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Summary NSC Paper on El Salvador

The level of future infiltration of materiel and men for the insurgents in El Salvador is unknown. Our information on the current strength and strategy of the guerrillas is spotty.

A comprehensive Interagency study on U.S. policy is currently underway. The U.S. Embassy has requested early action on a minimum package of additional helicopters, additional mobile training teams and US MILGP augmentation. Given the public attention to this issue, some preliminary decisions are required before completion of the basic study.

The Interagency Group recommends:

- The President should issue an unambiguous statement of our resolve to support the Salvadoran Government and oppose the Cuban-backed insurgents.
- Four additional UH-1H helicopters should be provided to El Salvador.
- A six-man naval MTT should be deployed to assist the Salvadoran Navy in interdiction techniques and maintenance.
- An additional \$5 million FMS guaranteed loan should be made available quickly through reprogramming (a 15 day Congressional Notification is required).
- The US should work closely with the GOES and its other principal supporter, Venezuela, in coordinating international strategy.

There are two issues requiring NSC decision.

(A) Training: The Embassy recommends we deploy 4 five-man training teams outside the capital. Our options, with Congressional/legislative constraints, are four:

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1. Deploy additional Military Training Teams (MTT) and authorize them to operate in the field; consult informally with Congress in advance, but not on a War Powers basis;

2. Deploy the MTT teams after formal consultation with Congress and, accepting the possibility of tripping the War Powers constraints, submit a War Powers report;

3. Deploy with the requirement that all training be conducted in the immediate vicinity of the capital to minimize visibility of U.S. presence and War Powers implications;

4. Provide training to Salvadoran instructor cadre at military facilities in the U.S. and Panama.

(B) Additional Materiel: While four additional helicopters are the immediate requirement, the funding option chosen for helicopters will set the pattern for additional requirements expected to total \$25-70 million over the next 12-18 months. Options for funding military assistance are:

1. Use Sec. 506 authority by certifying existence of an unforeseen emergency and that no other legal authority is available. Repeated decisions would be needed as requirements develop.

2. Seek a FY 81 supplemental appropriation for FMS credits on concessional terms.

3. Consult with Congress on whether to use Sec. 506 authority or a supplemental. Consensus in the Interagency Group favors this option.

The Interagency Group is still refining what level of economic assistance will be necessary to keep the hard-pressed Salvadoran economy afloat. The rough estimate is between \$30-100 million additional in a combination of reprogrammed AID, supplemental ESF and additional PL-480.

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War Powers Implications of the
Deployment of Additional Mobile
Training Teams (MTTs) to El Salvador

1. Requirements of the War Powers Resolution.

Section 4 of the War Powers Resolution^{1/} requires the President to submit a written report to Congress within 48 hours after the introduction of U.S. Armed Forces: (1) "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances"; or (2) "into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces" regardless of whether hostilities are imminent.^{2/} This report must set forth the circumstances, legal authority, and estimated scope and duration of the introduction of U.S. forces; and similar reports must be submitted periodically so long as it continues.

Additional requirements apply in the first category of cases (introduction into hostilities or situations of imminent hostilities) but not the second (introduction into foreign territory while equipped for combat). First, Section 3 requires the President to consult with Congress "in every possible instance" prior to the introduction of U.S. forces; in practice, this has involved consultation with the chairmen and ranking minority members of the foreign affairs and armed services committees, and with the leadership of the two houses. Second, Section 5 purports to require the President to withdraw the forces introduced within 60 days if the Congress has not acted to authorize the introduction,^{3/} or at any time if so required by a concurrent resolution of Congress; the constitutionality of this provision has never been tested.

1. P.L. 93-148; November 7, 1973.

2. The Resolution also requires a report to Congress in a third type of situation not relevant here: where U.S. forces are introduced "in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation."

3. The 60-day period may be expanded to 90 days "if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces."

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To make clear that these requirements apply to the introduction into hostile situations of individual members of the armed forces acting as advisers, commanders or support personnel for foreign forces, Section 8(c) provides that the term "introduction of United States Armed Forces" includes "the assignment of members of such armed forces to command, coordinate, participate in the movement of or accompany the regular or irregular military forces of any foreign country or government when such forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities."

The precise meaning of the phrase "involvement in hostilities" is not entirely clear. Officials of the Ford Administration advised Congress that they had construed Section 4 of the Resolution as follows:

. . . "hostilities" was used to mean a situation in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces, and "imminent hostilities" was considered to mean a situation in which there is a serious risk from hostile fire to the safety of United States forces. In our view, neither term necessarily encompasses irregular or infrequent violence which may occur in a particular area.

It is difficult to apply these concepts to unconventional warfare, particularly since guerrilla attacks are often designed to inflict maximum surprise damage before opposing forces can be brought to the scene of action or organized to engage in an effective exchange of fire. It may be possible to argue that the Resolution was not intended to cover sporadic guerrilla attacks in localities where U.S. noncombat personnel happen to be present; but it is doubtful that Congress would accept such an argument where U.S. military personnel are training or advising government forces in an area where a sustained guerrilla campaign is taking place which has regularly involved substantial exchanges of fire, merely because the U.S. personnel threatened by hostile fire did not in themselves constitute a combat unit capable of conducting hostilities.

2. Will the MTTs be "equipped for combat"?

We understand that individual members of the MTTs will carry, or have access to, personal arms suitable for individual protection, but will not carry or operate any other weapons. Under these circumstances, there is no reason to treat these teams as forces "equipped for combat" for the

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purpose of Section 4 of the Resolution. The possession of personal arms for individual protection has never been treated as requiring a report under the Resolution in past cases involving personnel performing non-combat functions, such as aircrews and observers. (1)

3. Will the MTTs be introduced into situations "where imminent involvement in hostilities is clearly indicated by the circumstances"?

It was determined in mid-January that the current assignment of MTTs for helicopter pilot training and maintenance programs in San Salvador would not present such a clear indication of involvement of U.S. military personnel in hostilities as to require a report under the Resolution; contributing to this conclusion were the facts that those MTTs were to be restricted to areas of San Salvador not expected to be subject to military operations, and were not to receive hostile fire pay or otherwise be treated in a manner suggesting other than a peacetime assignment. (1)

The assignment of additional MTTs would require a similar determination about the likelihood of their involvement in hostilities in each location to which they will be assigned. In some cases, such as the assignment of additional MTTs to San Salvador or the assignment of a proposed naval MTT to an area outside the capital where we understand there has not been significant insurgent activity, this determination may essentially cover the same ground as the mid-January assessment. However, the same assessment about the assignment of MTTs to regional headquarters outside San Salvador will probably be more difficult to make (and to defend) because of the greater number of locations involved, the greater insecurity of these areas, and the mobile nature of the insurgency. If no report is filed and these MTT personnel subsequently become involved in such an incident, it will be more difficult to dismiss it as a random occurrence which was not reasonably foreseeable (as, for example, we were able to do in the case of an unexpected confrontation during the Shaba airlift involving a group of insubordinate Zairian soldiers). Two added complications in this respect are the decision of the Department of Defense to grant hostile fire pay to U.S. military personnel in El Salvador (since the statutory criteria for such pay include "imminent danger" of exposure to "hostile fire");^{4/} and the characterization of the military situation in El Salvador as involving a "major offensive"

4. 37 U.S.C. §310(a).

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by rebel forces, marked by "intense, widespread" attacks which have "severely taxed" Government forces, which appeared in the justification sent forward to Congress on behalf of President Carter for his invocation of emergency authorities under the Foreign Assistance Act in January to permit immediate military assistance.^{5/}

Therefore, it is important that a careful assessment be made of the likelihood of involvement of the MTTs in hostilities in each of the locations to which they would be assigned, that this assessment be appropriately documented for the record, and that this question be reviewed frequently. Furthermore, even if it is determined that the requirements of Sections 3 and 4 of the Resolution do not apply, it would be prudent to consult beforehand with the appropriate Congressional leaders concerning this and other relevant aspects of our plans in El Salvador, although of course we would not suggest or admit that these consultations were required by the Resolution.

An additional consideration in this regard relates to the character of the training to be provided by certain of these MTTs. As we understand it, some of the contemplated training (by the operational MTTs) may involve practical instruction in the conduct of military operations to Salvadoran personnel who may, during the course of the training, be involved in actual hostile operations. This might draw our MTT personnel uncomfortably close to the language of Section 8(c) of the Resolution (described above) which applies to U.S. personnel who "command" or "coordinate" foreign forces who are engaged in hostile situations, particularly if the MTT instructors were to become involved in commenting on or giving advice on the specific operational plans or techniques of Salvadoran combat forces. We have been able, in the past, to convince Congressional committees that Section 8(c) only applies if U.S. personnel provide the services mentioned at the same time and place that the foreign forces in question are involved in hostilities, but that was in the context of operations like the Shaba airlift where U.S. personnel remained many miles from any battle zone. It will be more difficult to maintain this distinction if U.S. personnel are in relatively

5. Fortunately, the instructions issued by DOD to the MTTs in El Salvador were (in the end) not characterized as "rules of engagement", which might further have contributed to an impression that the MTTs were combat-capable forces proceeding into a potentially hostile situation.

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close proximity to the area of hostilities and are in frequent contact with the foreign personnel who are involved in combat. Therefore, at the same time that the assessment of the likelihood of the involvement of U.S. personnel in hostilities is made, we should also consider whether it is likely that the Salvadoran personnel to whom instruction or planning assistance is given may be making immediate combat use of this instruction in the same general area.

4. Consequences of the filing of a War Powers report.

If a formal report were submitted to Congress by the President under Section 4 of the Resolution, presumably on the grounds of imminent involvement of U.S. forces in hostilities, then Congress would expect the President to comply with the requirements of Section 5 concerning their withdrawal.^{6/} If Congress does not enact a specific authorization for that use of U.S. forces within 60 calendar days, then (according to Section 5) the President must terminate that use of those forces, unless the Congress extends that 60-day period or the President determines and certifies that up to 30 more days are required to carry out safely the removal of those forces.^{7/} Section 5 also purports to require the President to withdraw these forces at any time if Congress so directs by concurrent resolution.

The constitutionality of these provisions has never been tested (the military operations on which reports have

6. Presidents Ford and Carter were careful, in their reports, not to admit in so many words that the Resolution in fact compelled the filing of the report being submitted, but these reports were nonetheless generally regarded as having been formal War Powers reports. In the present case, whether or not the President's report specified that it was submitted under the Resolution, or that it was a case of imminent involvement of U.S. forces in hostilities, Congress would undoubtedly treat it as such for the purposes of Section 5. Indeed, the language of Section 5 specifically makes its provisions applicable in a case where a report is required under Section 4(a)(1) whether or not a report is, in fact, filed.

7. There are two other exceptions which are not relevant here: (1) where Congress has declared war; and (2) where Congress is physically unable to meet as a result of an armed attack upon the United States.

been filed in the past were all rescue operations which were completed within days of their commencement). Nonetheless, the continuation of this MTT program in El Salvador would not be viable in any event in the face of a formal Congressional mandate for its termination, whatever the constitutionality of that action. Therefore, as a practical matter, if a War Powers report were filed, it would probably be necessary to obtain specific Congressional authorization within 60 calendar days for these MTT deployments (or at least an extension of the 60-day period) if these teams were to be maintained in the regional command areas.^{8/} Congressional authorization, if obtained, might be made subject to detailed restrictions on the size, composition, location and type of training offered by the MTTs.

8. The language of Section 5 does not literally provide for a situation in which U.S. forces become involved in hostilities which cease prior to the expiration of the 60-day period. It might be possible to persuade Congress that Section 5 would logically cease to apply in such a situation, and U.S. forces could then remain even in the absence of Congressional authorization. However, Congress would probably have to be convinced that a basic and reasonably permanent change had occurred in the situation before acquiescing in such an argument; certainly, Congress would not concede that the President could take advantage of a temporary lull in fighting to suspend or nullify the operation of Section 5.

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