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June 25, 1986

The Honorable Dante B. Fascell
Chairman, Committee on Foreign Affairs
House of Representatives

Dear Mr. Chairman:

This responds to your letter of March 27, 1986, in which you and Representative Jack Brooks, Chairman, House Committee on Government Operations, requested this Office to render a legal opinion and conduct an investigation concerning certain activities of the Chemical Warfare Review Commission (CWRC), a Presidential advisory committee. Subsequent discussions with your staff limited the scope of the legal opinion to the question of whether the employment and use of two legislative and public affairs consultants by the CWRC may have violated applicable laws and regulations.

We conducted a preliminary investigation to develop the facts regarding the use of the consultants, which consisted of interviews of knowledgeable individuals and a search of available files. The factual data reported in the opinion was derived from these interviews and from relevant documents. As a result of the preliminary investigation, we concluded, for the reasons given below, that the Office of the Secretary of Defense (OSD) violated the Federal Advisory Committee Act and other applicable statutory and regulatory provisions regulating lobbying and public affairs activities in the course of providing administrative support for the CWRC. A more detailed explanation of our findings and legal conclusions is attached hereto. We are presently continuing our review and investigation of the activities of the entire Commission and expect to issue our report within a few months.

SUMMARY OF THE LEGAL OPINION

Background

Congress authorized the President to establish the CWRC in the DOD Authorization Act, 1985, Public Law 98-525, October 19, 1984, 98 Stat. 2492. That Act required the CWRC to report its findings and recommendations to the President, who was directed to submit the report together with his comments to the Congress not later than April 1, 1985. The President promulgated Executive Order 12502 on January 28, 1985 (3 C.F.R. p. 331 (1986)) establishing the CWRC. Among other things, the Order stated that: (1) the CWRC was subject to the Federal Advisory Committee Act (5 U.S.C.

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App. I); (2) the CWRC was to review the adequacy of the chemical warfare posture of the United States and report its findings and conclusions to the President; and (3) the Secretary of Defense was responsible for providing the CWRC with the administrative staff and support services it required.

About March 12, 1985, the Executive Secretary of the Commission, a DOD official, authorized the hiring of John A.C. Gibson as a legislative affairs consultant and Peter Hannaford as a public affairs consultant for the CWRC under the provisions of 5 U.S.C. § 3109. The consultants developed a complete legislative and public affairs strategy for the CWRC, designed to influence the public and the Congress favorably about the CWRC's viewpoint on funding new chemical warfare weapons production. The strategy involved making contact with the staff of congressional committees and individual members and briefing them about the functions and activities of the CWRC. The legislative affairs consultant arranged for CWRC members to brief congressional members on the CWRC's views on funding new chemical warfare weapons, once the Commission had formulated a position.

The public affairs consultant prepared and distributed press packets on the CWRC, issued press releases on CWRC activities, and notified the press of CWRC hearing dates. In addition the public affairs consultant sought opportunities for a CWRC spokesperson to appear before the media to present the CWRC viewpoint. The consultant also arranged for the chairman to appear on the McNeil-Lehrer News Hour public television show to discuss the CWRC position.

Legal Conclusions

There are a number of statutory and regulatory provisions that prohibit the use of legislative and public affairs consultants by a Presidential advisory committee to influence the public and the Congress with respect to pending legislation. These provisions include restrictions on the types of activities in which advisory committees may engage as well as general restrictions on agency lobbying, publicity and propaganda activities, and the use of publicity experts. We have briefly summarized these restrictions below:

--Section 9(b) of the Federal Advisory Committee Act (5 U.S.C. App. I 9(b)) restricts the use of Federal advisory committees to perform advisory functions only, unless otherwise provided by law or Presidential directive. That section

the members questioned whether the lack of sufficient public hearings might damage the credibility of the CWRC, even if it could formulate a position during the coming week. The meeting notes indicate that the Commission began to think in terms of arranging its schedule so it could have maximum influence on the Congress in its consideration of funding legislation. This is demonstrated in the following passage from the meeting notes:

"Also it was agreed that they must report to the President before going to Congress, and (Col. Sharps's point) they must talk to the Congressional leadership before talking to committees.

"Since the feeling was that before going to Congress there should be

- ° hearings that would be, and would be perceived as, giving a hearing to the public, including opponents of binary weapons and chemical weapons in general.
- ° an agreed-on strong consensus
- ° a paper, although not necessarily a full report, presenting that consensus
- ° a meeting with the President
- ° a meeting with Congressional leaders

it would be difficult, or not possible, to meet the 22 April deadline."

Because it appeared that the CWRC could not accomplish everything by the April 22 deadline, LTC Sharp suggested two alternative approaches to the CWRC. First, the CWRC would have no involvement with the Congress during the authorization phase, leaving OSD to present its case to try and get the authorization on its own. The CWRC would make its presentation in July for the binary weapons appropriations. LTC Sharp stated that the problem with this approach was that the President could take no part in the legislative process until the CWRC had reported to him. The second alternative was that the CWRC could take a few more days and go to the President with its findings by the 1st or 2nd of May, just before the vote, so that the President could have input at that point.

At this meeting the CWRC added another day of public hearings to its schedule (a total of three days) before formulating a position. April 24 was set as the date on which the CWRC members would formulate an official position on the chemical warfare issue. On that date, the members would approve a draft letter to the President, presenting its position. It was agreed that when the CWRC members visited the President (around the 1st of May) the Chairman would present the CWRC findings. In fact, the CWRC did report its conclusions to the President on April 26, 1985.

The notes clearly demonstrate that the CWRC members were participating in the planning of a strategy to influence chemical warfare legislation. The members were planning to initiate meetings with Congressional leadership and committees regarding the CWRC position, despite the lack of authority in Executive Order 12502 or section 9(b) of the Federal Advisory Committee Act (5 U.S.C. App. I) to do so.

Memoranda attached as appendices III through V describe how Mr. Gibson, the legislative affairs consultant, arranged for the CWRC Chairman, Ambassador Stoessel, and other members of the Commission to visit key Members of Congress and conduct one-on-one briefings regarding the CWRC position, after the meeting with the President. Appendix VI shows that the Chairman was scheduled to meet with at least one special interest group to discuss the CWRC position and inform it of the status of the chemical warfare weapons funding legislation in Congress. All of these efforts appear to have been intended to influence the outcome of the pending appropriation legislation.

From the beginning of his employment, Mr. Gibson planned to spend about an hour a day on Capitol Hill. As a part of his legislative affairs activities, he contacted staff members of certain Congressional Committees and staff of certain individual Members of Congress. He briefed them on the CWRC and its activities and agenda and offered to provide them with more specific information. These Congressional contacts were continued if the particular staff member expressed any interest in the CWRC. He passed on to the CWRC members and staff and to OSD officials information he picked up from his congressional contacts. On one occasion, he contacted the staff of the House Foreign Affairs Committee and tried to arrange a joint meeting between members of that Committee, members of the House Armed Services Committee and Members of the CWRC for a round table discussion of chemical warfare issues. Mr. Gibson also worked with OSD officials in trying to influence the

funding legislation. This is demonstrated in a June 26, 1985 memorandum to Dr. Wagner, the Assistant to the Secretary of Defense (Atomic Energy). The subject of the memorandum was "Hill Interest in Chemical Weapons Budget," which reads as follows:

"As we discussed briefly this morning, in the course of winding up my work for the Chemical Warfare Review Commission, I made inquiries of the House and Senate Appropriations Committees and of the House Armed Services Committee concerning additional briefings or appearances at hearings by the commission members or staff.

* * * * *

"I recommend that you actively seek opportunities, at least to brief the Committee staff members on the CWRC report. My sense of things is that staff inquiries are motivated by curiosity more than any anti-chemical weapons bias. You have a good report from a bipartisan panel and I believe you can turn that fact to your advantage by taking the initiative in seeking out opportunities to make Hill presentations."

Mr. Hannaford, together with Mr. Gibson and others from the Hannaford firm, developed a public affairs strategy for the CWRC. They sent out invitations to the press to cover the CWRC proceedings, sought media opportunities for CWRC spokespersons, issued periodic press releases on CWRC activities, prepared press packets on the CWRC to distribute to the press and arranged for the chairman to appear on the McNeil-Lehrer News Hour, to discuss the CWRC position.

Messrs. Gibson and Hannaford were terminated from their consultant positions on June 28, 1985, when the term of the CWRC also expired.

A number of statutory provisions and regulations are applicable to the functions and activities of advisory committees, including restrictions on lobbying and restrictions on public affairs activities. We shall examine these restrictions and their applicability to the CWRC. Finally, we shall review the legal consequences of DOD's improper appointment of these consultants.

RESTRICTIONS ON COMMISSION FUNCTIONS AND ACTIVITIES

Federal Advisory Committee Act Restriction. The Federal Advisory Committee Act severely restricts the functions and activities of Federal Advisory Committees. These restrictions are contained in 5 U.S.C. App. I, 9(b), which reads as follows:

"(b) Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government."

The above-quoted provision requires that Federal Advisory Committees be utilized solely for advisory functions, in the absence of specific authority to the contrary. The act further prohibits Committees from taking action, or expressing policy positions with respect to matters they have under consideration. These functions are reserved solely for the President or an officer of the Federal Government and are not to be performed by officers and employees of advisory committees. We are of the opinion that this provision should be construed as prohibiting advisory committees from using legislative and public affairs experts and consultants to influence the public or the Congress with respect to matters they have under consideration. Of course, the provision should not be construed as prohibiting advisory committees from responding to legitimate requests for information and other inquiries from the Congress or the press. However, the responses may not involve self-initiated presentations to the Congress designed to influence votes on pending legislation.

Executive Order 12502 established the CWRC in accordance with the Federal Advisory Committee Act. The activities of the legislative and public affairs consultants hired for the CWRC suggest that they were trying to influence the public and the Congress with respect to legislative matters of concern to the CWRC and the OSD. These consultants analyzed the voting records of Congressional members on certain defense and chemical warfare issues. They arranged meetings with members of congressional committees and individual members of Congress so that members of the CWRC could present their viewpoint on new chemical warfare weapons

production. They sought opportunities to provide Congressional staff members with information concerning the activities of the CWRC. They issued press releases on the activities of the CWRC, notified the press of the CWRC meetings and sought opportunities for CWRC spokesmen to appear before the media to express the viewpoint of the CWRC. On at least one occasion, they arranged for the Chairman of the CWRC to meet with a special interest group to discuss the CWRC viewpoint on the pending legislation.

We are of the opinion that hiring experts and consultants to perform such functions for the CWRC violates the restriction contained in 5 U.S.C. App. I, 9(b) that limits an advisory committee to performing advisory functions only and restricts any public expression of its views on policy questions related to matters under its consideration. In sum, OSD had no authority to employ these consultants on behalf of the CWRC.

Antilobbying Restrictions. Also applicable to these questions is the antilobbying restriction contained in section 8069 of the DOD Appropriation Act, 1985, Public Law 98-473, October 12, 1984, 98 Stat. 1904, which provides:

"None of the funds made available by this Act shall be used in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before the Congress."

This is a relatively new appropriation restriction which we have not previously construed in detail. In construing other antilobbying appropriation restrictions contained in various appropriation acts, we have always held that they did not prohibit an agency or department, charged with the responsibility of administering laws and programs, from communicating with the public and the Congress concerning its policies and activities, even when such communications are related to legislation pending before the Congress. The statutory responsibility of an agency or department to administer certain laws and programs carries with it the right to communicate about such laws and programs with the public and the Congress. 63 Comp. Gen. 624, 626 (1984).

In addition, communications by Federal officials made in response to direct requests from the Congress are not subject to question. We do not think that the Congress intends the antilobbying restrictions to be an impediment to obtaining the information it requests from Federal officials

and organizations. 63 Comp. Gen. 624, 629 (1984). Therefore, we think that any Federal agency has a right to respond to direct congressional requests for information without fear of violating an antilobbying appropriations restriction.

These two exceptions would apply to the antilobbying appropriations restriction contained in section 8069. However, in this case, neither one is applicable. We are concerned here with the hiring of a professional lobbyist expressly for the purpose of facilitating an effort to influence passage of pending chemical warfare weapons appropriations. This appears to be an expenditure of appropriated funds in direct contravention of the prohibition in section 8069.

The Office of Management and Budget (OMB) has promulgated another restriction on lobbying. OMB Circular No. A-120 provides guidance to Heads of Executive agencies for the use of consulting services. Subparagraph 6e of that circular states that "consulting services will not be used under any circumstances to specifically aid in influencing or enacting legislation."

The above described activities demonstrate that Mr. Gibson, with the support and encouragement of OSD, was trying to influence the chemical warfare funding legislation pending before the Congress at the time. Mr. Gibson operated as one would expect a professional lobbyist to operate. While OSD spokespersons could properly communicate with the Congress about the chemical warfare funding legislation, CWRC spokespersons could not engage in such communications, because the direct communications exception available to OSD was not available to the CWRC, which, as explained previously, was not authorized to use appropriated funds to express its views publicly to anyone but the President or to initiate communications with the Congress, especially when that communication was aimed at influencing pending legislation.

We therefore find that OSD violated section 8069 of the DOD Appropriation Act, 1985, and subparagraph 6e of OMB Circular No. A-120 in expending appropriated funds to pay for the services of a legislative affairs consultant for the CWRC whose lobbying activities were designed to influence legislation pending before the Congress. Accordingly, all OSD payments to Mr. Gibson were illegal.

Publicity Restrictions. There are other restrictions applicable to such experts and consultants. Section 8002 of

the DOD Appropriation Act, 1985, Public Law 98-473, October 12, 1984, 98 Stat. 1904, 1922 states that:

"No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress."

A somewhat similar restriction is contained in 5 U.S.C. § 3107, which reads as follows:

"Appropriated funds may not be used to pay a publicity expert unless specifically appropriated for that purpose."

These statutes are closely related in that they both involve restrictions on publicity activities. However, the focus of section 3107 is different from section 8002 in that section 3107 is violated only when the publicity or propaganda activities are conducted by a "publicity expert."

In our previous construction of similar statutory restrictions, our view has been that they do not prohibit an agency's legitimate informational or promotional functions where authorized by law. It should be noted that both statutes provide for this exception. We have therefore held that the restrictions would not serve to prohibit an agency from disseminating information, reasonably necessary to the proper administration of the laws for which the agency is responsible, to the general public or to particular inquirers. See for example 31 Comp. Gen. 311 (1952); B-181254, February 28, 1975 and B-136762 August 18, 1958.

OSD employed Mr. Peter Hannaford, the Chairman of the Board of the Hannaford Company, a national public affairs firm, and author of a recently published book on press relations,^{1/} to serve as the CWRC public affairs consultant. The public affairs activities described earlier must be considered publicity and propaganda.

As previously noted, the CWRC's functions were solely advisory and there was no authority for it to engage in promotional activities. Because there was no authority for a public affairs program, the public affairs activities performed by the consultant on behalf of the CWRC, which were previously described, must be considered publicity or

^{1/} How to Handle the Press, published by Facts on File (1986).

propaganda within the purview of section 8002. We think that Mr. Peter Hannaford qualifies as a publicity expert on the basis of his job title and reputation. Because there was no legal authorization for the CWRC public affairs program, we are of the opinion that OSD's expenditures for a CWRC public affairs consultant violated the provisions of section 8002 and 5 U.S.C. § 3107. Therefore, OSD payments to Mr. Hannaford for work done as a public affairs consultant for the CWRC are also improper.

The Legislative Liaison Expenditure Ceiling Restriction.

OSD also failed to include the amount of funds expended on CWRC legislative affairs activities, estimated to be approximately \$20,000, for purposes of compliance with the ceiling on legislative liaison activities imposed on DOD by section 8022 of the Department of Defense Appropriations Act, 1985, Public Law 98-473. Failure to report and account for such expenditures as a general practice throughout the agency makes it impossible for us to determine whether the ceiling has been exceeded. See our report GAO/NSIAD 86-134 BR, June 1986, entitled "DOD Legislative Activities, Better Guidance, Accountability, and Reporting Needed."

THE CONSULTANT APPOINTMENTS

OSD failed to follow applicable laws and regulations in appointing the consultants. Under Federal personnel law and regulations, appointments are effective from the date the appointing authority actually approves the appointments, unless a later date is stated in the appointment. They may not be made effective retroactively to cover service previously rendered. 8 Comp. Gen. 582 (1929), 24 Comp. Gen. 150 (1944). Generally, an employee is not entitled to compensation for any period prior to the date of his official appointment, although during such period he may have actually performed the duties of the position and taken the oath of office. 4 Comp. Gen. 675 (1925), 20 Comp. Gen. 267 (1940) and B-157876 November 4, 1965. An employee who serves in good faith and without fault may be considered as being in a de facto status and paid the reasonable value of his services, provided there are no legal restrictions barring the appointment of such an employee. 52 Comp. Gen. 700 (1973); 55 Comp. Gen. 109 (1975) and 58 Comp. Gen. 734 (1979). In this case, however, these appointments were impermissible even if they had been accomplished before the consultants began their work, for the reasons explained above. Therefore, the de facto rule is not applicable.

Notwithstanding the legal requirement that employees be appointed before they are placed in a duty status, Dr. Welch authorized Messrs. Gibson and Hannaford to begin work on March 12, 1985, before they were officially appointed. He justified the intentional violation of appointment procedures on the ground that the consultants were urgently needed, although arrangements for the consultants' employment could have been made in January and February when other CWRC staff members were hired. Despite the urgent nature of the hiring, no effort was made to expedite the appointments until May. Mr. Gibson told us that when the consultants began to complain about the lack of pay, Dr. Welch improperly offered to extend the consultants' appointments beyond the normal termination date so that they could be paid. The consultants refused the offer because of the concern that it would constitute a false claim against the Government.

The consultants were ultimately paid for their pre-appointment services under the theory that there was an informal commitment that was subject to contractual ratification procedures contained in subpart 50.302-3 of the Federal Acquisition Regulations. However, such payments were improper, because of the appropriations restrictions described above.

Even if the appropriations restrictions did not bar payment, there is a serious question of whether Mr. Hannaford provided all of the consultants services for which he was paid. Although Mr. Hannaford was appointed as the public affairs consultant, much of these duties were performed by Mr. Gibson, who was appointed in his own right as the legislative affairs consultant. There is some dispute concerning caveats alleged to have been made by Mr. Hannaford concerning the terms of his employment. Mr. Hannaford maintains that when he agreed to serve as the public affairs consultant, he made it clear to the CWRC staff that although he would be appointed in his personal capacity, he would be unable to personally perform very much of the day-to-day work. Instead he would provide personnel from the Hannaford Company such as Joseph Norton, a vice president, and John Gibson, who had an office arrangement with the Hannaford Company, to perform the day-to-day public affairs tasks of the CWRC. Mr. Hannaford contends he pointed out that as Chairman of the Board, he had to remain at the offices of the Company, but would be able to supervise others who would provide the required services. However, Col. Mullins, the CWRC staff director, states there was no such understanding. The evidence indicates that Mr. Hannaford performed in the manner he described, never personally performing any work at CWRC offices.

Therefore, Mr. Hannaford would not be entitled to pay for work performed by Mr. Gibson, who was already being paid by the Government. If it were possible to pay Mr. Hannaford, which it is not, he would only be entitled to pay for work that he himself performed and not for work performed by Mr. Gibson.

After Messrs. Gibson and Hannaford were appointed on May 8, the same working arrangements continued, with Mr. Gibson performing much of Mr. Hannaford's work. Mr. Hannaford did perform some work and it should be noted that a consultant is entitled to his daily rate of compensation regardless of the number of hours worked in any day. B-187389, July 19, 1978.

On two separate pay periods, Dr. Welch failed to certify Mr. Hannaford's time card in a timely manner; once when Mr. Hannaford was overseas and again when he was out of town. Mr. Gibson wrote a letter to Dr. Welch on Mr. Hannaford's behalf as follows:

"Peter Hannaford's check did not come today, although we sent the signed time card over to you last week. The same thing happened for the prior pay period.

"Please correct me if I am wrong, but I understood that he would be getting paid for public affairs work and we are able to document that these services were performed for the Commission during the month of May and June. You had a problem with his billing you for the time in May when he was overseas, although public affairs services were delegated to Joe Norton and me during that time and he continued to exercise overall direction during that time.

"As I recall our discussions when we undertook this assignment, it was at the Department's insistence that the public affairs and legislative affairs assignment were divided. We also explained that even when Hannaford was not able to exercise hands-on control, he could delegate this responsibility to an assistant, with the result that you would receive no diminution in the quality of service."

The time cards were subsequently certified and processed and Mr. Hannaford was paid for every work day of the pay periods in question, despite the fact that Dr. Welch had actual knowledge that he was overseas on one occasion and out of town on another. Subsection 17.2 of Title 6, GAO Policy and Procedures Manual for Guidance of Federal Agencies requires that the supervisor most knowledgeable about and responsible for the employee's attendance must certify each employee's time and attendance report as correct at the end of the time period. It is difficult to understand how Dr. Welch who worked in the Pentagon could certify the correctness of Mr. Hannaford's time and attendance reports when Mr. Hannaford remained in the offices of his company and never performed any work at the CWRC offices.

According to our calculations, the two consultants received the following payments. Messrs. Gibson and Hannaford were each paid for 75 days at \$260 per day, or \$19,500 each, for a total of \$39,000.

SUMMARY AND CONCLUSIONS

The facts of this case demonstrate that OSD exceeded its authority with regard to the CWRC. Section 3(c) of Executive Order 12502 made OSD responsible for providing administrative staff and support services to this Presidential Commission. OSD appointed one of its officials, Dr. Thomas Welch, to serve as Executive Secretary to the commission as an additional duty. Dr. Welch's permanent position in OSD was and is Deputy Assistant for Chemical Matters to the Assistant to the Secretary of Defense (Atomic Energy). In this capacity, Dr. Welch is the primary official within OSD responsible for securing new chemical warfare weapons funding legislation. Dr. Welch utilized his staff position to suggest to the Chairman that the CWRC needed these consultants. Receiving approval, he hired these consultants and was their supervisor. The consultants formulated a legislative and public affairs strategy designed to influence the public and the Congress to fund chemical warfare weapons production. LTC Gregg Sharp, the OSD Legislative Affairs Officer responsible for chemical warfare weapons issues in the Congress briefed the CWRC members on the Congressional schedule regarding chemical warfare funding legislation and suggested ways the CWRC could assist OSD in influencing the legislation. The CWRC members adopted LTC Sharp's suggestions and began a program to influence members of Congress to adopt the CWRC position.

We have concluded that OSD officials violated certain statutory restrictions in employing and using Mr. Gibson as a legislative affairs consultant and Mr. Hannaford as a public affairs consultant in support of the CWRC. Specifically, we found that the employment of such consultants was in violation of section 9(b) of the Federal Advisory Committee Act (5 U.S.C. App. I, 9(b)) which restricts Federal Advisory Committees to solely advisory functions and prohibits Committee members and staff from expressing policy views on matters under consideration by the Committee. OSD violated section 8069 of the DOD Appropriations Act, 1985, by paying a legislative affairs consultant to attempt to influence legislation pending before the Congress. OSD violated section 8002 of the DOD Appropriations Act and 5 U.S.C. § 3107 by paying Mr. Hannaford, a public affairs consultant, to carry on a public affairs program to favorably influence the public to support the CWRC position on chemical warfare weapons funding. Finally, OSD violated certain other regulations and guidelines in the appointment and payment of the consultants. By separate correspondence, we will be requesting OSD to recover appropriated funds expended in payments made to Messrs. Gibson and Hannaford as legislative and public affairs consultants in violation of the appropriations restrictions.

LEGAL OPINION

This responds to a March 27, 1986, letter from Representative Jack Brooks, Chairman, House Committee on Government Operations and Representative Dante B. Fascell, Chairman, House Committee on Foreign Affairs, requesting this Office to render a legal opinion and conduct an investigation concerning certain activities of the Chemical Warfare Review Commission (CWRC), a Presidential Advisory Committee. Subsequent discussions with the requesters' staffs limited the scope of the legal opinion to the question of whether the employment and use of two legislative and public affairs consultants by the CWRC may have violated applicable laws and regulations. We conducted a preliminary investigation to develop the facts regarding this issue, which consisted of interviews of knowledgeable individuals and a search of available files. Appendix I contains a list of sources from which we obtained our information.

As a result of the preliminary investigation, we conclude, for the reasons given below, that the Office of the Secretary of Defense (OSD) violated the Federal Advisory Committee Act (5 U.S.C. App. I) and other applicable statutory and regulatory provisions regulating lobbying and public affairs activities in the course of providing administrative support for the Commission.

BACKGROUND

For several years the Department of Defense (DOD) has had difficulty in obtaining funds from the Congress to upgrade its chemical warfare weaponry. OSD believed it could improve the chances of obtaining approval for that program if a Presidential Commission studied the matter and issued a report containing its findings and recommendations. Subsequently, Congress directed that the President establish such a Commission in section 1511 of the DOD Authorization Act, 1985, Public Law 98-525, October 19, 1984, 98 Stat. 2492, 2626. That Act required the CWRC to report its findings and recommendations to the President, who was directed to submit the report together with his comments to the Congress not later than April 1, 1985. Following this mandate, the President promulgated Executive Order 12502, dated January 28, 1985 (3 C.F.R. p. 331 (1986)) establishing the CWRC. Executive Order 12502 set forth the function of the CWRC which was to prepare a report for the President on Chemical Warfare issues. It also directed the Secretary of Defense to furnish all required administrative support for the CWRC. The CWRC was made subject to the Federal Advisory Committee Act (5 U.S.C. App. I), which limits a Presidential Advisory Committee's activities to those directly related to reporting its findings and recommendations to the President.

OSD appointed one of its officials, Dr. Thomas Welch, to serve as Executive Secretary to the Commission in addition to duties related to his permanent OSD position. The Executive Secretary was the highest ranking staff member of the CWRC. Dr. Welch's permanent position in OSD is Deputy Assistant for Chemical Matters to the Assistant to the Secretary of Defense (Atomic Energy). In his OSD position, Dr. Welch is the official primarily responsible for proposing legislation providing funds for new chemical warfare weapons.

The CWRC held its first meeting on March 12, 1985, and on that date, Dr. Welch suggested to the Chairman (Ambassador Stoessel) that experts on legislative and public affairs be hired as consultants immediately under the provisions of 5 U.S.C. § 3109. The chairman concurred. Dr. Welch authorized the employment of Mr. John A.C. Gibson, a legislative affairs consultant, and Mr. Peter Hannaford, a public affairs consultant, before they were officially appointed. Administrative problems delayed their appointments for almost 2 months, during which period they continued to work for the CWRC. The consultants developed a complete legislative and public affairs strategy, designed to influence favorably the public and the Congress about the CWRC's viewpoint on funding chemical warfare weapons production.

After the CWRC had organized itself and began to function, the members and senior staff held a luncheon meeting on April 5, 1985 to plan the CWRC's future objectives. Mrs. Hammerman, a writer-editor consultant, made notes on the meeting which we found in the CWRC files, a copy of which is attached as appendix II. According to the notes LTC Greg Sharp, the OSD Legislative Liaison Officer responsible for chemical warfare issues, spent some time briefing the CWRC members on how the congressional schedule was shaping up for chemical warfare funding legislation. He stated that Senate hearings would occur during the week of April 22, with floor action occurring on April 29. Hearings in the House would occur during the week of April 22 with the full committee meeting the week of April 29 and floor action coming in the middle of May. LTC Sharp emphasized that the week of April 22 was a key week. He said that the CWRC should not give any input to the Congress until it at least had an agreed-on set of findings.

At this meeting, the CWRC members began to plan a work schedule that would enable them to meet the April 22 key week deadline for having an agreed-upon position. One of

also makes the President or an officer of the Federal Government (as opposed to the advisory committee) solely responsible for determining the action to be taken or the policy to be expressed with respect to matters upon which the advisory committee reports. Since Executive Order 12502 limited the mission of the CWRC to preparing a report on its findings and conclusions for the President, we have determined that OSD was not authorized to employ legislative and public affairs consultants to support the CWRC in an attempt to influence the public and the Congress regarding the CWRC's recommendations.

--The antilobbying restriction contained in section 8069 of the DOD Appropriation Act, 1985, Public Law 98-473, October 12, 1984, 98 Stat. 1904, is also applicable to the employment of the legislative affairs consultant by OSD for the CWRC. That provision states that funds appropriated for DOD may not be used "in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before the Congress."

As an advisory committee, the CWRC did not administer laws or programs and was restricted to advisory functions only. It therefore was not authorized to communicate its views to the Congress unless it was responding to a direct congressional request for information. Accordingly, the hire of a legislative affairs consultant was a violation of the antilobbying appropriation restriction contained in section 8069, since the consultant's activities were directed toward influencing legislation pending before the Congress.

--OMB Circular A-120 provides guidance to Heads of Executive agencies for the use of consulting services. Subparagraph 6e of that Circular states that "consulting services will not be used under any circumstances to specifically aid in influencing or enacting legislation." Since we have determined that the CWRC legislative affairs consultant did engage in activities to influence appropriation measures, it follows that subparagraph 6e, OMB Circular A-120 was also violated by OSD.

--Section 8002 of the DOD Appropriation Act, 1985, states that DOD appropriations shall not "be used for publicity or propaganda purposes not authorized by the Congress." A similar restriction is contained in 5 U.S.C. § 3107, and states that "appropriated funds may not be used to pay a publicity expert unless specifically appropriated for that purpose." We have held that the first mentioned restriction would not serve to prohibit an agency from disseminating information reasonably necessary for the proper administration of the laws for which the agency is responsible, to the general public or to particular inquirers. See, e.g., 31 Comp. Gen. 311 (1952). However, the CWRC's functions were solely to provide advice to the President and there was no authority for the consultant to distribute unsolicited information or otherwise to engage in the promotional activities described earlier.

Because there was no legal authorization for CWRC public affairs activities, employment of the CWRC public affairs consultant violated the provisions of section 8002 and 5 U.S.C. § 3107. Therefore, OSD expenditures for a public affairs consultant for the CWRC are also improper.

--OSD failed to comply with personnel appointment and payment procedures regarding its hiring of the consultants. They were placed in a duty status almost two months before their appointments were made. One of the consultants was continued in a pay status while out of town on non-Government business and was paid for some work actually performed by the other consultant. OSD paid for the preappointment services of the consultants on a contractual basis. However, the consultants should not have been paid because of the appropriation restrictions described above.

Section 3(c) of Executive Order 12502 made OSD responsible for providing staff and support services to this Presidential Commission. We have concluded that OSD

officials violated statutory restrictions by employing a legislative affairs consultant and a public affairs consultant in support of the CWRC. By separate correspondence, we will be requesting OSD to recover appropriated funds expended in payments made to the legislative and public affairs consultants in violation of the appropriations restrictions.

Unless you publicly announce its contents earlier, we plan no further distribution until 30 days from the date of this opinion. At that time we will send copies to interested parties and make copies available to others on request.

Sincerely yours,

for Milton F. Horlan
Comptroller General
of the United States

Attachment: Legal Opinion

INFORMATION SOURCES

Before we could respond to the request for a legal opinion on the propriety of the employment and use of the legislative and public affairs consultants by the Chemical Warfare Review Commission (CWRC), it was necessary for us to develop the factual data set forth in our opinion. We did this by interviewing former officers and employees of the CWRC and officials of the Office of the Secretary of Defense (OSD). We also examined the files of the CWRC which are located in the library of the Chemical Warfare School at Fort McClellan, Alabama. The CWRC files were not complete in that they did not contain memoranda submitted by the consultants in the regular course of their duties, which were very pertinent to our review. We obtained copies of such memoranda from Mr. John A. C. Gibson, the CWRC legislative affairs consultant. We did obtain a copy of the notes of the April 5, 1985, executive session of the CWRC from the files of the Commission. Copies of other relevant documents were obtained from the files of various offices in OSD.

The following is a partial listing of persons interviewed by us:

Ambassador Walter J. Stoessel, Jr., Chairman, CWRC;

Dr. Thomas J. Welch, Executive Secretary of the CWRC and Deputy to Assistant to the Secretary of Defense (Atomic Energy);

Col. C. Warren Mullins, USA, Staff Director, CWRC;

LTC. Francis J. Sisti, USA Ret., Staff Manager, CWRC;

Maj. John D. Nelson, USA, Technical Consultant, CWRC;

Maj. Charles M. Tutwiler, USAF, Technical Consultant, CWRC;

Mr. John A. C. Gibson, Legislative Affairs Consultant, CWRC;

Mr. Peter D. Hannaford, Public Affairs Consultant, CWRC;

Mr. Joseph Norton, Vice President, The Hannaford Company

LTC. Gregg Sharp, Legislative Affairs Officer, OSD;
Mr. Thomas Tucker, Personnel Office, OSD;
Ms. Pat Perry, Personnel Office, OSD;
Mr. Phillip H. Miller, Deputy Director, Defense
Supply Service Washington;
Mr. Ivo Spalatin, House Committee on Foreign Affairs;
Mr. David Barton, House Committee on Foreign Affairs;
Mr. Herbert Hetu, Public Affairs Consultant;
COL. George Connor, USA, Pine Bluff Arsenal,
Arkansas.

B-222758

April 5, 1985

Notes on Commission Working Lunch Meeting on Agenda

When these notes begin, Greg Sharp of OSA Congressional Liaison was running through the Congressional schedule as it is now shaping up:

Floor action is expected in Senate 29 April, and this seems firm if only because of Goldwater's determination.

Any Senate hearings would be previous week in Foreign Relations Committee, week of April 22.

House hearings, if they come, will be week of April 22.

Full Committee will meet week of 29th.

Floor action will come middle of May.

Thus, the week of April 22 is key week.

(Col. Sharp also gave the following informal briefing on Congressional matters, answering questions in some cases: The Commission should not make any input to Congress until it has a report, or at least an agreed-on set of findings. He understands that McFarlane has offered to have a cabinet meeting on the report (I'm not quite sure on this). Answering a query on the "stacked deck" question, the only thing Sharp has seen is a press article based on Porter's talk with press. Mr. Conable reported having heard this ("stacked deck" -- 5 of Commission have "voted" for) from Congressional staffer. Col. Sharp reported Rep. Les Aspin has not expressed himself for or against, but has seen the concern of commanders in Europe and has agreed to two days of hearings. His staff understands the problem.)

5 April Working Lunch

hearing to the public, including opponents of binary weapons and chemical weapons in general

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The Commissioners then began to plan a work schedule that would enable them to meet the 22 April deadline. However, Mr. Kester said, and there seemed to be agreement, that without having heard from the public, Commission would not have credibility, even if the members could formulate a position during the coming week. Also, it was agreed that they must report to the President before going to Congress, and (Col. Sharp's point) they must talk to the Congressional leadership before talking to committees.

Since the feeling was that before going to Congress there should be

o hearings that would be, and would be perceived as, giving a full
o an agreed-on strong consensus

o a paper, although not necessarily a full report, presenting that consensus

o a meeting with the President

o a meeting with Congressional leaders

it would be difficult, ^{or not possible,} to meet the 22 April deadline.

Colonel Sharp suggested two alternative approaches: (1) the Commission could have no involvement with Congress during the authorization phase. OSD ~~XXXXXXXXXXXX~~ would present its case and try to get the authorization, which he felt optimistic about. The Commission would make its presentation in July for Appropriations. ~~XXXXTheCommission~~ A problem with this approach is that the President can take no part in the process until the Commission has reported to him. (2) The Commission could go to the President with ~~the~~ its findings by the 1st or 2d of May, just before the vote, so that the President could have input ^{at} that point.

Open hearings were discussed at some length. Dr. Welch said he would advertise, by press release, today open hearings for April 10 and 11. These were identified by Col. Mullins as days when good attendance by Commissioners was expected, which it was agreed was very important; members of public must not come to present views and find only a few Commissioners to hear them. There was some discussion as to whether 7 or 14 days' notice was required for the hearings, but Dr. Welch said this was covered by the fact that hearings had already been advertised in the Federal Register April 17 was later added to April 10 and 11 for public hearings.

Commissioners stressed the importance of getting the new member on board as soon as possible. White House approval is awaited. Col. Mullins (or Dr. Welch?) said he would get on phone about this immediately.

April 24 was set as day for Commission members to agree on "collective wisdom," formulate a position. On that day they would approve a draft letter to the President presenting this position. They must have a first draft before them for ~~xxxxxxxxxxxxxxxx~~ the April 24 meeting, which they will revise and approve. It was agreed that when the members visit the President, Amb. Stoessel will present the Commission findings (from a "talking points" paper prepared by the staff), and if any members have special points they wish to add, they will do so. Basically, they will give him their conclusions and say that a full final report ~~xxxx~~ is in preparation and will be ~~xxxx~~ delivered to him later.

Mr. Conable said he felt the members would agree ~~xxxxxxxxxxxx~~ on a position but would differ on matters of emphasis. He himself feels strongly about environmental danger of existing stockpile; must be destroyed.

April 5, working lunch

-4-

Mr. Kester raised the question of the report itself. Should it be like the Scowcroft Report. Gen. Haig agreed, ~~should~~ give the reader background, setting for the problem. Then give Commission's thinking. Amb. Stoessel said the history should be included. Haig said that on Scowcroft Com. they sent drafts around, everybody kept refining them.

The degree of consensus already reached was discussed. Mr. Erlenborn mentioned that almost no witness so far has said that we should not have weapons.

Report from Amb. Stoessel on European trip

Those who made trip are very aware of ~~XXXXXXXXXX~~ allies' sensitivities.

In writing the report, Commission must be careful in ~~XXXXX~~ phrasing because of allies.

Members saw protective shelter at EUCOM, impressed with how complex, expensive it was. Impressive, but wondered how it could be used in actually fighting a war. Got strong feeling from military of need for scenarios. Afraid of having to fight a war ~~XXXX~~ in protective gear without retaliation. Saw stockpile. Impressed with security. No safety problem, but not the right stuff. Old weapons, wrong mix. The French were strong on the need. Germans would not see; too sensitive an issue. Objections were voiced to name of Commission, having Chemical Warfare in the title. Some other allied military stressed need, others feared political "outcry."

Chief problem is with deployment. Gen. Haig stressed that ~~XXXXX~~ essential ~~XXXXXXXXXXXX~~ thing for allies is how we handle the deployment issue. Mr. Kester¹¹ said we should not get into this at all in report. Policy is, as Col Connor's presentation this morning made clear, not to deploy outside US.

The Hannatord Company, Inc. Public Relations & Public Affairs

April 23, 1985

TO: Ambassador Stoessel

FROM: John Gibson *JG*

SUBJECT: Hill Briefing Sessions

With your approval, I will begin scheduling meetings on the Hill for you to brief key Members of Congress on the commission and its report. I will stipulate in advance that these meetings will have to be tentatively scheduled until I have a firm date for submission of the commission's report and recommendations to the President.

I believe you should personally brief the following Members:

<u>Member</u>	<u>Committee</u>
Barry Goldwater	Chairman, Senate Armed Services
Sam Nunn	Ranking Minority Member, Senate A-S
Richard Lugar	Chairman, Senate Foreign Relations
Claiborne Pell	Ranking Minority Member, Senate F-R
Les Aspin	Chairman, House Armed Services
William L. Dickinson	Ranking Minority Member, House A-S
Dante Fascell	Chairman, House Foreign Affairs
William S. Broomfield	Ranking Minority Member, House F-A

In addition to these Members, who are key Committee leaders, I will schedule you for the appropriate Subcommittee leadership on both House and Senate Appropriations Defense Subcommittees.

Aside from leadership, I want to schedule you to see Senator Gary Hart, Senator Edward Kennedy, and Congressman John Porter. Hart and Porter have a particular interest in the issue of chemical warfare, Kennedy is important because of his status in the Senate and in the country.

I will also inquire with the offices of the floor leadership in the House and Senate, although I imagine they will not be interested.

I will specify that meetings with you are to be for Members Only; there is no need for you to be spending time talking to Hill staff. In addition, I will try to schedule no more than two meetings each morning and afternoon and will try to leave you with at least half a free day while these sessions are going on.

With respect to the Congressional Arms Control and Foreign Policy Caucus, I will try to arrange a session with caucus members, but failing that, I will arrange for a staff-level briefing which the CWRC staff and I will conduct.

possibility was raised that having ~~XXXXXXXX~~ binaries would mean
 German
 that the weapons now in ~~XXXXXX~~/could be gotten out, which would
 seem to be favorable point for Germans. ~~XXXXXXXXXXXXXXXXXXXXXXXX~~
~~XX~~


It was agreed by Haig and Conable that once there was a
 consensus and a report, it was important to approach columnists,
 get Commission's reasoning across.

PRESIDENT'S CHEMICAL WARFARE REVIEW COMMISSION

WASHINGTON, DISTRICT OF COLUMBIA

May 22, 1985

TO: Ambassador Stoessel

FROM: John A. C. Gibson 

SUBJECT: Future Procedures for Scheduling Visits by Commission Members

The two foul-ups we have had with scheduling in the past twenty-four hours, the Glenn meeting and the Fiedler meeting, convince me that we need to have some very clear procedures for scheduling Commission members for visits to the Hill and contacts with the media. I also sense that you and some of your colleagues are becoming a bit impatient with this "two-or-three day assignment" that now shows every indication of lasting well into June and perhaps beyond that.

As I analyze both of the mistakes of the last twenty-four hours, they resulted from communications problems on the staff. We simply cannot have more than one member of the staff responsible for scheduling these meetings. To my way of thinking, I should be given the sole authority and responsibility to make these arrangements. That way, if meetings are scheduled without bothering to inform the Commission member involved, or if meetings are scheduled without proper follow-up to make certain that the people on the Hill are going to produce the bodies they promise to, at least you will know who is responsible.

With respect to continuing to use you and your colleagues to work this issue on the Hill, without pay, of course, I suggest that you call a meeting of those members of the commission who are willing to make these donations of time and let's get everyone's schedule together and make firm assignments with respect to who is going to do what. That way, at least all of you will be able to make arrangements in your own personal lives without fear of interruption or interference. I will make arrangements with the DoD, the NSC staff, and whoever else and will impress upon them the fact that the agreed-to assignments are the only ones you and your colleagues are prepared to accept.

If I may, may I ask you to make the suggested assignments of responsibility to me and then notify all staff members what procedures we will follow from here on out?

Thank you.

John A. C. Gibson
Public and Government Affairs Consulting

May 6, 1985

TO: Tom Welch, Warren Mullins

FROM: John Gibson *JG*

SUBJECT: CWRC Congressional and Public Liaison Functions

Following up on our conversations of last Friday, I have some thoughts on the congressional and public affairs liaison functions of the commission, as opposed to those of the Department of Defense.

First, while it is against the law to use public funds to influence the passage or defeat of legislation, any branch of the government is permitted to "inform" the public and Congress about its activities. Thus, it is perfectly permissible and legal for me to report the commission's activities to people on the Hill and to the public at large. It is not necessary for my activities to be prompted by an inquiry from the Hill or the public, all the law requires is that I not twist arms or attempt to influence public opinion.

Second, it seems to me that the mandate of the commission is quite different from that of the Department of Defense and that the activities of the two should be kept as separate as possible. While the DoD has a clear responsibility for advancing the objectives and policies of the Administration, the commission has a much narrower charge. It is responsible solely for studying and making recommendations on certain questions about U. S. chemical weapons policy. It is not up to the commission, under its charter as it now stands, to make any attempt to persuade Congress to enact its recommendations into law. That limitation also applies to commission staff, both those who are detailed from DoD to the commission and those who, like myself, are retained by DoD to service the commission.

Third, given that limitation, it seems to me that we may have a problem with the way Hill affairs in particular, have been handled to date. Specifically, I believe it is unwise and perhaps improper to continue to rely on DoD legislative affairs people to make appointments for the commission or its members on the Hill. While we should certainly listen to the input that DoD staff has concerning the commission's work, I believe it is unwise to invite them to participate in commission sessions or to solicit their advice on how to perform our own tasks of informing the Congress or the public about commission activities. It is also unwise to respond directly to DoD staff requests for commission appearances on the Hill or before public groups. All such activities should be performed by commission staff and any requests for commission participation in Hill or public functions should be routed to the commission and the details should be worked out by commission staff

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more-more-more

in future.

Fourth, I believe that the three of us, and certainly the Ambassador if he has the time, should meet at least every third day or so to go over my public and congressional affairs activities and to plan how best to use the talent and expertise we have assembled on the commission. It seems to me that those meetings would provide the proper forum for dealing with requests, input, or comment from DoD.

If this procedure is not acceptable, or if it is the collective wisdom of the appropriate decision-makers in the Administration that some or all of the commissioners and their staff should become more directly involved in legislative or public liaison for the direct purpose of advocating the implementation of the commission's proposals, then I submit that that specific directive should come from the White House. As things stand now, I believe there may be trouble ahead if we continue to proceed as we have done these past eight or so weeks.

I am sending another memorandum containing my thoughts on what appointments the commission should be seeking on the Hill.

PRESIDENT'S CHEMICAL WARFARE REVIEW COMMISSION

WASHINGTON, DISTRICT OF COLUMBIA

June 5, 1985

TO: Ambassador Stoessel

FROM: John Gibson 

SUBJECT: Luncheon Meeting Today

You will be speaking to a group called together by the Jewish Institute for National Security Affairs. The original proposal for this meeting came from Col. Sharp, Congressional Liaison Officer for the Department of Defense. Attending the meeting will be:

Shoshana Bryen	Director, JINSA
Saul Stern	President, JINSA
Stefan Leader	Eagle Research Corporation
Marlene Koremstein	" " "
Leonard Sullivan	System Planning Corporation
Carolyn Fanerhoff	JINSA Member
Chuck Brooks	Republican Jewish Coalition
William Baxter	Col., U. S. Army, retired
Anthony Koremstein	Republican Jewish Coalition
Stephen Rosen	Director of Research, America-Israel Political Action Committee
Seth Carus	Research Associate, AIPAC
Leslie Levy	Legislative Liaison, AIPAC
Guest	AIPAC
Michael Weiner	JINSA Member
Abbie Weiner	JINSA Member
Joyce Press	JINSA Member

You should plan to give your standard account of how the commission was established and what it was charged with doing. Who is on the commission. How much work it did and what its conclusions were. Also, you might tell them that the report is near completion and will be sent to the President soon. The House of Representatives will begin debating the defense procurement bill next week and we expect a vote on an amendment to prohibit developing binary chemical weapons, probably on Tuesday. The Senate rejected a similar amendment by a 50-46 vote last month.

According to Col. Sharp, the group should be generally friendly, although from what I have seen, you are capable of handling any questions, hostile or otherwise. Also according to Col. Sharp, Israel has binary weapons and would welcome our company.