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DEPARTMENT OF STATE
THE LEGAL ADVISER

July 16, 1961

TOP SECRET
MEMORANDUM

TO : L - Mr. Abram Chayes

FROM : L/SFP - John H. Pender

SUBJECT: Atomic Stockpiles.

The following is an analysis of the accompanying two Defense memoranda on problems in the aforenoted area which State has been anxious to resolve.

The first memorandum, that which Dr. Sterns submitted to Mr. Gilpatric on March 22, focuses principally on safety, stability and communications problems concerning atomic weapons systems available to NATO Nuclear Strike Forces. This memorandum reflects a candid assessment of the situation and an attempt to propose something constructive.

The memorandum acknowledges that, while there has not been an accidental detonation of a warhead to date, there is, despite all the safety devices presently in use, still a "finite probability" of such an accident (See p. 8). This hazard can be further minimized, and perhaps even eliminated, according to Dr. Stern, by incorporating in the weapon a so-called interlock (either mechanical or electronic) which would, in effect, keep the weapon in an untriggered state but which would enable it to be triggered for use momentarily by anyone having the "key".

The safety of warheads deployed abroad is obviously a matter of concern for State since even an accidental detonation of any size nuclear weapon would have serious foreign-relations repercussions.

During the various negotiations with the Italians, for example, our negotiators have reported that the question of safety repeatedly came up and the Italians looked to the Embassy for assurance on this score. One accidental detonation could scuttle the entire atomic stockpile program; and even worse, it could kick off a general war should a local commander become alarmed, assume an enemy attack was under way and conclude it was necessary to launch his weapons to preserve them from destruction.

State, therefore, could rightfully insist on a voice in this area to assure that all possible safety features are being explored and adopted whenever feasible.

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With respect to "stability", Dr. Stern takes the position that the problem is intertwined with that of inadequate and unreliable communications between the field and the top command.

Three different situations appear to be involved. They are:

1. Premature expenditure by a local commander who, knowing the inadequacy of the communication systems, decides he cannot take the chance of waiting and launches against a supposed attacker, or launches against an attacker in fact, even though top command would order destruction rather than use of the weapons.

2. Delay in expenditure because of failure of the communications system to provide timely direction to the point that the unit fire power is destroyed or otherwise nullified by an actual attacker.

3. Unauthorized expenditure, after seizure, by allied personnel.

The value of Dr. Stern's interlock proposal here would depend on whether a mechanical or an electronic one was employed. An electronic one, independent of the existing communications network, would take care of both the first and third situations. It should also be of some value for the second situation if the electronic arming of the warhead would be readily apparent to the launch officer since this could be regarded as his final alert warning or his order to fire.

Such a device is particularly attractive to those concerned about the need for civilian control of the military since, carried to its ultimate conclusion, it would seem possible for the President himself to control the final arming of the weapons for use. Moreover, it would seem that such an approach would open up a host of possibilities for dealing with multilateral control problems.

Unfortunately, such a device is some years away from availability, according to Dr. Stern.

Apparently, a mechanical interlock device is now, or can be made readily available. Such a device would minimize, or eliminate, the danger of allied unauthorized expenditure of weapons, after seizure, since United States custodial arrangements are not always designed to deal with the problem of seizure by friendly forces. It would also be valuable for safety reasons as previously noted. But the mechanical interlock would not be of much value for preventing premature expenditure by our own commanders (situation 1) and it would not do much to overcome our existing vulnerability attributable to an inadequate and unreliable communications system which does not sufficiently meet the needs posed by the Soviet strike-first threat.

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The Stern memorandum is essentially an attempt to identify the areas in which scientific or technological aids might help meet military, political and legal needs. It does speculate, however, that the interlock "would help satisfy the custody/possession requirement" (p. 10).

That particular conclusion may not be justified since the "custody" requirement, which involves physical guardianship of weapons by United States personnel to prevent access to the weapon, must be distinguished from the "control" requirement which concerns unauthorized use. The interlock would take care of "control" problems in that it would prevent unauthorized use by friendly forces. But it would not preclude seizure of, or unauthorized access to, the weapon and consequently may not resolve our custody dispute with the Joint Committee even though the device would probably remove the primary motive for seizure. (Copies of recent memoranda of mine on the custody problem are attached.)

Finally, it is worth noting that the Stern memorandum seems to suggest that the interlock does not involve interference with the normal military chain of command for issuing orders to take action.

The JCS papers (dated nearly two months later) reflect suspicion of anything which could make it possible to circumvent the established chain of command. In any event the JCS have reached the conclusion that the needs of operational readiness preclude something less than absolute security and that, consequently, a balance must be struck by weighing a strictly military decision against such factors as the degree of mutual trust within NATO, faith in military command and discipline, domestic legal requirements and international political factors.

It seems clear, from the JCS papers, that the military believe the decision on what weight to assign each such factor in the balancing process is primarily one for the military.

I see no reason why that is the only alternative. Indeed, the appropriate process would be for the military to identify what is necessary from the operational readiness standpoint and for others to pass on the question of the price that can be paid in each of the other spheres of their respective competence, with any disagreements eventually resolved by the President.

Illustrative of the all-encompassing role now exercised by the military is the discussion on page 7 of the Appendix to the JCS memorandum. There the equipping of certain Turkish forces with atomic weapons, with alert status, is justified on political grounds although this particular question was not referred to State.

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Again, we find such euphemisms in the JCS papers as the weapons "are adequately safe, within the limits of the operational requirements imposed upon them," or "Maximum safety consistent with operational requirements" (id. at p. 12).

In other words, everything is relative and we cannot ascertain the degree to which, and where, corners have been cut in the balancing process.

It is not surprising, therefore, to find the JCS memorandum concluding that all is well with the atomic stockpile program and there is no need for any changes, even such as that posed for consideration by Dr. Stern. In that connection, the JCS paper gives us an excellent insight to the military approach when it starts the discussions of this problem from the premise that "no single device can be expected to increase both safety and readiness (id. at p. 10). Such a statement begs the question and actually poses a false issue.

Perhaps the most disconcerting aspect of the JCS paper, however, is the feeling one gets from its general tenor that units in the field equipped with the weapons are going to use them when and how they see fit; that in the last analysis one must expect that for the most part commanders of such units will put those weapons to use almost automatically when they consider they are under attack without awaiting a decision by the President. See, for example, the discussion on p. 5, p. 8, and p. 11 of the Appendix to the JCS memorandum.

On the matter of custody, the JCS paper states that the custodial units have the know-how and means to destroy the weapons if they are imminently in danger of falling into enemy hands (id. at p. 6). There is no similar statement concerning unauthorized seizure and use by allied forces. Dr. Stern's interlock would be helpful here as was discussed above.

In summary, neither of the papers under discussion touches upon the problem of whether State should have a voice in certain aspects of the instant problems. There is nothing in either paper, however, which would warrant a change in our previous position that we should insist on having a voice in at least certain of these matters before action is taken. Indeed, the JCS paper helps to reinforce the merits of our earlier conclusion that factors about which State should have a voice are involved.

Over four months have elapsed since your February 28 memorandum to the Secretary recommending that the Department insist on exercising "civilian supervision of the deployment of United States atomic weapons in support of allied troops abroad so as to assure that the weapons are deployed in a manner consistent with legal and policy requirements concerning their custody and control".

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Since then, the Joint Committee has asked us, as well as Defense, for our respective legal views on certain NATO military documents over which we had no voice. We have been waiting for some three months for Defense to develop an initial draft.

It seems to me that we can no longer defer insistence on rightful participation in studies and decisions in this area. Indeed, rather than continue as at present, it would be better to take the position that the matter is one for Defense and the President.

Attachments

L/SFP:JHPender:lhd