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OGC-84-51747
23 August 1984

—C 0415

MEMORANDUM FOR: General Counsel
FROM: [REDACTED]
Office of General Counsel
SUBJECT: H.R. 5399 -- Section 107, Prohibition on Covert Assistance for Military Operations in Nicaragua

1. The Director has asked for a legal interpretation of the restriction contained in Section 107 of H.R. 5399, which was recently passed by the House of Representatives. More specifically, OGC has been asked to analyze the effect of this provision on expenditures for staff salaries.

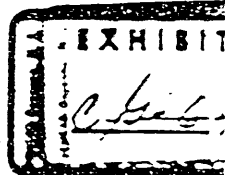
[REDACTED] In my view, while we plainly can pay all of these fixed costs on the basis of other appropriations, we just as clearly cannot utilize these resources in any activities which would have the effect of supporting paramilitary operations in Nicaragua by anyone.

2. In addition, we have been asked to comment upon the use of third countries to continue the Nicaragua project. I believe the Agency can request third countries to carry on the program at their own expense so long as it is made clear that no U.S. funds would be used either now or in the future to repay such a commitment. The extent to which Agency personnel can be involved in soliciting third country support would have to be determined on a case-by-case basis.

3. Although the language of Section 107 differs only slightly from that of Section 108 of the Intelligence Authorization Act for FY 84 (hereinafter Section 108), the legal effect of these differences is substantial. Section 107 reads as follows:

PROHIBITION ON COVERT ASSISTANCE FOR MILITARY OPERATIONS IN NICARAGUA

Sec. 107. During fiscal year 1985, no funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose of



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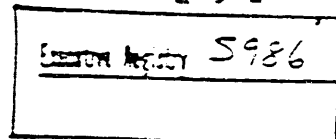
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By S. Packer, National Security Council



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which would have the effect of supporting directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual.^{1/}

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On its face and by its very title, the House version operates as a total prohibition on the use of any funds by U.S. intelligence elements during FY 85 for direct or indirect support of military or paramilitary operations in Nicaragua by anyone. This language effectively blocks all direct U.S. activities in Nicaragua and precludes U.S. financial support for the Contras during FY 85 by any means. In dissecting Section 107, we are faced with the following restrictions:

A) RESTRICTION ON TIME -- This prohibition would operate throughout FY85 and any subsequent supplemental appropriations would likewise be subject to its restrictions. Should this language become the final version of next year's Intelligence Authorization Act, as of 30 September 1984, an amendment of the Section would be required in order to legalize spending for the Nicaragua program.

B) RESTRICTION ON FUNDS -- The wording contained in Section 107 that "no funds available" may be obligated or expended for the restricted purpose translates into a total prohibition on all activities supporting paramilitary operations in Nicaragua that require funding by the U.S. The funds available are not limited by year of appropriation. Thus, reprogramming of prior year funds and releases from the Reserve for Contingencies would be prohibited. Moreover, the prohibition is not limited by its language to appropriated funds. The broadness of the wording of this section appears to prohibit the use of funds

^{1/} By comparison, Section 108 of the Intelligence Authorization Act for FY 1984 reads as follows:

LIMITATION ON COVERT ASSISTANCE FOR MILITARY OPERATIONS IN NICARAGUA

Sec. 108. During fiscal year 1984, not more than \$24,000,000 of the funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual.

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made "available" to the Agency by other nations, groups or individuals. Therefore, the Agency could not conduct ~~the~~ covert action while another nation, group or ~~person~~ individual foots the bill.

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C) ~~RESTRICTIONS ON OBLIGATIONS OR EXPENDITURES~~
-- This restriction on both obligations and expenditures of funds available in FY85 not only precludes Agency spending now for the restricted purpose, but forbids the making of commitments to spend available funds at some future time. This same language is contained in FY84's spending cap and the question was raised in that situation whether funds obligated in FY83, but expended in FY84, would be subject to the \$24 million limitation. It is my understanding that the question was informally resolved because the Committees reportedly did not intend the limitation to effect funds already obligated. In any event, funds that have been obligated arguably are not "available" to the Agency in a technical sense. To avoid future questions by the Committees, however, it might be appropriate to urge Congress to modify any final restrictive language in a manner that clarifies this point. Perhaps adding to the phrase "no funds available" the words "for obligation" would narrow the restriction.^{2/}

2/ There has been at least one instance where the language of a proposed amendment required the deobligation of funds and their return to the Treasury. Senator Proxmire offered the following amendment to the Department of State Authorization Act for FY84-85, S. 1342:

PROHIBITION ON CERTAIN ASSISTANCE TO THE
KHMER ROUGE IN KAMPUCHEA

Sec. 701. (a) Notwithstanding any other provision of law, none of the funds authorized to be appropriated by this Act or any other Act may be obligated or expended for the purpose, or with the effect, of promoting, sustaining or augmenting, directly or indirectly, the capacity of the Khmer Rouge or any of its members to conduct military or paramilitary operations in Kampuchea or elsewhere in Indochina.

(b)(1) All funds appropriated before the date of enactment of this section which were obligated but not expended for activities having the purpose or effect described in subsection (a) shall be deobligated.

(2) All funds deobligated pursuant to paragraph (1) shall be deposited in the Treasury of the United States as miscellaneous receipts.

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D) RESTRICTION ON WHO MAY SPEND -- The provision expressly ~~prohibits~~ the CIA, DoD and "any other agency or entity of the U.S. involved in intelligence activities." ~~These~~ funds are subject to the restriction. This language appears to prohibit use of funds made available to the Department of State, to the extent that expenditure of those funds would have the effect of supporting paramilitary operations. Section 107 does not, however, prohibit the Department from obligating or expending funds for diplomatic or other purposes in Nicaragua. Although the restriction does not apply to entities not involved in intelligence, such as the Department of Agriculture, for example, any appropriated funds available to those agencies could not legally be expended for unauthorized purposes under traditional appropriations law. Obviously such other agencies are not authorized by law to conduct paramilitary operations.

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E) RESTRICTION ON PURPOSE OR EFFECT -- The language of Section 107 requires the Agency not only to refrain from committing or spending funds for the express purpose of supporting paramilitary activities in Nicaragua, but also demands that the CIA anticipate the "effect" of its expenditures. Thus, funds given to the Contras that were being expended, for example, to provide humanitarian support, interdict the flow of arms in the region or assist with public relations efforts, would be prohibited only if such assistance were determined to have the "effect" of supporting paramilitary activities in Nicaragua. While the language of Section 107 itself can be construed to permit humanitarian aid by U.S. intelligence elements, the legislative history indicates that the bill's proponents would oppose any assistance to the Contras.

F) RESTRICTION ON DIRECT OR INDIRECT SUPPORT FOR MILITARY OR PARAMILITARY OPERATIONS -- The restriction on direct or indirect support for military/paramilitary operations prohibits the funding of any Agency activities which have a reasonable nexus with the Nicaraguan covert action program. While the interpretation of "direct" support may cause us few problems, how to define what will have the effect of indirectly supporting such activities in Nicaragua cannot be determined with certainty. Rather than drawing a thin line, this language paints a gray zone subject to interpretation. The provision of medical supplies to the Contras, for example, arguably has the "effect" of "indirectly" supporting their paramilitary activities.

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This point takes on particular significance when we compare this year's \$24 million cap with the "no ~~fixed~~ prohibition of Section 107. As we were approaching the cap, CIA informed the Committees that the Agency had not exceeded the statutory \$24 million limitation. We responded to congressional inquiries regarding certain expenditures by treating the matter as an accounting issue and distinguishing direct or indirect support from direct and indirect costs. We noted that the legislative history gave no indication that all "indirect costs" conceivably related to the program must be charged against the cap and that we had charged costs in accordance with long-standing Agency accounting procedures. The SSCI found no problems with this explanation, but the majority members of HPSCI stated their belief that all direct and indirect costs of the program should have been charged against the cap.^{3/}

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The essential difference between the cap and the prohibition is that, in the former, the Agency had authorization for an ongoing program and could expend funds and account for them in some way until \$24 million was reached; in Section 107 no expenditures can be charged against the Nicaraguan covert action program.

The only useful discussion of the meaning of the terminology "directly or indirectly" is found in the House Report on H.R. 2760, which attempted to impose an absolute ban on support for military/paramilitary operations in Nicaragua. The language of that bill is

^{3/} Only one reference was made during the floor debate to the accounting practices utilized by the intelligence community in accounting for FY84 funds. Congressman Miller remarked:

I would also suggest that the funding is illegal, because never have I seen such magnificent bookkeeping that can allow this \$21 million to go the number of months that it has. They are always going to run out just before we take up the bill, but when the bill does not come out the way the intelligence community likes, then they are able to fund it for several months because somehow the economies are worked out. This is the most efficiently run war in history if they can make \$21 million go this far. But we know that is not what is going on. There is diversion of other military sources and there is the raising of money in the private sector to support these mercenaries.

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Source: Report 5992

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similar to the wording of Section 107 and may be helpful in determining what the House had in mind.^{4/} The section contains an analysis of the relevant provisions of "indirect support" in the context of support of entities outside Nicaragua which operate within Nicaragua. The specific examples given to show the type of indirect support that would be prohibited was training conducted exclusively outside Nicaragua if given in preparation for military or paramilitary activity inside Nicaragua.

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The report expressly noted that the section would not prohibit the collection, production or analysis of intelligence. Nor would it prohibit the provision of that intelligence to foreign governments, as long as the provision of such intelligence did not support military/paramilitary operations in Nicaragua by foreign nations or other entities.

G) RESTRICTION ON PLACE -- Section 107 prohibits the financial support of military or paramilitary activities in Nicaragua. Funding for any activity which would take place outside Nicaragua but would have the effect of supporting paramilitary operations inside Nicaragua would thus be forbidden.

H) RESTRICTION ON WHO DOES THE OPERATIONS -- The restriction against funding applies to paramilitary operations "by any nation, group, organization, movement, or individual." This wording effectively prohibits the Agency's funding of such activities via intermediaries.

Legislative History

4. The legislative history is helpful only for discerning the spirit behind Section 107. There is no analysis of the wording in 20 pages of floor debate. 130 CONG. REC. H8264-84

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OPERATIONS IN NICARAGUA

SEC. 801. (a) None of the funds appropriated for fiscal year 1983 or 1984 for the Central Intelligence Agency or any other department, agency, or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual. H.R. 2760, 98th Cong., 1st Sess. (1983).

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(Daily ed. Aug. 2, 1984). Both those in favor of and those against the restriction agreed, however, that Section 107 bans the provision of any funds for military or paramilitary activities in Nicaragua and that the intent is to terminate U.S. assistance to the Contras. 0421

5. Congressman Boland stated in his opening remarks that the single issue is "disagreement on the effectiveness and appropriateness of a particular covert action to overthrow the government of another nation." Id. at 8266. He later added that "our policy does not strengthen democracy in Nicaragua" and that "(t)his secret war should end -- today." Id. at 8276. Congressman Hyde noted that Section 107 "forbids any assistance to the freedom fighters in Nicaragua.... No food, no medicine, no ammunition, not even moral support." Id. at 8269. The spirit of Section 107 is abundantly clear -- the House expects Section 107 to end U.S. assistance to the Contras.

6. While the drafters more than likely attempted to imitate the Clark Amendment's prohibition on assistance of any kind for paramilitary operations in Angola,^{5/} it can be argued that the Section 107 restriction is somewhat different. Unlike the Clark Amendment, this section limits all funds rather than all assistance and it could be thought, therefore, to permit certain activities precluded under the Clark Amendment. Section 107 can be read to allow assistance that either does not require funding by intelligence elements or that does not directly or indirectly support paramilitary operations.

Staff Salaries.

7. With regard to the staff salaries

Section 107 would prohibit the obligation or expenditure of funds available to the

5/ The Clark Amendment reads, in pertinent part:

Limitation on certain assistance to and activities in Angola

Sec. 401(a) Notwithstanding any other provision of law, no assistance of any kind may be provided for the purpose, or which would have the effect, of promoting or augmenting, directly or indirectly, the capacity of any nation, group, organization, movement, or individual to conduct military or paramilitary operations in Angola unless and until the Congress expressly authorizes such assistance by law enacted after the date of enactment of this section.

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Agency [redacted] for salaries [redacted] to the extent that those expenditures would have the effect of supporting paramilitary operations in Nicaragua. The question of allocation of these costs, which was an important point under the spending cap, is not an issue under the wording of Section 107. Since no funds can be obligated or expended in FY85, no covert action program by the U.S. which supports paramilitary operations in Nicaragua is possible.

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Provision of Aid by Third Countries

8. With regard to the provision of aid by third countries, Section 107 prohibits funding, not discussion. This issue also presents a gray zone subject to interpretation. Certainly asking other countries to provide aid on their own is not prohibited so long as there is no quid pro quo. If, however, the third country expected repayment from the U.S., such assistance would be forbidden. If such a country provided aid with the understanding that the U.S. would provide an equal amount for one of their programs, the Agency would be in violation of both the letter and the spirit of Section 107 and would be open to charges of deliberate circumvention of the law.

9. The more difficult question is the extent to which Agency personnel can be used to solicit third country assistance. In my view, when FY85 begins, Section 107 prohibits the payment of the salaries and expenses of personnel for solicitation of third country assistance because such efforts would have the effect of indirectly supporting paramilitary operations in Nicaragua. Once again, on the spectrum of possible Agency activities to solicit third country assistance, some efforts would clearly be prohibited and others are arguably authorized. Payment of the salary and expenses of an employee whose full-time was dedicated to soliciting such assistance would contravene the restriction. On the other hand, requests for assistance by [redacted] in the course of his normal duties presents a closer case.^{6/}

10. Another hypothetical situation poses troubling legal questions: the use of Agency personnel as couriers for funds provided by third countries to the Contras. While I believe such activity would be prohibited by Section 107 if the courier's sole function was to pass those funds, if that item was a de minimis part of the courier's functions, it could be argued that no funds were expended for the restricted purpose.

6/ If the President tasks the representative of a nonintelligence agency to solicit such assistance in diplomatic or other channels, the letter of Section 107 would not appear to be violated, but such action might be viewed by supporters of the restriction as a violation of the spirit of that prohibition.

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11. In any event, under the requirement to keep Congress fully and currently informed concerning intelligence activities, the Agency is required to advise the Committees of any plans to solicit entry assistance for the Contras.

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Conclusion

The congressional intent behind Section 107 is to stop covering U.S. assistance to the Contras. The House crafted the language of that section tightly in order to restrict in every way possible any obligations or expenditures by U.S. intelligence elements which would result in continued assistance to military or paramilitary activities in Nicaragua. Should that language remain in the final authorization act, in my view, any close cases would be viewed by the proponents of Section 107 as efforts to circumvent the statutory prohibition.

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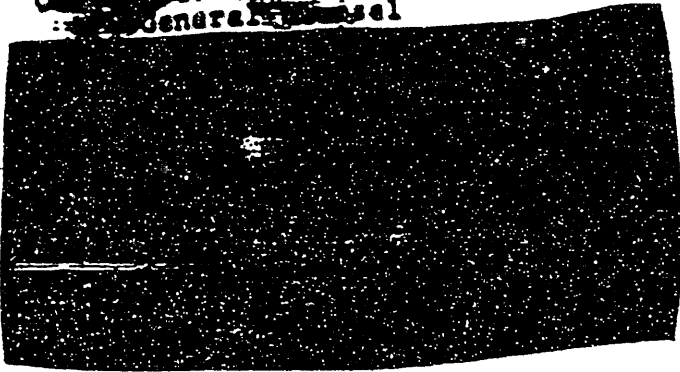
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