra note 90, A 13, col. 2.

114. Dickey, Gadhafi Makes New Threats, Wash. Post, Mar. 29, 1986, at A 1, col. 1.

115. Oberdorfer, supra note 92, at A 25, col. 5.

2. The Bombing of TWA Flight 840

On April 2, 1986 a bomb blast on an American airliner (TWA Flight 840) flying over the Mediterranean Sea killed four Americans. 116/ A group called the Ezzedine Kassam of the Arab Revolutionary Cells claimed that the TWA bombing was in retaliation for American attacks on Libya. 117/ For a while a known woman terrorist named Mansour, who had been a passenger on the plane, was the prime suspect, but she denied responsibility and pointed out that she was partially paralyzed and not an explosives expert. 118/ There was speculation that the bombing may have been the work of any one of a number of other groups: the Lebanese Armed Revolutionary Faction, Abu Ibrahim's "May 15" organization, a group headed by Abu Musa, or even Abu Nidal's group. 119/

United States officials, however, believed that any link to Gadhafi was "obscure" and that it was "very unlikely" he ordered such an attack. It was believed that a free lance terrorist group which was sympathetic to Libya did the bombing on their own. Gadhafi denied ordering the attack. 120/ President Reagan condemned the bombing, promised to search for and prosecute those responsible, but did not specifically accuse Gadhafi. 121/ The matter remains unresolved.

116. DeYoung, Blast on TWA Jet Kills Four, Wash. Post, Apr. 3, 1986, at A 1, col. 4.

117. Hoffman, U.S. Officials Doubt Mid Air Blast Was Retaliatory Strike by Gadhafi, Wash. Post, Apr. 3, 1986, at A 30, col. 1.

118. Boustany, Lebanese Woman Denies TWA Bombing, Wash. Post, Apr. 6, 1986, at A 1, col. 3.

119. DeYoung, FBI Says Plastic Bomb Was Used in TWA Blast, Wash. Post, Apr. 6, 1986, at A 29, col. 5, A 34, col. 1.

120. Hoffman, supra note 117.

121. Hoffman, Reagan Pledges to Find, Prosecute Terrorists, Wash. Post, Apr. 4, 1986, at A 25, col. 1.

3. The Bombing of the La Belle Discotheque

Two days after the bombing of TWA Flight 840, the United States intercepted another Libyan message in apparent response to the March 25th message from Tripoli calling for attacks on Americans generally. The newly intercepted message was from the Libyan People's Bureau in East Berlin and was directed to headquarters in Tripoli. It advised Libyan authorities that they would "be very happy when you see the headlines tomorrow"; it was dated April 4, 1986. 122/ At 1:50 am, April 5, 1986 a bomb exploded in the La Belle discotheque which was a popular entertainment spot among the American soldiers stationed in West Berlin. 123/ One Turkish woman and one American soldier were killed and 204 people were injured including 64 Americans. 124/ Three different groups claimed responsibility: the Arab Liberation Front, the Red Army Faction, and the Holger Meins commandos. 125/ However, within 10 minutes of the explosion another message from the Libyan People's Bureau in East Berlin advised authorities in Tripoli that an operation was "happening now" and that it would not be traceable to the People's Bureau. 126/

In response to the La Belle bombing, President Reagan has charged that Gadhafi has a 'master plan' of indiscriminate violence against

122. Woodward, supra note 56.

123. Wilson & Oberdorfer, Bomb Explodes In Berlin Disco Frequentd By GI's, Wash. Post, Apr. 5, 1986, at A 1, col. 5.

124. Cannon, U.S. Presses Allies to Accept Military Move Against Libya, Wash. Post, Apr. 12, 1986, at A 1, col. 5.

125. Lee, Three Groups Say They Placed Berlin Bomb, Wash. Post, Apr. 6, 1986, at A 1, col. 5.

126. Woodward, supra note 56.

Americans in Europe and has urged our allies to force Libyan diplomats out of their countries. 127/ At a news conference on April 9, 1986 President Reagan called Gadhafi "this mad dog of the Middle East" and said the United States was prepared to respond militarily if there was proof linking Libya to the La Belle bombing. 128/ Later the Reagan administration urged our Western allies to accept a United States military operation against Libya if one was to be launched. 129/ During the week following the April 9th news conference, stories began to appear in the popular media as to exactly how the United States would attack Libya, including specific forces that would be utilized and what targets would be hit. 130/

4. The United States Bombing Raid on Libya

On the night of April 14, 1986 United States Air Force planes from Great Britain and Navy planes from two American aircraft carriers in the Mediterranean Sea near Sicily bombed Gadhafi's headquarters and military and terrorist bases in and around Tripoli and Benghazi, Libya. 131/ In addition to considerable damage to structures, 37 Libyans were killed and 93 were injured according to Abdul Salaam Jalloud, the number

127. Hoffman, U.S. Accuses Qaddafi of Terror Master Plan, Wash. Post, Apr. 6, 1986, at A 1, col. 6.

128. Transcript of President Reagan's News Conference, Wash. Post, Apr. 10, 1986, at A 32, col. 1.

129. Cannon, supra note 124.

130. Beck, Hitting Back at Libya-How the U.S. Might Do It, Newsweek, Apr. 21, 1986, at 22; Church, Targeting Gadhafi, Time, Apr. 21, 1986, at 18.

131. Coordinated Efforts Mark Air Strike on Libya, Army Times, Apr. 28, 1986 at 4, col. 1.

two man in the Libyan government. 132/ One American plane and its two man crew were lost. 133/

In an address televised nationwide, President Reagan explained the bombing raid on Libya as an attempt to stop Gadhafi's terrorism. He cited the bombing of the La Belle discotheque and the intercepted messages linking that terrorist act to Libya. He cited the right to self defense under Article 51 of the United Nations charter and said that it was a duty as well as a right. Most importantly he said, "we have done what we had to do. If necessary, we shall do it again." 134/ Clearly the United States had reached a turning point and there would be no return.

B. Prior Plans

1. Reagan's Military Threat

This list of recent events began with a comment from an unidentified White House official to the effect that President Reagan's actions under IEEPA of January 7, 1986 were intended to provoke a fight with Gadhafi. 135/ Considering that the comment was made in January it would appear to have been prophetic, but it actually was a subtle reference to a secret plan within the Reagan administration to attack Libya that predates even the December 27, 1985 terrorist attacks on the Rome and Vienna airports. For eight months the United States tried to convince

132. Dickey, Libya Says It May Allow Soviet Bases, Wash. Post, Apr. 19, 1986, at A 1, col. 2, col. 4.

133. Coordinated Efforts, supra note 131.

134. We Have Done What We Had to Do - Text of President Reagan's Address, Wash. Post, Apr. 15, 1986, at A 23, col. 1.

135. See supra note 107 and accompanying text.

Egypt to engage in a joint military attack on Libya. One option was for the United States to provide air support for an Egyptian ground attack across its border with Libya. Another option was for Egypt to attack and then request our assistance. 136/ The catalyst for this planning was not the December 27th attacks, but rather the hijacking of a TWA plane in June, 1985 where one American was killed. As one reporter noted:

U.S. intelligence showed that Iran and Syria probably were more involved in the [June TWA hijack], but those countries were not the visible symbols of evil that Gadhafi presented. A demonstration of U.S. resolve was necessary and Libya was singled out. 137/

The first visible action on this plan was taken on January 7, 1986. Ostensibly the President was imposing economic sanctions on Libya. However, President Reagan concluded his January 7, speech with, "If these [economic sanctions] do not end Gadhafi's terrorism, I promise you that further steps will be taken." 138/ Couple this with the fact that, as revealed in the press conference, Reagan felt Gadhafi was sufficiently worried by the movement of the American aircraft carrier Coral Sea immediately after the Rome and Vienna attacks that Gadhafi falsely denied supporting the terrorists. 139/ The movement of the Coral Sea may have been routine as Reagan noted in his press conference but other U.S. officials remarked at the time that the

136. Woodward, U.S. Unable to Persuade Egypt to Back Plan for Joint Anti-Gadhafi Move, Wash. Post, Apr. 2, 1986, at A 1, col. 6, A 17, col. 1.

137. Woodward, U.S. Decided to Give Libya Firm Message, Wash. Post, Mar. 26, 1986, at A 1, col. 6, A 26, col. 1.

138. Transcript, Jan. 8, supra note 23, at A 16, col. 1.

139. Id. at A 16, col. 2.

escalated presence of our armed forces in the region was designed to keep Gadhafi unsettled about a possible military strike. 140/ President Reagan obviously was aware of the effect of the Coral Sea on Gadhafi before his January 7 speech and did not cancel the ship's routine maneuver before imposing his economic sanctions to ensure they were perceived as peaceful rather than belligerent.

Gadhafi certainly saw a link between the Coral Sea and the January 7 speech and perceived the latter as belligerent. The day after Reagan's speech, Gadhafi described the American embargo as, "tantamount politically to a declaration of war." 141/ At that time Gadhafi gave no indication of reprisals, repeated again that he was not responsible for the terrorist attacks, offered to return to Europe any fugitive terrorists found in Libya, and even offered to urge Palestinians to concentrate their attacks on Israel (as opposed to Europe or the United States). 142/ Later, when it was clear that the Coral Sea would not be withdrawn immediately, Gadhafi warned that "suicide groups" were being formed to respond to any United States attack. "If they threaten us at home, we shall threaten them at home." 143/

With the advantage of hindsight, President Reagan's actions under IEEPA on January 7, 1986 were calculated belligerency particularly in light of the state of affairs at that time. 144/ As one anonymous

140. Hoffman, Gadhafi's Isolation Urged, Wash. Post, Jan. 8, 1986, at A 1, col. 4, A 17, col. 5.

141. Dickey, Tripoli Says U.S. Move Is "Tantamount" to War, Wash. Post, Jan. 9, 1986, at A 1, col. 4.

142. Id.

143. Watson, supra note 52, at 15.

144. See supra "The Requirement for A National Emergency", p. 14 this text.

administration source phrased it:

It was an absolute tragedy. Libya does provide support to (terrorists) ... but as we've learned so many times support is not control ... and to virtually declare war on Gadhafi is way out of proportion to the threat and the problem. 145/

2. An Attempt at Assassination?

By the time of the bombing raid on Libya, Reagan's military threat had acquired a decidedly sinister subplot. As previously mentioned, Gadhafi's headquarters was one of the bombing targets. 146/ It was undoubtedly his command post, but it also was a residence for him and his family, not unlike the dual function of the White House. The plan for the bombing raid included four 2,000 pound bombs aimed at the command post with the knowledge that everything in the vicinity could be damaged; Gadhafi's residential compound and personal tent were not put off limits. 147/ One official involved in planning the raid said, "[w]e hoped we would get him, but nobody was sure where he would be that night." 148/ Others admitted they targeted his headquarters with "a reasonable expectation that he might be there." 149/ National Security Council officials even drafted a potential public statement describing Gadhafi's death as "fortuitous." 150/ Gadhafi was home that

145. Woodward, supra note 81, at C 4, col. 2.

146. See supra note 131 and accompanying text.

147. Wilson, Gadhafi Was A Target of U.S. Raid, Wash. Post, Apr. 18, 1986, at A 1, col. 5.

148. Id.

149. Whitaker, Getting Rid of Gadhafi, Newsweek, Apr. 28, 1986, at 18.

150. Wilson, supra note 147.

night, but escaped uninjured; however three of his children were injured and an infant girl taken in by his wife was killed. 151/ Secretary of State George Shultz said, "He [Gadhafi] was not a direct target." 152/ Pentagon spokesman Robert Sims said, "The nerve center was the target, not the individual." 153/ President Reagan denied that the bombing raid was intended to kill Gadhafi but added, "I don't think any of us would have shed tears if that had happened." 154/

Assassination is more than morally reprehensible. A 1976 Executive Order ratified by President Reagan in 1981 states:

No person employed by or acting on behalf of the United States government shall engage in, or conspire to engage in, assassination. 155/

James Turner Johnson points out that the traditional distinction between killing in war and by assassination is the random nature of death in war as opposed to targeting one individual for death. 156/ That is why the precise moral status of the planning of the bombing raid is so important. In this regard one reporter noted:

Privately, the, Reagan's aides left no doubt that, to put it mildly, they would not have been unhappy if Gadhafi just happened to die in the raid. The distinction appeared to be largely legalistic, a long-standing U.S. Executive Order forbids attempts to assassinate foreign heads of

151. Calvin, Gadhafi: U.S. Raid Hit His Home, Wash. Post, June 20, 1986, at A 21, col. 1.

152. Church, Hitting the Source, Time, Apr. 28, 1986, at 16.

153. Id.

154. Hoffman, Military Action Is Not Precluded, Wash. Post, May 7, 1986, at A 1, col. 6.

155. Prohibition Against Assassination, 3 C.F.R. 1981 Comp., p. 213 (1982) [hereinafter cited as Exec. Order No. 12,333].

156. Johnson, Why We Shouldn't Assassinate Moammar Gadhafi, Wash. Post, Apr. 20, 1986, at C 1, col. 2, C 2, col. 2.

state, and it would be an extremely fine point whether that includes targeting one in a bombing raid. 157/

When, one of the president's men was asked about future bombing raids he replied, "The more of his places we hit at once, the better the odds." When he was asked the odds of what, he replied, "[y]ou can guess." 158/

3. Manipulating the Press

The fact that the targeting of Gadhafi for terrorism was the result of the June 1985 hijacking of TWA Flight 847 is particularly ironic. As pointed out by George Ball (former United States Ambassador to the United Nations) Flight 847 was hijacked by Shiite militiamen, not terrorists, because of America's role in Israel's invasion of Lebanon. 159/ Mr. Ball cites a number of factors which led the Shias to believe that the United States was their enemy, including the destruction of Shiite neighborhoods with 16 inch shells from the United States battleship New Jersey. In addition, the United States concurred when Israel imprisoned more than 1,100 Shias on little or no evidence to cover its retreat from Lebanon in flagrant violation of the Fourth Geneva Convention of 1949 according to Mr. Ball. The Shias, who had no effective military might of their own, concluded that only by kidnapping enough Americans could they persuade our government to persuade Israel to release their countrymen. Mr. Ball states that the skyjackers were not terrorists, but were "zealous young

157. Church, supra note 152, at 18.

158. Whitaker, supra note 149, at 18.

159. George Ball address, supra note 9.

patriots doing what they could to secure the release of their friends and relatives" 160/ This was eventually recognized by some of the hostages themselves, notably Allyn Corwell (the elected spokesman for the 152 hostages) and Captain Testrake (pilot of TWA Flight 847).

As Mr. Ball stated:

Only in the United States was that point largely missed - obscured, as it was by cries of public outrage born of frustration, racial resentments, a lack of public awareness of even the most elementary facts about the Middle East, and a mindless conviction that any efforts to understand or explain the motives of skyjackers is to condone the practice. The press and television were the worst offenders; in the beginning they called the Shias "terrorists" and "fanatics" and only after receiving a volume of letters and protests did they change the terminology to "guerillas," "Shiite militamen", and the "Shiite Resistance Movement." 161/

The media, however, was not the only offender in Mr. Ball's view:

Even before Corwell's airplane touched down in New York the Reagan Administration had maneuvered to have him replaced as spokesman for the hostages, while omniscient commentators in the American media called him abusive names. 162/

As noted previously, Arabs in general have suffered from a negative media in this country. 163/ Gadhafi, however, has been the particular focus of Reagan's efforts. The President of the United States has called the head of another country "a mad dog", "flaky", a "pariah", and a "barbarian" which, in the words of Haynes Johnson, is "an attack of

160. Id. at 17.

161. Id. at 17.

162. Id.

163. See supra note 10 and accompanying text.

unseemly rhetoric." 164/ After the United States' bombing raid on Libya, a Middle East-born media expert said that President Reagan's rhetoric had dehumanized Gadhafi and inevitably led to the bombing raid; "[i]n a sense, the public has been prepared to accept it." 165/ If one suspects the loyalties of such a speaker, consider that after the Gulf of Sidra incident, but before the U.S. bombing raid, Lou Cannon accused President Reagan of "dehumanizing discourse" with respect to Gadhafi personally and concluded that it was designed "to provoke the Libyan leader while preparing the American public for military action." 166/ The preparation worked; according to various polls, 71 to 76 percent of Americans approved of the bombing raid on Libya. 167/

VI. The Unexpressed Objective

It has already been shown that there was no national emergency with respect to Libya before January, 1986 that would support President Reagan's use of his powers under IEEPA and that his actions on January 7, 1986 were part of a larger plan aimed at Gadhafi. Why then did the President attempt to make criminals of those Americans who would not leave Libya?

164. Johnson, An Attack of Unseemly Rhetoric, Wash. Post, Apr. 23, 1986, at A 2, col. 5.

165. Grove, supra note 10, at C 14, col. 3.

166. Cannon, A Dehumanizing Discourse, Wash. Post, Apr. 14, 1986, at A2, col. 5.

167. Sussman, 76% of Americans Polled Back Bombing of Libya, Wash. Post, Apr. 30, 1986, at A 4, col. 1, and Newsweek Poll, Newsweek, Apr. 28, 1986, at 22.

A. The American Oil Technician - A New Weapon of Coercive Foreign Diplomacy

At first glance the bulk of Executive Order 12,543 and the implementing regulations 168/ appear to make international trade the main target. Consider, however, that in March of 1982, President Reagan banned the importation of Libyan oil into the United States. 169/ Since that time United States - Libyan trade has shrunk to \$336 million, which is tiny compared to the \$2.5 billion Italy poured into Libya and the \$2 billion West Germany spent in Libya in 1984. 170/

Nor was the safety of Americans in Libya the primary motivation for forcing them to leave. After Libyan jets shot at two United States Navy planes and Gadhafi threatened to send hit squads to Washington, D.C. in 1981, the use of American passports for travel to, in, or through Libya was restricted and the following warning was published:

This action is required by the unsettled relations between the United States and the Government of Libya, and the increased threat of hostile acts against Americans. Travel to or residence in Libya by American citizens is hazardous because of the continued anti-American stance and hostile actions of the Libyan Government. The Government of Libya has repeatedly demonstrated a willingness to direct hostile acts against United States nationals. The American Embassy in Tripoli remains closed and the United States Government is not in a position to provide diplomatic protection or consular assistance to Americans in Libya. Under the circumstances, there is an imminent danger to the physical safety of Americans traveling to or present in Libya. 171/

168. Exec. Order No. 12,543, 51 Fed. Reg. 875 (1986); Libyan Sanctions Regulations, supra note 34.

169. Proclamation No. 4,907, 47 Fed. Reg. 10,507 (1982).

170. Why U.S. Allies Won't Follow, U.S. News & World Report, Jan. 20, 1986, at 18.

171. Public Notice 787, 46 Fed. Reg. 60,712 (1981).

There were 8,000 Americans in Libya before the warning and approximately 1,000 to 1,500 afterwards. 172/ Despite our fears, however, Libyans coddled rather than harassed Americans working in their country after 1981. To make it easier for Americans to enter, Libyans stopped stamping American passports. Instead they were given a separate piece of paper to be returned on their departure. 173/ Their baggage was rarely searched. 174/ Unlike other foreign workers, Americans were allowed to send home most of their earnings. 175/ It is apparent that despite the December 27th attacks on the Rome and Vienna airports, Americans in Libya did not feel threatened or endangered. As one prophetic, oil-company executive said in January, "I will probably leave now for security reasons, but the threat is coming from my own Government, not from the Libyans. I don't want to be bombed in an American military attack here." 176/

The real reason Reagan forced Americans out of Libya, rather than just warning them, is the same reason Libyans have treated them so well. Libya's oil production operations are almost totally American designed, equipped and operated. 177/ Despite the actions taken by the United States in 1981 and 1982, Gadhafi's oil "weapon" has remained a threat to world peace. 178/ Gadhafi is able to support terrorism only because

172. Transcript, Jan. 8, supra note 23, at A 17 col. 1.

173. Dickey, supra note 80, at A 18, col. 1.

174. Miller, The Americans Living in Libya Are Resentful but Resigned, N.Y. Times, Jan. 9, 1986, at A 8, col. 1, col. 4.

175. Ottaway, supra note 78, at A 14 col. 2.

176. Miller, supra note 174, at col. 2.

177. Randal, supra note 80, at A 22, col. 2.

178. Dickey, Gadhafi's "Weapon" Against West Maybe Blunted but It Remains a Threat, Wash. Post, Jan. 30, 1986, at A 32, col. 1.

of the revenue earned from oil and American technicians are vital to Libya's oil production as evidenced by the fact that departing American employees were promised that their jobs will remain open for a month up to one year in hopes that United States' policy will change. Reagan wants to stop or slow down Gadhafi's oil revenues by pulling out the American technicians. The President does not have a precise authority to do that so he used his power under IEEPA to force all Americans out of Libya. Secretary of State George Shultz has confirmed that the American technician is the primary target by saying,

There undoubtedly are cases of people who are married to Libyans ... who are very special cases. The Treasury [Department] has the ability to gear itself to those humanitarian cases. 179/

Shultz was referring to the fact that under the implementing regulations, the Foreign Assets Control Office of the Treasury Department has the power to license or authorize exceptions to the sweeping prohibition against transactions with Libyans. 180/ The license authority is restricted to humanitarian concerns such as Americans married to Libyans. 181/ The oil technicians have not recieved such exemptions. 182/

In short, the American oil technician has been involuntarily drafted by the executive branch of the government as a "weapon" of coercive foreign diplomacy. As with congressionally enacted military drafts of previous wars, those who would attempt to evade Reagan's "draft" are told they are subject to criminal prosecution under IEEPA.

179. Press, Getting Americans Out of Libya: Is It Legal?, Newsweek, Jan. 20, 1986, at 19.

180. Libyan Sanctions Regulations, supra note 34.

181. Randal, supra note 80, at A 22, cols. 3-4.

182. Id. at A 1, col. 2.

B. A New Definition of "Trade"

In order to implement his hidden agenda, President Reagan stretched his powers under IEEPA more than ever before. As noted previously, IEEPA gives the President broad powers to control international economic transactions without distinguishing between personal and business transactions. ^{183/} However, reading the plain language of the statute leaves the impression that Congress aimed it at bankers, currency traders, corporations and exporters rather than individual Americans working at an oil well or just paying for their own food and shelter. A new definition of "trade" was needed to achieve Reagan's objectives.

President Reagan's definition of "trade" with respect to Libya is different from any other instance in which IEEPA has been utilized. IEEPA was used to prohibit "any transaction" between United States citizens and any foreign property interest in both Cuba ^{184/} and Iran. ^{185/} In neither case, however, did this specifically include normal living expenses as in the case of Libya. ^{186/} Thus, the commercial rather than personal transactions inference of the statute was maintained. President Carter prohibited any American from performing any service contract in support of an industrial project in Iran, but specifically exempted contracts entered into prior to the date of his order. ^{187/} President Reagan's order prohibits performance of personal service contracts in support of any governmental, commercial, or industrial project in Libya

183. See supra "The Statutory Basis", p. 11 this text.

184. Cuban Assets Control Regulations, supra note 41.

185. Iranian Assets Control Regulations, supra note 42.

186. Libyan Sanctions Regulations, supra note 34.

187. Exec. Order No. 12,205, 45 Fed. Reg. 24,099 (1980); Specifically see para. 1-101 (e) of the order.

and does not contain such a prospective application rule. 188/ Considering the Reagan Administration's view of the seriousness of the Nicaraguan threat, it is suprising that the economic sanctions against that country do not prohibit Americans from working or living there. IEEPA was used to prohibit importation of Nicaraguan goods and services into the United States, export of American goods to Nicaragua, and the landing in the United States of any Nicaraguan plane or ship. 189/ Similarly, with respect to South Africa, IEEPA was used to prohibit American loans, computers, and nuclear technology from going to that country and South African arms, ammunition, military vehicles, and Krugerrands from coming into the United States. 190/ American companies were prohibited from racial discrimination in their businesses in South Africa, but individual Americans can still work and live there. 191/

There is, in addition, a more subtle difference in President Reagan's utilization of IEEPA with respect to Libya. IEEPA provides for civil penalties up to \$10,000 for violators as well as criminal penalties up to \$50,000 in fines and/or 10 years imprisonment for willful violators. 192/ There seems to be an emphasis on the possibility of criminal penalties for individual Americans performing mundane "transactions" necessary for survival in Libya that is not present with respect to any other country. To be fair, the Americans who decided to stay with their Libyan spouses are receiving

188. See supra note 30 and accompanying text.

189. Nicaraguan Trade Control Regulations, supra note 43.

190. Exec. Order No. 12,532, supra note 44.

191. Id.

192. IEEPA, supra note 26, at § 1705.

exemptions to stay. However, as Shelley Ashureq, a mother of two from Portland, Oregon said, "I never thought I would have to apply for a license to eat." 193/

In summary, President Reagan attempted to indirectly deter terrorism on January 7, 1986 by imposing economic sanctions against Libya. One of those economic sanctions was the removal of the American oil technicians from that country. In order to coerce their departure the President used his broad but inspecific power under IEEPA to criminalize traveling to, working in, or even living in Libya for any American. The legitimacy of these actions rests on a delegation of authority from Congress for periods of national emergency. Considering the state of affairs at the time, it is debatable whether the President's actions of January 7, including ordering Americans out of Libya, were properly based on a national emergency with respect to Libya or helped create such a crisis.

VII. Key Domestic Legal Issues

A. The Current State of Legal Affairs

As indicated previously, the President's actions of January 7, 1986 had the effect of creating three new crimes for Americans: travel to, working in, or living in Libya. The nature of these crimes and the fact that they were created by the executive branch rather than the legislative branch of government raises questions concerning the separation of powers concept, the right to travel, the prohibition against bills of attainder and ex post facto laws, and the requirement for a due process taking. For some the answers appear to be clear. Chuck Sims, an attorney for the American Civil Liberties Union (ACLU) said

193. Randal, supra note 80, at A 22, col. 4.

that Reagan's economic sanctions against Libya fall "squarely within" a 1984 ruling of the United States Supreme Court and "I don't see any grounds to challenge it." ^{194/} Actually, the Supreme Court upheld the constitutionality of the president's power to prohibit commercial transactions under IEEPA in Dames & Moore v. Regan, ^{195/} and to prohibit prospective tourist travel to Cuba under IEEPA in Regan v. Wald. ^{196/} Neither case, however, addresses purely private transactions of Americans already in a country necessary for survival, nor criminal penalties for these transactions or individual travel unrelated to foreign trade. Thus, this paper will focus on these unexamined areas.

It should be noted that to date there have been no arrests made, no prosecutions begun, nor civil challenges filed with respect to Americans and the economic sanctions against Libya. There are, however, three potential cases. Allegedly Stokley Carmichael said he has traveled to and from Libya subsequent to President Reagan's ban and the matter has been referred to the Department of Justice. ^{197/} That department refuses all comment on any investigation, ^{198/} but as noted earlier no arrests have been made nor charges filed. Ramsey Clark also has supposedly traveled to and from Libya since the President's order, ^{199/}

194. Lardner, Penalties Set for Americans Who Fail to Quit Libya, Wash. Post, Jan. 9, 1986, at A 14, col. 3, col. 5.

195. Dames & Moore v. Regan, 453 U.S. 654 (1981).

196. Regan v. Wald, 104 S.Ct. 3026 (1984).

197. O'Connell interview, supra note 7.

198. Telephone interview with Ron Roose, Criminal Division, Department of Justice (Jun. 16, 1986).

199. Telephone interview with Roger Dankert, Libya Country Officer, Department of State (July 7, 1986).

but again no action has been taken yet. Louis Farakhan allegedly has traveled to and from Libya since the ban and said he would be filing a civil challenge to the order on the grounds of religious freedom in order to repay a five million dollar loan from Gadhafi. 200/ Again, no criminal or civil action has been filed to date. None of the five American oil companies that were in Libya (their licenses expired June 30, 1986) have filed any actions on their behalf or on behalf of any individual American. 201/ Although an exact count is not available, hundreds of humanitarian exemptions from the order to leave Libya have been granted but only to Americans married to Libyans; no exemptions have been granted to anyone else. 202/

The absence of formal indictments is understandable considering the newness of the prohibitions. None of the potential cases noted above, if and when they are pursued in the courts, are likely to be relevant to the American working or living in Libya without benefit of a local national spouse. With time, however, some of these presently unknown violators are likely to surface to visit gravely ill, family members in the United States or simply due to a desire to come home not unlike the Vietnam War era draft evader. Thus, this paper shall examine the legality of ordering Americans out of Libya in terms of three hypothetical violators. Within the context of this analysis a "traveler" shall be an American who visits Libya

200. Id.

201. Id.

202. Telephone interview with Francis A. Keating II, Assistant Secretary (Enforcement and Operations), Office of Foreign Assets Control, Department of the Treasury (May 22, 1986).

subsequent to the February 1, 1986 effective date of the prohibition for purposes unrelated to commercial trade or the tourist industry. The term "oil technician" shall be used to describe an American in Libya prior to the President's order who was and continues to work at any job that supports an industrial, other commercial, or governmental project of Libya. Finally, those Americans who were in Libya prior to the economic sanctions working at a job that does not support that country's industrial base and those Americans who might be unemployed and unrelated to Libyans, but disobey the order to leave, shall be grouped together under the label "schoolteacher."

B. Separation of Powers

1. The Powers of the President

Fundamental to our system of government is the concept that the legislature makes the laws and the executive implements them. 203/ This is particularly important when criminal penalties are involved. Congress sometimes blurs these lines when it delegates some of its power to the Executive branch as it did in IEEPA. When the President exercises power not specifically delegated as he did on January 7, 1986, it reopens the whole question of separation of powers. Justice Jackson in his concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer divided the question of separation of powers between Congress and the Executive branch into three categories:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his independent

203. U.S. Const. art. I and art. II, § 3.

powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. 204/

One of the inherent powers of the President is in the area of foreign relations as noted by the Supreme Court in United States v. Curtiss-Wright Export Corp.:

[W]e are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations - a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. 205/

However, some of those provisions of the Constitution to which the President's foreign policy power must be subordinated is Congress' power "to regulate commerce with foreign nations" and "to declare war." 206/ Hence the need for the delegation of authority in IEEPA and the continuing question of separation of powers.

Closely associated with the President's power in foreign relations is the Emergency Powers Doctrine in both times of war and peace. The Constitution does not mention emergency powers, probably because the

204. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-637 (1952) [hereinafter cited as Youngstown].

205. United States v. Curtis-Wright Export Corp., 299 U.S. 304, 319-20 (1926).

206. U.S. Const. art. I § 8, cl. 3 and 11.

framers thought they had created a government that would have sufficient power to deal with any contingency. 207/ However, it is impossible to provide for all future exigencies and the Executive is well suited to exercise emergency powers because it is "unitary, always in session, [and] possessing confidential sources of information" 208/ Therefore, the Executive "is the best equipped of the three branches to act with the necessary decisiveness, dispatch, and knowledge." 209/ On the other hand, as Clinton Rossiter states in his book Constitutional Dictatorship, "granting plenary executive power to act in emergencies may pose great dangers to the rule of law and our system of limited, constitutional government." 210/ Michael Belknap has pointed out that the Supreme Court has been reluctant to accept the Emergency Powers Doctrine in regards to peacetime domestic affairs. 211/ In wartime, however, as Edward Corwin observed:

The more general principles of constitutional law and theory, those that ordinarily govern the delegation of legislative power, the scope of natural power over the ordinary life of the citizen, and the interpretation of the "due process" clause as a restraint on substantive legislative power, become highly malleable, and that even more specific provisions of the Bill of Rights take on unaccustomed flexibility. 212/

All of which leads Corwin to conclude that, "Article II is the most

207. Belknap, Historical Observation-The New Deal and the Emergency Powers Doctrine, 62 Tex. L. Rev. 67, 77 (1983).

208. Notes, The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power, 96 Harv. L. Rev. 1102, 1103 (1983).

209. Id.

210. Id. at 1103, quoting from C. Rossiter, Constitutional Dictatorship 61-73, 294-97 (1963 ed.).

211. Belknap, supra note 207.

212. E. Corwin, The President: Office and Power 1787-1957 236 (4th rev. ed. 1957).

loosely drawn chapter of the Constitution." 213/ Many have observed that the Supreme Court has been reluctant to enforce limits on the President's emergency powers in foreign affairs. 214/ This is particularly unfortunate because as President Kennedy used to say, "domestic policy can only defeat us; foreign policy can kill us." 215/

One of the few occasions when the Court did restrain the President's emergency powers was in the case of Youngstown Sheet & Tube Co. v. Sawyer which involved matters both internal and external to the United States. 216/ During the Korean War the American steelworkers' union threatened to call a nation-wide strike. President Truman issued an executive order to keep the steel mills operating. There was no statutory basis for the order; the President said that it was necessary to avoid an emergency which would endanger the national defense. The Supreme Court rejected that emergency rationale stating in part that, "[t]he Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times." 217/ As Justice Douglas said in his concurring opinion, "the emergency did not create the power; it merely marked an occasion when power should be exercised." 218/ Moreover, Douglas specifically rejected the idea that the Executive should exercise emergency powers rather than Congress

213. E. Corwin and L. Koenig, The Presidency Today 2 (1956).

214. Notes, supra note 208, at 113 n. 59.

215. Schlesinger, Strengthening and Restraining the President, in The Power of the Presidency: Concepts and Controversy 370 (R. Hirschfield ed. 1973).

216. Youngstown, supra note 204.

217. Id. at 589.

218. Id. at 629.

because executive power is more efficient:

"The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but by means of inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." 219/

2. Dames & Moore v. Regan.

One of the more numerous cases where the Supreme Court upheld the President's emergency powers was Dames & Moore v. Regan. 220/ In November, 1979 the American Embassy in Tehran, Iran was seized and our diplomatic personnel were held hostage. President Carter froze Iranian assets in the United States under IEEPA in response. Thereafter the Treasury Department issued regulations that nullified any attachment, judgement, decree, lien, execution, or garnishment with respect to those Iranian assets unless licensed or authorized. Any license or authorization that was granted could be amended or revoked at any time. Later President Carter granted a general license that authorized prejudgment attachments against Iran but not the entry of any judgment or decree. In December, 1979 Dames & Moore obtained a prejudgment attachment in federal district court against Iran for services it performed in connection with the Iranian Atomic Energy Organization. In January, 1981 the hostages were released pursuant to a presidential agreement that required termination of all legal proceedings involving American claims against Iran, nullification of all attachments, and to

219. Id. at 629, quoting Brandeis dissent in Myers v. United States, 272 U.S. 52.

220. Dames & Moore, supra note 195.

submit all claims to binding arbitration before an Iran-United States Claims Tribunal. Simultaneous to the agreement, President Carter issued executive orders revoking the previous general license for attachments. Dames & Moore sued to prevent nullification of its attachment claiming the President had exceeded his statutory and constitutional powers. The Supreme Court upheld the President's actions under IEEPA.

Justice Rehnquist, who wrote the opinion of the Court, did not find a specific delegation of authority to the President to suspend claims in IEEPA 221/ and refused to find a presidential plenary power to settle claims. 222/ Instead Rehnquist relied upon the history of "congressional acquiescence" in executive claims settlement as the basis for President Carter's authority. 223/ Since Congress had not resisted President Carter's agreement with Iran, Rehnquist found that Congress had acquiesced in the specific agreement 224/ and that the acquiescence was tantamount to an express congressional delegation:

As Justice Frankfurter pointed out in Youngstown [Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-611 (1952)] "a systematic, unbroken executive practice, long pursued to the knowledge of Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President by § 1 of Art. II." Past practice does not, by itself, create power, but "long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] has been [taken] in

221. Id. at 675.

222. Id. at 688.

223. Id. at 686.

224. Id. at 688.

pursuance of its consent" United States v. Midwest Oil Co., 236 U.S. 459, 469 (1915). See Haig v. Agee, 453 U.S. 280 (1981). 225/

Rehnquist has been severely criticized for his "congressional acquiescence" rationale. 226/ It has been pointed out that the above quoted passage from Justice Frankfurter's concurring opinion is dictum, not representative of the majority of the Court in Youngstown, and inappropriate to Dames & Moore given the Court's refusal to find any such inherent Article II power vested in the President. 227/ Similarly the reference to Haig v. Agee is disputed because that case involved an express delegation of power from the Congress to the President to regulate passports in contrast to the court's holding in Dames & Moore that Congress had made no such express delegation. 228/ Finally, the above quoted passage from Midwest Oil left out crucial language which limited it to a recognized administrative power of the President peculiar to the management of public lands and ignores specific, prospective authorization of the president's actions in the case. 229/ Rehnquist's critics concluded:

The court thus implicitly created a presumption of legislative acquiescence in executive agreements, absent specific congressional disapproval. The absence of congressional disapproval surely cannot be the determinative factor in a finding of acquiescence, for it would give the President powers unchecked by judicial review and subject

225. Id. at 686.

226. Marks and Grabow, The President's Foreign Economic Powers After Dames & Moore v. Regan: Legislation by Acquiescence, 68 Cornell L. Rev. 68 (1982).

227. Id. at 85.

228. Id. at 87.

229. Id. at 86.

only to the ultimate veto of Congress. Such a rule would contravene the basic principles of our constitutional scheme of government. 230/

It may be argued that Dames & Moore may be distinguished from the potential cases of "travelers", "oil technicians", and "schoolteachers" in Libya because it upholds the President's power to prohibit foreign trade under IEEPA in the more traditional understanding of commercial trade without addressing purely private transactions. The danger of Rehnquist's "congressional acquiescence" theory is that it is easily extendable to our trio of potential Libya cases. It is a danger foretold in Justice Jackson's concurring opinion in Youngstown, more than thirty years ago, "[w]e may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers." 231/

3. Congress' Attempts to Limit the President's Emergency Powers

In a way it is unfortunate that the first test of the constitutionality of the President's powers under IEEPA should come in a case like Dames & Moore where there was at least a past practice of congressional acquiescence in foreign claims settlement by the Executive to rely on, because IEEPA was born out of a desire by Congress to limit the President and his power. After the Vietnam War ended there was a general frustration with the manner in which the Executive involved the United States in that conflict. Congress passed a series of acts to reassert itself in a variety of areas hitherto left to the President. The most obvious of these was the War Powers Resolution of 1973 which limited the President's ability to involve the country in armed conflicts without Congress'

230. Id. at 103.

231. Youngstown, supra note 204, at 654.

participation. 232/ In 1976 Congress attempted to limit the President's emergency powers during a crisis that did not necessarily involve armed conflict in the National Emergencies Act. 233/

The National Emergencies Act was prompted by Congress' discovery of 470 permanent emergency statutes which gave the Executive "almost dictatorial powers over the economy, the military, foreign relations, and domestic affairs." 234/ These powers were kept alive by a series of presidentially declared national emergencies dating back to 1933 that were never terminated. 235/ TWEA was the most frequently abused emergency statute. 236/ As with the other emergency statutes, TWEA did not define a national emergency or provide criteria to determine when one may be properly declared. Indeed, section 5(b) of TWEA even allowed the President to define key terms in the statute thereby increasing his power. 237/

The National Emergencies Act terminated all existing national emergencies with limited exceptions. 238/ It grants the President authority to declare national emergencies, but requires that these declarations be printed in the Federal Register. 239/ Section 1622(a)

232. War Powers Resolution 50 U.S.C.S. § 1541-1548 (1981, with 1986 Supp.).

233. The National Emergencies Act, supra note 27.

234. Notes, The National Emergency Dilemma: Balancing the Executive's Crisis Powers with the Need for Accountability, 52 S. Cal. L. Rev. 1453 (1979).

235. Id.

236. Id. at 1454 n. 4.

237. Id. at 1459.

238. The National Emergencies Act, supra note 27, at § 1601.

239. Id. at § 1621.

of the Act provides for termination of a national emergency by congressional concurrent resolution or Presidential proclamation. Congress must meet within six months of the declaration to determine whether to terminate the national emergency. 240/ In any event the national emergency will automatically terminate one year after it is declared unless the President publishes a continuation notice in the Federal Register within ninety days of that anniversary. 241/ Although the Act was intended to limit the President's power, it has been criticized for specifically authorizing the President to declare national emergencies without defining what constitutes a national emergency. 242/

In 1977, Congress turned its attention to reforming TWEA, separated the President's emergency powers from his wartime powers under section 5(b), and created IEEPA. The announced purpose was to "revive and delimit the President's authority to regulate international economic transactions during wars or national emergencies". 243/ As previously noted, the President's emergency powers under section 1702 of IEEPA 244/ are virtually identical to his powers to regulate foreign trade under section 5(b) of TWEA during wartime. 245/ Unlike TWEA, IEEPA did not allow the President to regulate gold and silver bullion holdings by Americans or to seize records. IEEPA prohibited the President from

240. Id. at § 1622(b).

241. Id. at § 1622(d).

242. Notes, supra note 234, at 1464.

243. 1977 U.S. Code Cong. & Ad. News 4540, 4541.

244. See supra note 36 and accompanying text.

245. TWEA, supra note 37.

interfering with the international flow of mail and telephone communications, unlike TWEA. More importantly, IEEPA did not allow the Executive to vest property or regulate purely domestic economic transactions. 246/ The previously criticized authority of the President to define the terms of the statute under section 5(b) of TWEA was not carried over to IEEPA.

Procedurally the President is required to declare a national emergency and consult with Congress before exercising his emergency powers under IEEPA. 247/ However, the President may continue to exercise certain powers even after the emergency terminates, notwithstanding the National Emergencies Act, if necessary due to claims. 248/ Finally, section 1706(b) states that Congress may terminate the declared national emergency by concurrent resolution. 249/

As a practical matter IEEPA did little to restrain the President. Dames & Moore emasculated the prohibition against vesting property. The restriction to foreign transaction is undercut by the language in section 1702 that allows regulation of "any interest of any foreign country or national thereof" which may include political/economic interests affected by large financial transactions involving Americans only. The requirement to consult with Congress does not require their approval or specify who is to be consulted. Most important, there still is no definition of what constitutes a national emergency except for the language in section 1701 about an "unusual and extraordinary threat" which

246. 1977 U.S. Code Cong. & Ad. News 4540, 4543.

247. IEEPA, supra note 26, at § 1703.

248. Id. at § 1706.

249. Id.

could be almost anything the President chooses. Finally, the one positive check on the President's emergency powers under IEEPA, the legislative veto, has been declared unconstitutional in INS v. Chada. 250/ As one commentator concluded:

To the degree that IEEPA was intended to restrict the peacetime emergency powers that had been granted the President by TWEA, it failed. IEEPA did not add any significant procedural or substantive restraints to those imposed by TWEA; the powers delegated to the President are still vast and amorphous. 251/

4. The Coming Crisis in Controlling the Executive Under IEEPA

It must be remembered that Chada was decided two years after Dames & Moore. The combined effect is devastating to the system of checks and balances that is presumed in our system of government in the case of IEEPA which gives such sweeping power to the President. On the one hand Dames & Moore presumes congressional acquiescence in any exercise of Executive emergency power unless the Congress specifically objects. On the other hand Chada prohibits the legislative veto that was the only effective restraint accompanying the delegation of extraordinary powers to the President. The Congress can't revoke the now unprotected delegation without stripping the President of the flexibility to deal with genuine crises quickly and decisively. That leaves the judiciary as the sole check on the President under the current state of IEEPA.

Unfortunately we live in a time when crisis is routine and the emergency powers of the President, once considered extraordinary, have

250. INS v. Chada, 462 U.S. 919 (1983) [hereinafter cited as Chada].

251. Notes, supra note 208, at 1120.

become a permanent part of the executive office. Even more unfortunate, given the above analysis, is the fact that judicial supervision has been the least effective restraint on the President's emergency powers. According to R.S. Hirschfield:

[I]n a showdown the President's power is greater than the Supreme Court's. The judicial branch has generally recognized this fact and either avoided conflict with the executive when possible or accepted his assertions of authority when forced to reach a decision. Indeed the Court has established a consistent pattern of acquiescence in judging presidential exercises of extraordinary power. 252/

Hirschfield points out that even in the one real exception to this acquiescence, Youngstown, seven members of the Court declined to deprive the President of emergency powers although they forced him to return the steel mills. 253/ Hirschfield concludes:

The judiciary is always placed in a difficult position by conditions which allow a strong President to assume extraordinary power. Compelled to acknowledge that the law of necessity is superior to the law of the Constitution, and lacking the kind of popular support which is accorded the political leader, it must accept many actions which under normal conditions would be outside the realm of legitimate power. The Court's infrequent ex post facto pronouncements regarding the limits of presidential authority have little direct effect in any case, and since no judicial decision is self-enforcing they are always essentially lectures rather than injunctions. The Court's primary function in checking a strong President is to act as a symbol of restraint, a moral force, and a constant reminder of established principles . . . executive power is what the President, and not what the Court, says it is. 254/

252. Hirschfield, The Power of the Contemporary Presidency, in the Power of the Presidency: Concepts and Controversy 293 (R. Hirschfield ed. 1973).

253. Id.

254. Id. at 294.

Congress is only slightly more effective as a restraint on the President in Hirschfield's view. Congress is hampered in this role by the fast paced succession of complex crises. As a result, the legislature increasingly looks to the executive branch for leadership in domestic areas such as economic policy and civil rights as well as national defense and foreign policy. 255/ "The most important limitation on Congress as a presidential restrainer, however, is public support for the executive." 256/ It should be noted that Hirschfield was writing in 1973 long before IEEPA or the whipsaw effect of Dames & Moore and Chada were created.

Hirschfield acknowledges that popular opinion may be an effective restraint on a President as well as his ally. However, he also makes an observation that is particularly appropriate to President Reagan's actions under IEEPA with respect to Libya:

While popular support may, on rare occasions, be mobilized against the President, the opposite is the rule. For he is the principal molder of public opinion, and as a result, even this most important instrument of restraint is not often effective. The same psychology that creates a desire for presidential leadership in critical times assures the executive of popular support for policies which he pursues. Moreover, it is important to recognize that this "crisis psychology" which elevates the President to a dominant position is itself partly created by the President. For, given the framework of objective facts surrounding a critical situation, it is largely the crisis leader's own reaction to those facts - the extent to which he emphasizes and dramatizes the situation's seriousness - that determines the form of the response. 257/

255. Id. at 295.

256. Id. at 296.

257. Id. at 298.

The most effective restraint, according to Hirschfield, is our system of selecting a President which assures us a man with a personal commitment to the constitutional democratic process. 258/ He points out that we have never had a dictator although we have had some leaders who have assumed dictatorial authority; more often presidents try to involve the Congress in crisis government in order to obtain legitimacy. 259/ Frankly, this is the one part of Hirschfield's analysis that has aged badly. Today it sounds like saying, "Don't worry; the fox is guarding the hen house." Perhaps this self-restraint has become less valid because of the increasing use of the executive office to mold public opinion over the last thirteen years since both theories were espoused. In any event self-restraint has not worked well with respect to our current situation with Libya.

In summary, the concept of separation of powers is currently non-functional with respect to IEEPA. The Congress has delegated extraordinary power to the executive branch without adequate criteria for controlling its use. The one possible restraint, the legislative veto, is probably unenforceable under Chada. The Supreme Court which should be a restraining influence on the Executive has a history of acquiescence with respect to the exercise of presidential emergency powers. What is worse, the presumption of congressional acquiescence in Dames & Moore combines with Chada to make revocation of IEEPA the only real restraint on the President. Although the "traveler", the "schoolteacher", and the "oil technician" in Libya should be able to rely on the judiciary for protection against excesses of executive

258. Id. at 299-300.

259. Id. at 300.

emergency power, they are left, as a practical matter, with the prosecutorial discretion of the President who created the crime. The only hope is that the Supreme Court awakens to the crisis in controlling the President's emergency powers it helped create and excepts IEEPA from Chada or though less likely, produces a Youngstown type solution where IEEPA is preserved, but the excesses with respect to Libya are curbed.

C. The Right to Travel

As mentioned earlier there have been two Supreme Court opinions on IEEPA. Dames & Moore involved foreign trade which was at least within the language of IEEPA. The other opinion, also written by Justice Rehnquist, was Regan v. Wald. 260/ Wald involved the right to travel, which was less obviously in the scope of IEEPA. The right to travel has been much discussed by the Supreme Court, but always in the context of the Executive's power to regulate passports prior to Wald. It should be remembered while analyzing the passport cases that all of them involve an express delegation of congressional authority to the President in regards to control of travel, unlike the delegation in IEEPA.

1. The Passport Cases

The first of the right to travel cases was Kent v. Dulles. 261/ The Secretary of the State refused to issue passports to Kent and others who refused to file an affidavit concerning their membership in the Communist Party. Congress had made a passport necessary for

260. Wald, supra note 196.

261. Kent v. Dulles, 357 U.S. 116 (1958).

foreign travel and delegated authority to the Secretary of State to issue passports on the basis of citizenship and allegiance to the United States. Justice Douglas, writing for the majority of the Court, found that:

The right to travel is a part of the "liberty" of which the citizen cannot be deprived without due process of law under the Fifth Amendment. 262/

Douglas pointed out that travel outside the United States may be necessary for a livelihood, marriage, reuniting families, or being well informed on public issues. 263/ Since the right to travel is protected by the Fifth Amendment, its regulation must be pursuant to the law-making functions of Congress and any delegation will be construed narrowly. 264/ The Supreme Court found that the Communist Party affidavit requirement was not within the congressional delegation of authority to issue passports on the basis of citizenship or allegiance to the United States. 265/

In Aptheker v. Secretary of State 266/ the chairman of the American Communist Party challenged the Subversive Activities Control Act provision that forbid members of a Communist organization from applying for or using a passport. The Supreme Court found the statute to be an unconstitutionally broad interference with the right to travel under the Fifth Amendment:

"[A] governmental purpose to control or prevent activities constitutionally subject to state

262. Id. at 125.

263. Id. at 126-127.

264. Id. at 129.

265. Id. at 130.

266. Aptheker v. Secretary of State, 378 U.S. 500 (1964).

regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." 267/

In a concurring opinion, Justice Douglas supplied an admonition for the future:

Absent war, I see no way to keep a citizen from traveling within or without the country, unless there is power to detain him. Ex parte Endo, 323 U.S. 283. And no authority to detain exists except under extreme conditions, e.g., unless he has been convicted of a crime or unless there is probable cause for issuing a warrant of arrest by standards of the Fourth Amendment. 268/

Despite Douglas's admonition, the right to travel became qualified the following year in Zemel v. Rusk. 269/ Zemel was not a Communist, but he wanted to travel to a Communist country, Cuba, as a tourist and to learn about the state of affairs in that country. The United States State Department refused to validate Zemel's passport for travel to Cuba. Travel to Cuba without the special validation would subject Zemel to criminal penalties under the Immigration and Nationality Act of 1952. The Supreme Court held that the Passport Act of 1926 was a sufficient delegation of authority to the Executive to impose area restrictions on the right to travel and, therefore, to refuse to validate otherwise valid passports for travel to Cuba. Chief Justice Warren, writing for the majority, distinguished Kent v. Dulles:

It must be remembered . . . that the issue involved in Kent was whether a citizen could be denied a passport because of his political beliefs or associations In this case, however, the Secretary of State has refused to validate appellant's passport not because of any

267. Id. at 508, quoting NAACP v. Alabama, 377 U.S. 288.

268. Aptheker, supra note 266, at 520.

269. Zemel v. Rusk, 381 U.S. 1 (1965).

characteristic peculiar to appellant, but rather because of foreign policy considerations affecting all citizens. 270/

The Court rejected the argument that travel to Cuba without the special validation might subject the traveler to possible criminal prosecution under the Immigration and Nationality Act as a matter not ripe for review in this case. 271/

Not surprisingly, Justice Douglas wrote a dissenting opinion in Zemel which Justice Goldberg joined. Douglas reasserted the right to travel and the correctness of Zemel's motives. He also noted that Congress could restrict travel where there was sufficient danger from disease or war, but in the case of Cuba, the Executive alone was declaring an area dangerous. 272/

We have here no congressional determination that Cuba is an area from which our national security demands that Americans be excluded. Nor do we have a congressional authorization of the Executive to make such a determination according to standards fixed by Congress "[A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." NAACP v. Alabama 377 U.S. 288 273/

Justice Golberg wrote a separate dissenting opinion as well, in which he asserted that the Executive has neither inherent nor delegated authority to restrict travel in peacetime. 274/ Justice Black also filed a separate dissenting opinion motivated in part by the potential

270. Id. at 13.

271. Id. at 20.

272. Id. at 25-26.

273. Id. at 26.

274. Id. at 27-39.

criminal penalties the majority refused to address:

Our Constitution has ordained that laws restricting the liberty of our people can be enacted by the Congress and by the Congress only The people who are called to obey laws have a constitutional right to have them passed only in this constitutional way. This right becomes all the more essential when as here the person called on to obey may be punishable by five years imprisonment and a \$5,000 fine if he dares to travel without the consent of the Secretary or one of his subordinates. 275/

The case of Haig v. Agee 276/ presented a far less sympathy-evoking set of facts. Philip Agee was a former Central Intelligence Agency (CIA) employee who announced a campaign to fight the Agency wherever it operated and proceeded to do so by exposing CIA undercover agents and sources in several foreign countries. The Secretary of State revoked Agee's passport on the basis that his activities abroad were likely to cause serious damage to the national security or foreign policy of the United States. The United States District Court for the District of Columbia and the Court of Appeals found that the Secretary of State had exceeded his authority. The Passport Act of 1926 which authorized the Secretary to issue passports in accordance with rules made by the President was too broad to constitute an express delegation of congressional authority to impair the constitutionally protected right to travel and expression. The Supreme Court reversed, finding congressional acquiescence:

The history of passport controls since the earliest days of the Republic shows congressional recognition of Executive authority to withhold

275. Id. at 22.

276. Haig v. Agee, 453 U.S. 280 (1981).

passports on the basis of substantial reasons of national security and foreign policy. 277/

The Court distinguished Kent and Aptheker based on Philip Agee's already *damaging* actions, "[t]he protection accorded beliefs standing alone is very different from the protection accorded conduct." 278/ Agee's right to travel claim was, therefore, dismissed as without merit. 279/ The Court did note that, "[t]his case does not involve a criminal prosecution; accordingly, strict construction against the Government is not required." 280/ Moreover, "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." 281/

Justice Brennan, joined by Justice Marshall, dissented in Haig v. Agee. Brennan pointed out that the majority opinion found congressional acquiescence from administrative construction rather than from manifest practice which had been required in earlier cases. 282/ Brennan argued:

Only when Congress has maintained its silence in the face of a consistent and substantial pattern of actual passport denials or revocations - where the parties will presumably object loudly, perhaps through legal action, to the Secretary's exercise of discretion - can this Court be sure that Congress is aware of the Secretary's actions and has implicitly approved that exercise of discretion. 283/

277. Id. at 293.

278. Id. at 305.

279. Id. at 306.

280. Id. at 291 n. 21.

281. Id. at 292.

282. Id. at 312-318.

283. Id. at 315.

Brennan concluded, "[t]he Constitution allocates the law-making function to Congress, and I fear that today's decision has handed over too much of that function to the Executive." 284/

In summary, the passport cases begin by recognizing a constitutionally protected right to travel, gradually allow the Executive to restrict that right, and end by finding congressional acquiescence in Executive decisions as well as practices in the area. The Supreme Court has announced its reluctance to interfere with the President in foreign affairs and national security matters. Moreover, it has so far avoided addressing the criminal sanctions that accompany the President's restrictions on the right to travel. It would seem that judicial acquiescence has been added to congressional acquiescence.

2. Regan v. Wald

The case on which the ACLU spokesman and indeed the Reagan administration relied to support the President's actions under IEEPA 285/ was Regan v. Wald. 286/ The Cuban Assets Control Regulations were first promulgated in 1963 under section 5(b) of TWEA and prohibited any transaction involving property in which Cuba or any national thereof has any interest of any nature. 287/ In 1977 a general license permitting travel-related economic transactions with Cuba was added. 288/ Later that same year section 5(b) of TWEA was amended

284. Id. at 319.

285. Lardner, supra note 194 and accompanying text.

286. Wald, supra note 196.

287. Cuban Assets Control Regulations, supra note 41, at § 515.201(b).

288. Id. at § 515.560.

to limit the President's broad powers to times of war, but at the same time IEEPA was created to give the President similar powers in peacetime. IEEPA had its own procedural requirements. Congress also allowed to continue or "grandfathered" all powers exercised by the President under TWEA on July 1, 1977 notwithstanding the amendment to TWEA. 289/ In 1982, the general travel license of 1977 was amended to restrict tourist and business travel in order to reduce Cuba's hard currency earnings from American travelers. 290/ A group of Americans wanting to tour Cuba sued for an injunction against enforcement of the travel ban on the basis that: it was not a restriction being exercised on July 1, 1977 and therefore not "grandfathered" under TWEA; it was not in compliance with the procedural requirements of IEEPA; and it violated their right to travel. Justice Rehnquist, writing for the majority in Regan v. Wald, found that the ban did not comply with IEEPA, but was "grandfathered" under TWEA and that there was no violation of the right to travel. 291/

Key to Rehnquist's reasoning is a lack of distinctions:

Section 5(b) draws no distinction between the President's authority over travel-related transactions and his authority over other property transactions. For purposes of TWEA, it is clear that the authority to regulate travel-related transactions is merely part of the President's general authority to regulate property transactions. 292/

Since property transactions were being prohibited on July 1, 1977, the travel ban was "grandfathered." 293/ Incredibly, Rehnquist goes so far

289. 50 U.S.C. App. § 5 note .

290. 47 Fed. Reg. 17030 (1982).

291. Wald, supra note 196, at 3039-3040.

292. Id. at 3034.

293. Id.

as to say that the general license permitting travel is an example of travel to Cuba being regulated prior to the cut-off date. 294/ He follows Zemel v. Rusk in disposing of the right to travel claim and reiterates that foreign affairs should be largely immune from judicial intervention. 295/ He dismisses the criminal sanctions distinction in a footnote. 296/

Justice Blackmun, Brennan, Marshall, and Powell joined in dissent. They accused Rehnquist of:

[losing] all sight of the general legislative purposes of the IEEPA and the clear legislative intent behind the grandfather clause. To achieve its labored result, the Court invokes a series of platitudes on statutory interpretation, but ignores their application to this case. Ironically, the very pieces of legislative history that the Court cites to justify its result clearly support the contrary view. 297/

Their dissent, however, is limited to the "grandfather" clause and does not address the question of whether travel could be properly restricted as a transaction under IEEPA.

Lawrence H. Tribe, however, has taken that extra step:

In Regan v. Wald, the Court upheld President Reagan's virtual ban on tourist travel to Cuba as nothing new - merely a legislatively "grandfathered" variation on the preexisting ban on trade in Cuban cigars and other goods. Cigars, people - a mere shift in commodities. Thus, what economist Alfred E. Kahn once dubbed "the tyranny of small decisions" was all it took to lead the Supreme Court to overcome the long-standing constitutional principle that a citizen's freedom to travel abroad may not be curtailed without the

294. Id.

295. Id. at 3038-3039.

296. Id. at 3039 n. 26.

297. Id. at 3045.

clearest authorization from Congress. Was there sufficiently clear authorization for the executive ban at issue in Wald? I think not. 298/

Tribe also criticizes Rehnquist's deference to the President:

The decision underscores the Court's increasing abdication of authority to the "expertise" of the executive branch Indeed the Court's deference in this case should have been to Congress, which as the nation's most broadly representative body has the authority to regulate foreign travel and which had spoken negatively on the matter - or, at the very least, had not spoken positively. 299/

In summary, the Wald decision is flawed in several ways. Rehnquist manipulated statutory language to obscure the clear intent of Congress to limit the President's powers. He reduces people to mere objects and fails to distinguish between civil regulations and criminal sanctions. The writer of both Dames & Moore and Wald confuses deference in matters of national security and foreign relations with abdication of the judiciary's role in our system of government. He relies on Zemel which was supported by a genuine national emergency - the Cuban missile crisis - and never even considers whether there is the required national emergency with respect to the same country nearly 20 years later in Wald. Finally, the cursory treatment of the right to travel evidences the Court's willingness to reduce individual liberties to a flexible instrument of foreign policy at the disposal of the President.

Our hypothetical "traveler" to Libya should be able to rely upon a right to travel protected by the judiciary. Wald indicates that reliance would be a mistake.

298. Tribe, Colloquy: Constitutional Calculus-Equal Justice or Economic Efficiency? 98 Harv. L. Rev. 592, 612 (1985) (citations omitted).

299. Id. at 612-613.

D. The Criminal Sanction Distinction

Rehnquist's confusion of people with commodities in Wald is a key factor in avoiding the criminal penalties issue under IEEPA. His opinion in Dames & Moore provided an interesting opportunity to begin mixing people and commodities into a single homogenous category of "transaction" where only money would be of concern. He pointed out in Dames & Moore that the petitioner's contention that the suspension of claims under IEEPA constituted a taking of property without compensation in violation of the Fifth Amendment, was not ripe for review. ^{300/} However, he went on at some length to gratuitously find, "no jurisdictional obstacle to an appropriate action in the United States Court of Claims under the Tucker Act." ^{301/} This brought a storm of protest from Phillip Trimble for ignoring the treaty exception to the Claims Court jurisdiction and complicating the conduct of foreign policy by creating an unprecedented judicial remedy for those adversely affected. ^{302/} Another observer opined that President Carter's settling of claims by referral to an inferior alternative remedy (the Iran - United States Claims Tribunal) may be a taking without compensation if the Tribunal rejects a claim or awards an amount less than reasonable. ^{303/}

Dames & Moore dealt with the last clause of the Fifth Amendment, "nor shall private property be taken for public use, without just

300. Dames & Moore, supra note 195, at 688.

301. Id. at 689.

302. Trimble, Foreign Policy Frustrated-Dames & Moore, Claims Court Jurisdiction and a New Raid on the Treasury, 84 Colum. L. Rev. 317 (1984).

303. Note, The U.S.-Iran Accords and the Taking Clause of the Fifth Amendment, 68 Va. L. Rev. 1537 (1982).

compensation." 304/ However, Justice Douglas characterized the right to travel in Kent v. Dulles as a "liberty" protected by the Fifth Amendment. 305/ He was referring to the Due Process Clause of the Fifth Amendment:

nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; 306/

In Wald, Rehnquist noted the Due Process Clause issue, but converted travel into a transaction, treated it like property, and found no Due Process Clause protection necessary. The distinction between the two clauses of the Fifth Amendment is crucial.

1. The Requirement for a Due Process Taking

As noted, Kent v. Dulles stands for the proposition that the right to travel can be limited only by the Congress or by the executive branch pursuant to a specific congressional authorization. Zemel v. Rusk allowed the President to restrict travel under the Passport Act but refused to reach the issue of criminality under the Immigration and Nationality Act. That issue was decided in United States v. Laub. 307/

Laub and others were indicted for conspiring to violate section 215(b) of the Immigration and Nationality Act of 1952 which made it a crime for anyone to attempt to leave the United States without "a valid passport". The alleged conspiracy consisted of recruiting and arranging travel to Cuba for 58 Americans whose otherwise valid passports were not specifically validated for travel to Cuba as

304. U.S. Const. amend. V.

305. Kent, supra note 261, at 125.

306. U.S. Const. amend. V.

307. United States v. Laub, 385 U.S. 475 (1967).

required by executive branch rule making. Justice Fortas, writing for a unanimous Court, acknowledged, as in Zemel, that area travel restrictions were a valid civil regulation of travel by the Executive under the delegation of authority in the Passport Act of 1926. However, Fortas pointed out that section 215(b) of the Immigration and Nationality Act is a criminal statute and must be construed narrowly. 308/ He found that section 215(b) does not expressly prohibit violations of area restrictions 309/ and therefore the indictment does not allege a crime. 310/ Justice Fortas noted the importance of the right to travel as expressed in Kent v. Dulles and the confusion created by the State Department's issuance of valid passports that were not "valid" for certain countries. He concluded:

Crimes are not to be created by inference. They may not be constructed nunc pro tunc. Ordinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach. 311/

Admittedly Laub concerns passports, not transactions under IEEPA, and the Executive has made a greater effort to warn (threaten?) the public of the criminal penalties under IEEPA. The principle, however, is the same. As Justice Douglas said in his concurring opinion in Youngstown:

A determination that sanctions should be applied, that the hand of the law should be placed on the parties, and that the force of the courts should

308. Id. at 480.

309. Id.

310. Id. at 486.

311. Id. at 487.

be directed against them, is an exercise of legislative power of the Federal Government in the Congress. 312/

In order to convey the power to create crimes from the Congress to the Executive there must be, as noted in Kent and Laub, a clear delegation of authority. Such an express delegation is essential to our system of government where power is checked by its separation. As noted in Chada:

The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories: Legislative, Executive, and Judicial, to assure as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted. 313/

As noted earlier, the language of section 1702 of IEEPA authorizes the President to regulate international economic transactions in terms of commercial trade between two businessmen, not purely personal transactions involved in travel to, working in, or living in Libya. 314/ Without such an express delegation, it should be unconstitutional for the President to create a crime for our hypothetical "traveler", "schoolteacher", and "oil technician." Rehnquist dismisses Laub in a footnote in Wald. 315/

2. The Right to Specific Employment

Much of this paper has been concerned with the right to travel because of the number of cases in that area. As noted immediately

312. Youngstown, supra note 204, at 630.

313. Chada, supra note 250, at 951.

314. See supra note 37 and accompanying text.

315. Wald, supra note 196, at 3039 n. 26.

above, the same requirement for specific delegation applies to the "schoolteacher" and "oil technician" as well as the "traveler" because the criminal penalties under IEEPA. The "schoolteacher" and the "oil technician", however, have another basis for due process protection - the right to specific employment.

Greene v. McElroy 316/ involved an aeronautical engineer employed by a private manufacturer who was fired when his security clearance was revoked for associating with communists. His company had a defense contract and the security clearance was necessary for his job. The engineer was an avowed anticommunist, but his former wife was a party member and he had had business meetings with Russians on behalf of his company's products. Without the security clearance he was unemployable as an aeronautical engineer. The Supreme Court found that:

the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the Fifth Amendment. 317/

* * *

In the instant case, petitioner's work opportunities have been severely limited on the basis of a fact determination rendered after a hearing which failed to comport with our traditional ideas of fair procedure. The type of hearing was the product of administrative decision not explicitly authorized by either Congress or the President. Whether those procedures comport with the Constitution we do not decide. Nor do we decide whether the President has inherent authority to create such a program, whether congressional action is necessary, or what the limitation on executive or legislative authority may be. We decide only that in the absence of

316. Greene v. McElroy, 360 U.S. 474 (1959).

317. Id. at 492.

explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination. 318/

Many of the Americans that went to Libya to work went because they could not find jobs in the depressed American oil industry, not just because of high wages. One long-term American resident of Libya summarized the situation of many oil workers, "Many of the people here are middle-aged and older and rely on Libya for support. They will never be able to find jobs in the U.S." 319/ Even if the "oil technicians" and the "school-teachers" receive unemployment compensation or welfare on their return to the United States, the law will not be satisfied because of the distinction between the "due process clause" and the "just compensation clause" of the Fifth Amendment. Unfortunately, Rehnquist, the potential Chief Justice of the United States, is likely to follow his own lead in Dames & Moore and Wald, convert jobs into transactions, and meld people with the unprotected oil they produced.

3. Bills of Attainder and Ex Post Facto Laws

If the President claims delegated authority under IEEPA to order Americans in Libya to leave or face criminal penalties, it is important to remember that not even Congress can pass bills of attainder or ex post facto laws. 320/ An ex post facto law includes those that make an action, done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 321/

318. Id. at 508.

319. Miller, supra note 174, at col. 3.

320. U.S. Const. art. I, § 9, cl. 3.

321. Black's Law Dictionary 662 (4th ed. 1968).

In that regard the "schoolteacher" and the "oil technician" have another basis for protection unavailable to the "traveler" because they traveled to Libya at a time before President Reagan's order of January 7, 1986. Thus, Reagan's attempt to criminalize travel-related transactions under IEEPA represents an ex post facto law prohibited by the Constitution. His ban on transactions related to travel subsequent to his order does not act as an ex post facto law with respect to the hypothetical "traveler", but the "schoolteacher" and the "oil technician" were already there legally.

The careful reader may feel that the "schoolteacher" and the "oil technician" would have to have arrived before 1981 instead of 1986 because of the passport restriction announced that year. ^{322/} It must be remembered, however, that the 1981 notice that prohibited the use of passports for travel to Libya suffered from the same flaw that the Laub court found in the notice that prohibited the use of passports for travel to Cuba; it does not warn Americans of possible criminal penalties. Since Laub struck down a criminal indictment based on the authority to regulate passports, the Reagan administration must rely on its authority under IEEPA which was not exercised until 1986. Therefore, all the "schoolteachers" and "oil technicians" who entered Libya before 1986 should be protected from ex post facto travel crimes.

Finally, the "oil technician" has one basis for protection which is probably not available for the "traveler" or the "schoolteacher", the prohibition against bills of attainder. ^{323/} A bill of attainder

322. See supra note 171 and accompanying text.

323. U.S. Const. art. I, § 9, cl. 3.

is a legislative act that imposes punishment upon a designated class of persons without a judicial trial. 324/ As noted previously, President Reagan's hidden agenda on January 7, 1986 was to force the American oil technicians out of Libya in order to cripple Libya's oil production and Gadhafi's source of funds for terrorism. 325/ It is doubtful that he was really concerned with forcing out other Americans such as the "schoolteacher" or the "traveler", but they were swept up along with the "oil technician" because the President did not have a more precise tool than IEEPA's authorization to regulate transactions. Thus, "oil technicians" in Libya as a class became subject to criminal penalties because of their profession based upon the President's legislative act under IEEPA rather than by trial. The fact that IEEPA requires a conviction before imprisonment 326/ is not relevant because the "oil technician" is forced to leave his job by the President's order and that is a taking of a Fifth Amendment "liberty" without due process. 327/ In other words, the punishment that qualifies the order for a bill of attainder is the loss of the right to a specific employment, not the imprisonment.

Justice Black, in his concurring opinion in Aptheker, came to a similar conclusion. 328/ He reasoned, along with the Court's opinion,

324. Comment, Doe v. Selective Service System: The Constitutionality of Conditioning Student Financial Assistance on Draft Registration, 68 Minn. L. Rev. 677 (1984).

325. See supra "The American Oil Technician - A New Weapon of Coercive Foreign Diplomacy", p. 45 this text.

326. IEEPA, supra note 26, at § 1705(b).

327. Greene v. McElroy, supra note 316.

328. Aptheker, supra note 266, at 518.

that the right to travel was protected by the Due Process Clause of the Fifth Amendment, but that the Subversive Activities Control Act effectively took that "liberty" away based solely on the status of being a Communist through passport control measures. This constituted a bill of attainder according to Black. The fact that Aptheker faced a criminal trial under section 215(b) of the Immigration and Nationality Act of 1952 was never reached by the Court nor considered by Black in his analysis of the bill of attainder issue. The "oil technician" in Libya is subject to a bill of attainder just as surely as Aptheker was.

VIII. Concluding Analysis

A. Recommendations

On January 7, 1986 President Reagan ordered Americans out of Libya as part of the economic sanctions imposed against that country. His objective, to deter Gadhafi's terrorism, was well intentioned, but in the process he improperly created three crimes for Americans. The latter was not only unfortunate, it was unnecessary. There were alternative courses of action to deal with the problem.

1. A Proven Anti-terror Policy

One alternative is President Reagan's anti-terror policies. As he pointed out at his news conference on January 7, approximately 126 terrorist missions had been thwarted worldwide. ^{329/} Despite critical news media evaluations, his program was working. It may not be a total solution, but it is an effective tool that we should continue to use.

329. Transcript, Jan. 8, supra note 23, at A 16, col. 2.

2. Trade Credits - A Legitimate Linkage

Rather than asking our allies to stop all trade with Libya and thereby damage their own economies, Reagan could urge them to help their economies by ending trade credits to Libya. Daniel Kohler, a senior economist at the Rand Corp., points out that West European governments have subsidized Gadhafi in the amount of \$1.2 billion to \$2 billion through trade credits over the last four years. ^{330/} That amounts to \$350.00 to \$570.00 for every Libyan man, woman and child. ^{331/} These trade credits are usually in the form of government repayment guarantees to banks and businesses which give credit to Gadhafi, thereby lowering the risk and the cost of the loan to Libya. Curtailing these trade credits would provide a direct and legitimate deterrent to state-sponsored terrorism.

[I]f Gadhafi were forced to pay the risk premiums that private bankers would attach to unguaranteed loans to Libya, he would have to bear the costs of his irrational actions. Each new terrorist outrage, each additional confrontation with the United States would increase the probability of violent conflict and thus make Libya a worse credit risk in a private banker's eyes. That would lead to increases in Libya's cost of borrowing. ^{332/}

Since these loan guarantees are in the control of the various governments, they are not as dependent on the cooperation of businessmen as Reagan's trade sanctions. Moreover, as pointed out above, there is an economic incentive for cooperation unlike the trade sanctions which American oil companies have undermined in self-interest.

330. Kohler, A Sanction That Would Pinch Gadhafi, Wash. Post. Jan. 23, 1986, at A 23, col. 1, 2.

331. Id.

332. Id. at col. 3.

3. Allow Libyans to Deal With Gadhafi

The worldwide oil glut has probably done more to depress Libya's oil revenues than our economic sanctions. As a result, shortages of consumer goods are occurring in Libya; people fight over soap and bananas. ^{333/} Political unrest is spreading as well. There is a growing number of observers that feel a coup will possibly replace Gadhafi if the United States would stop attacking him long enough to allow his internal opposition to remove him without appearing to be on the side of the United States. ^{334/}

4. The United Nations

The United Nations Charter urges member nations to, "settle their international disputes by peaceful means in such a manner that international peace, security, and justice are not endangered," and not to use the threat or use of force. ^{335/} It suggests settlement of disputes by negotiation, mediation, arbitration, judicial settlement, resort to regional agencies, or any "other peaceful means of their choice." ^{336/} The United States, however, has avoided numerous opportunities to use these methods. Between the attacks on the Rome and Vienna airports and President Reagan's speech on January 7, 1986, Libya sent a letter to the United Nations that was automatically

333. Beyond the Barracks Gate, Time, Jan. 27, 1986, at 31.

334. Anderson, A Coup Will Topple Gadhafi If We Just Keep Our Hands Off, Wash. Post, Apr. 13, 1986, at C 1, col. 4.

335. U.N. Charter art. 2, paras. 3 and 4.

336. U.N. Charter art. 33.

distributed to the United States. 337/ The letter denies involvement in the attacks, condemns them, and beseeches the United Nations to secure peace in the region. 338/ Gadhafi also attempted to have Morocco, Algeria, and Saudi Arabia each intercede in his behalf with the Reagan administration. 339/ We rejected at least six overtures by Gadhafi after the Rome and Vienna attacks. 340/ After Reagan's speech in January, the United States Ambassador to the Vatican, William A. Wilson made an unauthorized visit to Libya and, according to Gadhafi, helped defuse the situation. 341/ Secretary of State Shultz reprimanded Wilson for his visit and later Wilson resigned. 342/

Now that we have bombed Libya, it is probably too late for direct talks with Gadhafi, but we should be alert to opportunities that do occur rather than rejecting them out of hand. Moreover, if we must pursue economic sanctions, we should do so through the United Nations rather than act unilaterally. The United Nations Charter provides a recognized means to apply economic sanctions against a country 343/

337. Letter from the Secretary of the People's Committee of Libya to the Secretary General of the United Nations (Jan. 2, 1986) U.N. Doc. A/41/73, S17710.

338. Id.

339. Anderson and Spear, Few Arab Countries Back Gadhafi, Wash. Post, Apr. 29, 1986, at E 9, col. 4.

340. Ottaway, Gadhafi Overtures Rejected By U.S., Wash. Post, Apr. 2, 1986, at A 1, col. 1.

341. Oberdorfer, U.S. Vatican Envoy Eased Libya Tension, Wash. Post, Jan. 23, 1986, at A 25, col. 1.

342. Envoy Who Visited Gadhafi Resigns Post at Vatican, Wash. Post, May 21, 1986, at A 37, col. 1.

343. U.N. Charter art. 41.

and we utilized it with respect to Rhodesia. 344/

5. Attacking the Root Causes of Terrorism

An analysis of terrorism states:

There is considerable historic evidence that no governmental attempt to suppress terrorism has been successful in the absence of a political program designed to eradicate the causes. 345/

This was reflected in some of the speeches at the Arab League meeting that pledged support of Gadhafi. Secretary-General Klibi (a Tunisian) said that the United States economic sanctions against Libya were an "artificial Zionist-orchestrated campaign" that sought to "divert world public opinion" from the real problems of the Arab-Israeli dispute and injustice to the Palestinian people. 346/ We need to "attack" the problem of the need for a Palestinian homeland and thereby remove one of the root causes of terrorism. Professor A. P. Rubin of the Fletcher School of Law and Diplomacy at Tufts University points out the danger of our present policy:

If the United States has the right under law to attack Libya because training camps for Palestinians are located there, then the Soviet Union could lawfully invade Honduras because of its support for U.S. - backed rebels against Nicaragua, or even hold the United States legally responsible for training camps for insurgents on U.S. territory. 347/

344. Rhodesian Sanctions Regulations, 31 C.F.R. § 530 (1985).

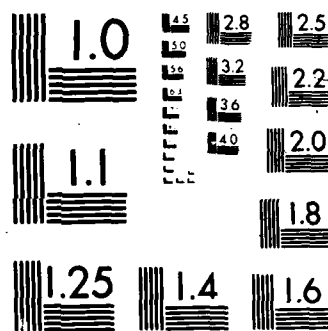
345. Mallison and Mallison, The Concept of Public Purpose Terror in International Law: Doctrines and Sanctions to Reduce the Destruction of Human Material Values, 18 How. L.J. 12, 14 (1974).

346. Jenkins, Arab League Condemns U.S. Embargo of Libya but Balks at Retaliation, Wash. Post, Jan. 31, 1986, at A 25, col. 1.

347. Oberdorfer, Some Experts Contradict Schultz on Retaliation, Wash. Post, Jan. 26, 1986, at A 25, col. 1, col. 3.

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We are doing more to upset world peace than pursue it. We need to remember the objective.

6. Patriotism

Finally, the executive branch of our government is punishing Americans, not terrorists, by creating new crimes under IEEPA that are not necessary. Skender Brame of the American School in Tripoli observed that most of the American oil workers would leave Libya. "The Americans working here don't want to break any laws. In fact, they're probably more patriotic than the average American." ^{348/} President Reagan is well known for his communication skills. Surely he could appeal to such patriotism by pointing out that the oil workers are helping to create the funds for terrorism without threatening all Americans in Libya with criminal action. There will be some who will refuse out of greed, but there are probably some such opportunists now even with the threat of jail. If criminal penalties are needed they should be created in the legislative branch of government where the specific purpose and the criminal or civil nature of any penalty can be debated.

B. Conclusions

The fact that there were alternative courses of action is further evidence that there was not such an "unusual and extraordinary threat to the national security, foreign policy or economy of the United States" as to comprise a national emergency with respect to Libya under IEEPA. Therefore, none of President Reagan's actions on January 7, 1986 were authorized. They also were terribly indirect. He punished Americans in Libya, to punish Gadhafi, to deter terrorism, on

348. Miller, supra note 174, at col. 2.

the basis of an incident sponsored by Syria. The President's actions were not so much in response to a crisis as they were part of an overall plan to provoke a crisis. Moreover, his efforts to deter terrorism are severely hampered by a lack of a program to deal with one of the real causes of Middle East terrorism - the Palestinian problem.

These international events are but a backdrop to a significant development in American criminal law, the creation of new crimes by the Executive rather than the Congress. In addition to stretching the term "national emergency" under IEEPA, President Reagan has redefined "trade" and increased his powers under IEEPA. A statute concerning commercial transactions between international businessmen has been used to make it a crime to travel to, work in, or even live in Libya. These actions violate the concept of separation of powers, the right to travel, the right to specific employment, the due process clause of the Fifth Amendment, and the prohibition against ex post facto laws and bills of attainder. <

The real tragedy is that all this violence to our legal system is due to the misuse of an overbroad instrument in order to make a narrow target an instrument of foreign policy. Reagan wanted to force the American oil technicians out of Libya to cut the source of funds for terrorism. By virtue of their profession alone, oil technicians are being punished as if they had committed treason or had aided and abetted a murder. Other Americans who want to live in or travel to Libya have been caught up in the same net as the oil technician simply because there is no more precise tool available to the President than a prohibition against "transactions." It is ironic that the President created a travel crime in the name of Natasha Simpson who died in the Rome airport exercising her right to travel.

The danger in the events of January 7 is that there is an emerging crisis in controlling the President's emergency powers. The Congress has given sweeping powers to the Executive without establishing a meaningful criteria for their use. The judiciary has removed the one effective control in IEEPA - the legislative veto - and compounded the problem by presuming congressional acquiescence in the President's actions. Rehnquist, the potential Chief Justice of the United States, has added judicial acquiescence to this deterioration of the separation of powers. In short, our hypothetical "traveler", "schoolteacher", and "oil technician" are protected only by the prosecutorial discretion of the Executive who created the crimes.

END

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