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MEMORANDUM FOR: Ashley Holmes, Chief, Operations
: Center

FROM: George W. Jett, General Counsel ^{/s/} GEORGE JETT

SUBJECT: Exercise Premier Task III - Authority for
Establishment of a National Defense Area

Pursuant to the request of Richard McKee of your staff, this office contacted Steven Wilkinson, Esquire, Office of the Legal Counsel, Department of Justice (DOJ) for the DOJ position on the following issue:

Is the establishment of a National Defense Area by the Department of Defense, for the protection of nuclear weapons on private property as a result of an aircraft accident, justified by 50 USC § 797 and DOD Directive 5800.8?

In the short time permitted for response, Mr. Wilkinson could not provide a substantiated legal conclusion on this issue. However, he did state that it was his impression that 50 USC § 797 was not direct substantiation for establishment of a NDA. Rather, he felt that the President's constitutional powers as Commander-in-Chief might provide better support for the establishment of a NDA. In either case, Mr. Wilkinson could not provide a definitive legal opinion without additional time for appropriate research of the issues.

Research conducted by this office revealed that there is only a tenuous nexus between 50 USC § 797 and the authority to establish a NDA. A stronger argument is contained in 42 USC 2271, which provides in part:

- (a) to protect against the unlawful dissemination of Restricted Data and to safeguard facilities, equipment, materials, and other property of the Commission (formally the Atomic Energy Commission, this authority now vested in Secretary of Energy), the President shall have authority to utilize the services of any Government agency to the extent he may deem necessary or desirable. (emphasis added).

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As part of the program to protect nuclear material or equipment (including nuclear weapons), the President, through his authorized representatives, pursuant to 42 USC 2271 and acting as Commander-in-Chief may utilize the services of Federal agencies to the extent he may deem necessary "to safeguard" DOE nuclear material. It would appear consistent with the broad authority of 42 USC 2271 and the punitive intent of 50 USC 797 that the President or his representatives may take reasonable action to establish a NDA for the protection of nuclear weapons and material.

Additionally, for the protection of the crash site, the authority of the National Transportation Safety Board (Board) should be considered. Pursuant to 49 USC 1903, the Board has authority to investigate aircraft accidents, to enter upon private property and by inference to secure the site of any aircraft accident. (49 USC 1903(b)(2)). This power may be invoked to further protect the crash site against potential looters, who would remove evidence from the site.

While this cursory review of an important issue does not provide overwhelming support for the legality of the NDA it does provide sufficient interim justification. Further research is recommended.

GC:DPCosgrove:jj 2/18/81

cc:

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