

RELEASE IN PART
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From: Mills, Cheryl D <MillsCD@state.gov>
Sent: Monday, May 9, 2011 12:31 PM
To: H
Cc: Sullivan, Jacob J
Subject: FW: Warning Flag re: Unfreezing Libyan Assets

FYI

From: Barry Carter [mailto:]
Sent: Monday, May 09, 2011 12:17 PM
To: Mills, Cheryl D
Subject: Warning Flag re: Unfreezing Libyan Assets

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Dear Cheryl:

You might have received a copy of this e-mail last night or this morning. If so, please disregard this e-mail and my apologies for the confusion. It appears, however, that Georgetown's e-mail system had a problem and the earlier e-mail was most likely lost. So, trying again.....My best, Barry

TO: Cheryl D. Mills
 Counselor of the Department and Chief of Staff
 U.S. Department of State

Dear Cheryl:

First, I want to applaud tardily Secretary Clinton's efforts to convince the U.S. Government and the United Nations to decide to intervene for very good reasons in Libya last March. As you probably well know, U.N. Security Council Resolution 1973 was the first U.N. approval for humanitarian intervention against the will of a country with major military forces because of that country's treatment of its own citizens. The United States and its NATO allies were unable to obtain such a U.N. resolution in the Kosovo situation in 1999, though NATO went ahead with the bombing campaign.

Second, I also applaud Secretary Clinton's initiative, announced last Thursday, to ask Congress to pass a law to allow some of the approximately \$34 billion in frozen Libyan funds to be used to support the Libyan rebels.

I wanted, however, to raise with you a warning flag. The budget hawks in Congress and elsewhere might well also push to divert some of the frozen assets to pay for the U.S. military activities in and around Libya—e.g., the bombs, fuel for our planes and ships, and related costs—or even that some of the funds be used generally to reduce the U.S. deficit.

I attended an off-the-record meeting at the Council on Foreign Relations about three weeks ago where, among others, some smart lawyers and former political appointees from the Bush Administration discussed the possibility of using the Libyan funds to help pay the U.S. military costs of its role in Libya. This last week I heard a conservative lawyer propose that some the funds be used for deficit reduction. I do not know whether the idea of diverting some of the frozen funds has reached budget hawks like Rep. Paul Ryan or Tea Party'ers, but I expect it will soon arise in the course of the debate over this Administration's proposal to help the rebels.

A related point. It is understandable that the Administration wants to involve Congress in the decision to

provide funds to the Libyan rebels. I believe, however, that here is a strong legal case that new Congressional approval is not needed for the President if he wants to take title to some or all of the \$34 billion and use it however he directs. David Aufhauser, the former General Counsel in Treasury under President George W. Bush, supports that view (and agreed that I might use his name). Indeed, David was a key participant in Bush's unfreezing and taking title to over \$1 billion in Iraqi assets after our 2003 invasion of Iraq, and then sending the funds back to the Development Fund for Iraq. Bush took the action pursuant to a 2001 amendment to the International Economic Emergency Powers Act (IEEPA), 50 U.S.C. § 1702 (a)(1)(C). It provides that the President may take title to the frozen assets and decide how they are used, sold, etc., "when the United States is engaged in armed hostilities" with a country.

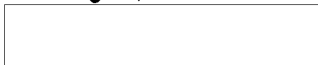
On a personal note. I believe that diverting the funds to reduce our deficit or to pay the U.S. military's expenses would be inconsistent with President Obama's statements, such as: "[T]he money doesn't belong to Qaddafi or to us—it belongs to the Libyan people." It would be inconsistent with U.N. Security Council Resolutions 1970 and 1973. And it would lead many Libyans and many of our allies to question our intentions. The crudest charge might be that we would be wrongfully using Muslim money to fund a war against Muslims.

Hope this is helpful.

My best, Barry

P.S. I have also brought this possible support for unwanted diversions of the frozen Libyan assets to the attention of U/S Bob Hormats, as well as Tom Delare in EEB and David Mortlock in L. I regularly work with Tom and David in my role as chair of the Sanctions Subcommittee of the State Department's Advisory Committee on International Economic Policy (ACIEP). (Tom and David have been outstanding in their cooperation with the Subcommittee.) However, given the likely fast pace of events after Secretary Clinton's announcement last Thursday, I thought it might be helpful to pass this information on to you directly.

—
Prof. Barry E. Carter
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