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The Boland Amendment

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The Intelligence Authorization Act for FY 1983 included a classified annex which expressed the "sense of the conferees" that no funds authorized by the act should be used "to overthrow the Government of Nicaragua or to provoke a military exchange between Nicaragua and Honduras."⁶¹ I was informed by congressional staff sources (who asked that their identities be protected) earlier this year that some members of the intelligence committees felt that this restriction (if a non-binding "sense of the conferees" provision can be so characterized⁶²) was not being observed.

On December 8, 1982, when the continuing resolution for FY 1983 was pending before the House, Congressman Harkin introduced an amendment as follows:

None of the funds provided in this Act may be used by the Central Intelligence Agency or the Department of Defense to furnish military equipment, military training or advice, or other support for military activities, to any group or individual, not part of a country's armed forces, for the purpose of assisting that group or individual in carrying out military activities in or against Nicaragua.⁶³

While this was being debated, House intelligence committee chairman Boland made public the above mentioned classified annex and proposed a substitute amendment to the Harkin amendment reading as follows:

None of the funds provided in this Act may be used by the Central Intelligence Agency or the Department of Defense to furnish military equipment, military training or advice, or other support for military activities, to any group or individual, not part of a country's armed forces, for the purpose of overthrowing the Government of Nicaragua or provoking a military exchange between Nicaragua and Honduras.⁶⁴

In return, Congressman Harkin offered a substitute to the Boland substitute which read:

None of the funds provided in this Act may be used by the Central Intelligence Agency or any

61. 128 Cong. Rec. H9156 (daily ed., Dec. 8, 1982).

62. Here I am not suggesting that it might be politically wise to ignore the expressed opinion of the conferees--I am only saying that in this form the language is not legally binding.

63. 128 Cong. Rec. H9148 (daily ed., Dec. 8, 1982).

64. Ibid., at H9158

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agency of the Department of Defense to furnish military equipment, military training or advice or other support for military activities, to any individual or group which is not part of a country's armed forces and which is already known by that agency to have the intent of overthrowing the Government of Nicaragua or of provoking a military conflict between Nicaragua and Honduras.⁶⁵

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The Harkin substitute was defeated by a vote of 13 to 27 on a division of the House,⁶⁶ and on a roll call vote the Boland substitute passed 411 to 0.⁶⁷ This language was subsequently accepted by the Senate in conference, and became law when the act was signed by the President.

Most of the recent legal criticism of alleged U.S. covert activities in Central America centers around this law. In late March, 37 House members sent a letter to the President reportedly warning that CIA activities in Central America may be violating the law.⁶⁸ Senator Moynihan, the ranking Democrat on the Senate intelligence committee, has been quoted by the New York Times as saying that while the committee has not as yet reached a consensus on whether the Boland amendment has been breached, "A growing number of my colleagues question whether the C.I.A. is complying with the law . . ."⁶⁹ Shortly thereafter, the Washington Post quoted Moynihan as saying that "a crisis of confidence" was building over this issue between Congress and the intelligence agencies. "It is absolutely necessary that the administration obey the law," said Moynihan, who expressed the view that either the law or the operations must be changed because the current situation is untenable.⁷⁰ Senator Goldwater has also been quoted as believing that the CIA might be involved in "plans to destabilize the Nicaraguan government,"⁷¹ but an inquiry to his office produced a denial that he had made any such statement.⁷²

65. Ibid., at H9159.

66. Ibid.

67. Ibid.

68. New York Times, April 1, 1983.

69. Ibid.

70. Washington Post, April 3, 1983.

71. Christian Science Monitor, March 29, 1983.

72. On March 29 I telephoned Denny Sharon, Senator Goldwater's Armed Services Legislative Assistant (Robo Simons, Goldwater's man on the intelligence committee, was out of town). Denny was unfamiliar with the Monitor article, but copied down the key language and said he would check with the Senator (who was out of town). On the morning of March 31, Denny called me back and said the Senator told him that he had made no such statement concerning alleged U.S. involvement in Nicaragua and that he would send a communication to the Monitor disavowing their account.

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The words "for the purpose of . . ." are critical to understanding the Boland Amendment. Does this bar expenditure of funds by the CIA only when the Agency's purpose is to overthrow the Nicaraguan government or to provoke a confrontation with Honduras, or does it also bar funding of a paramilitary group when the Agency's purpose is to pressure Nicaragua to cease its aggression against El Salvador but when the recipient group's objective is to overthrow the Nicaraguan government? The administration has taken the former view--that it is the CIA's "purpose" that is controlling--while at least some congressional critics have suggested that if either the CIA or a group receiving CIA funds has the "purpose" of overthrowing the Government of Nicaragua or provoking an exchange with Honduras the statute prohibits assistance to that group. The Washington Post recently reported:

Chairman Michael D. Barnes (D-Md.) of the House Foreign Affairs subcommittee on Latin America, said CIA attorneys argue that continued spending is legal because the "purpose" of the U.S. agencies supplying money and weapons to the insurgents is not to overthrow the Nicaraguan regime, even if the purpose of the guerrillas who receive the support is to do so. "Not a jury in the country would accept this, and the House will not accept it," said Barnes.⁷³

A similar interpretation was given by New York Times columnist Tom Wicker, who wrote:

Whether the goal is to overthrow the Sandinists or merely make them more amenable to Reagan Administration pressures is not so clear.

Either way, the C.I.A. operation appears to be violating the Boland Amendment, which prohibits support of paramilitary forces "with [sic--should read "for"] the purpose" of overthrowing the Nicaraguan Government. Phillip Taubman of the Times reports that C.I.A. officials claim they aren't trying to overthrow that Government, hence are observing the letter of the Boland Amendment. That's like saying you're hitting a man with a hammer but not trying to kill him; and it's the kind of sleazy, hair-splitting "deniability" that debases language and credibility alike.⁷⁴

73. Wash. Post, April 3, 1983.

74. New York Times, April 1, 1983.

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The distinction between the CIA's "purpose" and that of the insurgents allegedly being financed and supplied is an important one, because they don't appear to coincide. Consider this report by Washington Post writer Christopher Dickey, who recently spent time with anti-government guerrillas in Nicaragua:

"The United States is helping us in a way we don't want. They are saying no, no, no to everything. Our men want to do spectacular things," complained one counterrevolutionary political leader outside Nicaragua who was instrumental in setting up our visit. "You have the momentum, and they stop you. It's like an invisible hand holding strings."

As did his men on the ground here, he dismissed the Reagan administration's assertion to Congress that Washington's support for the anti-Sandinistas is intended essentially to cut the Nicaraguan government's arms supplies to insurgents in El Salvador.

"The people who are fighting, they are not fighting to stop the weapons," the counter-revolutionary leader said "We are fighting to liberate Nicaragua."

As [guerrilla leader] Suicide put it here in the middle of the war zone, "we're not going to stop the transport of arms and supplies to the Salvadoran guerrillas or the Guatemalan guerrillas until we cut the head off the Sandinists."⁷⁵

Fortunately, the legislative language is less ambiguous than might at first glance appear to be the case. Particularly when read in context, it is in my view beyond reasonable doubt that Congress was referring to the "purpose" of the CIA and DoD, not the purpose of the individuals and groups receiving assistance from the CIA.

To begin with, the Amendment prohibits the use of certain funds "by the Central Intelligence Agency or the Department of Defense" to furnish certain specified assistance to any "group or individual" "for the purpose of overthrowing the Government of Nicaragua or provoking a military exchange between Nicaragua and Honduras." [Emphasis added.] That is to say, the law prohibits the expenditure of funds "by" the CIA "for" the prohibited purpose. Had the Congress intended to

75. Washington Post, April 3, 1983.

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prohibit CIA assistance "to any individual or group which is not a part of a country's armed forces and which is already known by that agency to have the intent of overthrowing the Government of Nicaragua or of provoking a military conflict between Nicaragua and Honduras," it would presumably have so stated. Indeed, immediately before unanimously adopting the Boland Amendment, the House considered and overwhelmingly rejected the language I have just quoted, which had been proposed by Congressman Tom Harkin as a substitute to the Boland Amendment. The key difference between the unanimously approved Boland Amendment and the Harkin substitute (which was defeated by a margin of greater than two to one) was that Boland restricted the CIA's "purpose," while Harkin was triggered by the CIA's knowledge of the "intent" of a paramilitary group or individual.

Accepting this interpretation, it is not legally relevant whether the Government of Nicaragua is in fact eventually overthrown, or an exchange between Nicaragua and Honduras takes place. What matters is the motive or purpose for which the assistance is provided. Assistance provided to pressure Nicaragua to cease its intervention in El Salvador--even if it resulted in the fall of the present regime--would not be unlawful; while assistance given to overthrow that regime, even if totally ineffective or actually counterproductive, would violate the law.

Some congressional critics appear to acknowledge that the "letter" of the Boland Amendment has been followed, but charge that the CIA may be violating its "spirit" by failing to maintain adequate control over the paramilitary forces receiving assistance.⁷⁶ Congress may indeed be concerned about the possible consequences of a successful paramilitary effort to overthrow the Sandinistas and the accompanying risks of a conflict between Honduras and Nicaragua--and from both a policy and a political standpoint these considerations may warrant careful attention by administration decision-makers--but as a matter of law it is inappropriate to attach

76. "Members of the Senate Intelligence Committee, including Democrats and Republicans, said this week that a majority of senators on the panel think that the C.I.A. has insufficient control over the paramilitary forces that it supports in the region. . . . [They] said that sentiment on the committee runs strongly to the view that the law has been violated in spirit if not in letter." New York Times, April 1, 1983. See also, ibid., March 30, 1983: "Senator Patrick J. Leahy, Democrat of Vermont, visited Central America earlier this year for the Senate intelligence committee. Members who have read a report that Mr. Leahy prepared about his visit said it had left little doubt that the agency, while following the letter of the Boland amendment, was violating its spirit."

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the terms of the rejected Harkin Amendment as baggage to the Boland Amendment. The record shows that the House considered and rejected language which would have prohibited assistance to paramilitary groups intending to overthrow the Nicaraguan government. To suggest that the Harkin Amendment was somehow incorporated into the "spirit" of the Boland Amendment is in my view simply unpersuasive.

Although not legally relevant, it is perhaps worth noting that concerns that the paramilitary contras may succeed in overthrowing the Government of Nicaragua or provoking a conflict between that State and Honduras may be exaggerated. While there have been reports by journalists who have travelled with the contras of significant peasant support for the guerrillas and resentment of the Nicaraguan government,⁷⁷ there seems to be little reason to believe victory is in sight. Consider this assessment by a Washington Post reporter from Managua:

The worries do not seem to be military for the most part. The several thousand counter-revolutionary guerrillas reported to be operating in various zones inside Nicaragua pose little serious challenge to the Sandinistas' 22,000-man conventional army, backed by more than 10,000 trained militia reserves and tens of thousands more volunteer militiamen with rudimentary drill under their belts.

And despite several warnings that Honduras risks war by allowing the antigovernment Nicaraguans to use its territory, Sandinista officials and foreign diplomats say such a conflict is unlikely unless one side or the other makes a severe miscalculation.⁷⁸

Despite the frequent allegations in the press and by some members of the Congress that the Boland Amendment is being violated, I have to date encountered no persuasive evidence that the CIA or the Defense Department is providing assistance to any group for the purpose of overthrowing the Government of Nicaragua or provoking a confrontation with Honduras. Until evidence to that effect can be obtained, I am not prepared to conclude that either the letter or the "spirit" of the Boland Amendment is being violated.

77. See, e.g., Washington Post, April 5, 1983 ("In the six days another reporter and I spent traveling through this province with the U.S.-backed soldiers fighting to overthrow the leftist Sandinista government we saw a pattern of support for the contras by people with many grievances against the revolutionary government in Managua.")

78. Washington Post, March 8, 1983.

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