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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

B-214929

October 11, 1984

The Honorable Jim Sasser
Ranking Minority Member
Subcommittee on Military
Construction
Committee on Appropriations
United States Senate

Dear Senator Sasser:

This responds to your March 29, 1984 request that we review several recent instances in which U.S. military training team (MTT) personnel in El Salvador have come under hostile fire. You have asked us to determine the applicability of the War Powers Resolution or section 21(c) of the Arms Export Control Act to these events. Based upon our review of the Department of Defense's (DOD's) account of these occurrences, we are unable to conclude that the events in question were subject to the reporting requirements of either act. Our conclusions are discussed in detail below.

BACKGROUND

The events in question were first described by the Department of Defense in an insert for the record of a March 20, 1984, joint hearing before the Military Construction Subcommittees of the Senate Committee on Appropriations and Senate Committee on Armed Services. In response to a request for details of any instance in which MTT personnel at La Union or San Miguel had come under hostile fire, DOD stated for the record:

"MTT personnel billeted in the military quarters at San Miguel came under hostile fire on two occasions. In November 1983 and again in March 1984 a small group of insurgent forces attacked the camp but did not penetrate the perimeter and there were no injuries to U.S. personnel on either occasion. In February 1984 U.S. MTT personnel at the Salvadoran Naval Base at La Union received sporadic sniper fire; there were no injuries."

According to several press articles, this account was officially revised on March 30, 1984, at which time a DOD spokesman stated that the initial insert was prepared by a staff officer who had not checked the facts, and that in reality none of the attacks was directed at U.S. military personnel. This revised account is also reflected in the

description provided to this Office by DOD. On July 8, 1984, in response to our request for comments, DOD General Counsel Chapman Cox provided the following statement regarding the events in question:

"* * * [D]uring the November 1983 attack at San Miguel, no U.S. trainers came under attack, were engaged in any hostilities or were endangered by terrorists attacks. On two occasions during March 1984 guerrillas initiated probing small arms attacks on the perimeter of the Salvadoran army garrison at San Miguel. The Military Group (MILGROUP) Commander concluded, after an investigation of the incident, that the sporadic small arms fire was not directed at the U.S. trainers who were present at the compound. The trainers were at no time endangered nor were they required to take any active measures in self-defense. During an incident in February 1984, six rounds of small arms fire were directed at a Salvadoran naval formation within the Salvadoran naval compound at La Union. U.S. personnel were in their quarters during the incident and were not endangered. Salvadoran military authorities arrested an intoxicated individual who was suspected as being responsible for the firing.

"During the period of these incidents approximately 22 U.S. personnel were located at La Union and 10 U.S. personnel were at San Miguel. At both locations, U.S. personnel were authorized to carry only personal weapons which were to be used only for self-defense or to protect against loss of life of other U.S. military members.

"* * * It should be noted that, in the two particular incidents attributed to hostile acts, the U.S. trainers were not in the vicinity of and were not engaged in responding to the hostile fire, even in the exercise of self-defense.* * *"

Mr. Cox further stated that the incidents in question were "minor in nature," and that there was no indication that the attacks were directed at U.S. military personnel. It should be noted that his comments indicate that there were

actually four incidents, one in November 1983 at San Miguel, two others at San Miguel in March 1984, and one at La Union in February 1984.

Both the Defense Department and the Department of State (again, at our request) have provided us with their respective analyses of the War Powers Resolution and the Arms Export Control Act in connection with these specific events.

DISCUSSION

This Office has previously considered the applicability of section 21(c) of the Arms Export Control Act, 22 U.S.C. § 2761(c) (1982), and section 4(a)(1) of the War Powers Resolution, 50 U.S.C. § 1543(a)(1) (1982), to events taking place in El Salvador. In our report "Applicability of Certain U.S. Laws that Pertain to U.S. Military Involvement in El Salvador," GAO/ID-82-53, July 27, 1982, we examined the language and legislative history of both enactments, as well as DOD's internal guidelines on the applicability of both laws to MTT activities in El Salvador. Although we need not republish that analysis in full here, the principal points of that report are equally applicable to the events in the present case and will serve as the basis for our present discussion.

The Arms Export Control Act. Section 21(c) of the Arms Export Control Act, as amended, states:

"(1) Personnel performing defense services sold under this Chapter may not perform any duties of a combatant nature, including any duties related to training and advising that may engage United States personnel in combat activities, outside the United States in connection with the performance of those defense services.

"(2) Within forty-eight hours of the existence of, or a change in status of significant hostilities or terrorist acts or a series of such acts, which may endanger American lives or property, involving a country in which United States personnel are performing defense services pursuant to this Chapter or the Foreign Assistance Act of 1961, [22 U.S.C. § 2151 et seq.], the President shall submit to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, classified if necessary, setting forth--

"(A) the identity of such country;

"(B) a description of such hostilities or terrorist acts; and

"(C) the number of members of the United States Armed Forces and the number of United States civilian personnel that may be endangered by such hostilities or terrorist acts." 22 U.S.C. § 2761(c) (1982).

The language of section 21(c) contains both a prohibition (against performing duties of a combatant nature, including training or advising functions that "may engage" U.S. personnel in combat), and a reporting requirement. As we noted in our previous report, guidance in the conference committee report as to the nature of the prohibition primarily emphasized the principle of "no personnel with units engaged in combat." H.R. Rep. No. 96-1471, 96th Cong., 2d Sess. 43-44 (1980). Apart from this, the Senate Foreign Relations Committee indicated that it initially would be up to the President to decide which duties "may" engage U.S. personnel in combat, but that the reporting requirement of section 21(c)(2) would permit the Congress to share in that decision. S. Rep. No. 96-732, 96th Cong., 2d Sess. 20 (1980). The significance of the reporting requirement of section 21(c)(2), then, is that it requires that the Congress be alerted of situations that might involve U.S. military training personnel in combat roles.

In our previous report, we stated:

"Whether the reporting requirement of section 21(c)(2) is applicable to any given set of facts depends on whether those facts establish the occurrence of 'significant hostilities or terrorist acts' within the meaning of that phrase as used in the AECA. Neither section 21(c)(2) nor its legislative history provides a definition of this phrase or guidance as to the extent of hostile activity that must occur to trigger its requirement. Thus, the determination is ultimately a matter of judgment to be applied on a case by case basis."

There we concluded that a large-scale guerrilla attack on the Salvadoran air base at Ilopango, in which three American

helicopters were destroyed, was a "significant" hostility or terrorist act that should have been reported under section 21(c)(2).

At the time of our report, we noted that the Reagan Administration had never filed a report with the Congress under section 21(c)(2). Since that time, according to DOD, the Administration has made four reports to the Congress under this requirement. They are:

April 5, 1984 - The shooting of Master Sergeant Robert H. Judd, Jr., while driving a government vehicle in Athens, Greece by an assailant riding a motorcycle.

November 16, 1983 - The murder of Captain George Tsantes in Athens, Greece.

May 27, 1983 - The murder of Commander Albert A. Schaufelberger III in San Salvador, El Salvador while he was waiting for his girlfriend in a parking lot.

April 10, 1983 - the suicide truck bombing of the U.S. Embassy in Beirut.

We cannot be sure from such a limited experience, but the Administration may be interpreting its section 21(c)(2) reporting responsibilities in a relatively strict manner: reports have only been made where hostilities or terrorist incidents have actually resulted in the death or serious injury of U.S. military personnel. If this is indeed the case, we cannot agree with such a strict interpretation. The reporting requirements of section 21(c)(2) are applicable to any significant hostility or terrorist act no matter against whom it is directed, so long as it "may endanger" American lives or property. Thus, for example, a guerrilla offensive in a part of El Salvador where American military advisers are located might, in our view, trigger the reporting requirements of section 21(c)(2) regardless of whether U.S. military personnel are actually involved in hostilities.

In the present case, however, we agree that the four incidents in question did not, on their own, constitute a violation of the prohibition contained in section 21(c)(1) of the AECA, or constitute reportable incidents under section 21(c)(2). Although in each case U.S. troops were located in the general vicinity of minor hostilities, it does not appear that U.S. forces were performing duties of a combatant nature as that term is used in section 21(c)(1). The legislative history of section 21(c)(1), as described in our previous

report, indicates that U.S. trainers may legally continue training activities in support areas; we do not believe that isolated and minor instances of hostilities in such support areas render the continued presence of U.S. advisers violative of section 21(a)(1). Similarly, from the description provided by DOD, it does not appear that any of the incidents in question were so "significant" that they were required to be reported under section 21(c)(2).

The War Powers Resolution. The War Powers Resolution, 50 U.S.C. §§ 1541-48, requires the President to notify, consult, and participate with the Congress in the decision of whether the United States should go to war or should deploy its forces in a manner that war is likely. Section 4 of the resolution, 50 U.S.C. § 1543, directs the President to submit a report to the Congress within 48 hours after U.S. forces have been introduced

- into hostilities or into situations where imminent involvement in hostilities is indicated clearly by the circumstances;
- into a foreign nation's territory, airspace, or waters, while equipped for combat (except for deployment related solely to training supply, repair); or
- in numbers substantially enlarging the number of U.S. Armed Forces equipped for combat already located in a foreign nation.

Again, our previous report GAO/ID-82-53, July 27, 1982, describes in detail the language and legislative history of the War Powers Resolution, particularly in light of activities taking place in El Salvador. Our report did not find that U.S. military activities in El Salvador were in violation of the War Powers Resolution. We did, however, examine the various presumptions underlying DOD's conclusion that the War Powers Resolution was not implicated by activities in El Salvador. Those presumptions, according to a February 12, 1981 memorandum from DOD's Office of General Counsel, were that MTT personnel

- would be restricted to areas of El Salvador not expected to be the subject of military operations;
- would not function in a command and control capacity;
- would not deploy to hostile areas to advise;
- would not receive hostile fire pay; and

--would be engaged in routine training and maintenance program.

Our report concluded that one of these presumptions, that military personnel would not receive hostile fire pay, was incorrect.

In the present case, we again cannot conclude that any of the specific incidents in question warranted a report under section 4(a) of the War Powers Resolution. The principal question here is whether, under section 4(a)(1), these incidents involve situations where U.S. troops have been introduced into "hostilities" or where there is an "imminent danger" of hostilities. As we stated in our previous report, the phrase "introduction of United States Armed Forces" appears to be directed against the use of military personnel for commanding or coordinating foreign military actions, and to prevent military "advisers" from accompanying or participating with foreign troops in battle, even though the word "adviser" does not appear in the War Powers Resolution.

In addition, we noted that the State Department has long interpreted the terms "hostilities" and "imminent hostilities" as not including irregular or infrequent violence which may occur in a particular area, a view reiterated in the State Department's response to our request for comments in the present case. Because of the minor nature of the incidents in question and the absence of U.S. participation, even in an advisory capacity, we cannot conclude that a section 4(a) report is required. Nonetheless, we believe that it would be prudent for the Defense Department to reevaluate the situation in El Salvador, in light of these and other incidents, to verify the accuracy of the other "presumptions" discussed in our previous report, in particular, whether MTT personnel continue to be assigned to areas not expected to be the subject of military operations.

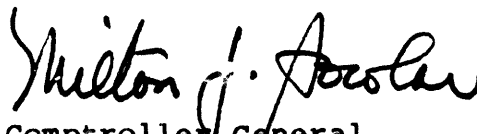
Finally, with regard to the question of whether the overall political and military situation in El Salvador is such that U.S. forces are exposed to "imminent danger of hostilities," we would note that the United States Court of Appeals for the District of Columbia Circuit recently upheld a lower court decision dismissing, on political question grounds, a claim by 29 members of the Congress that the U.S. military presence in El Salvador required a presidential report under the War Powers Resolution. Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied 52 U.S.L.W. 3906 (U.S. June 18, 1984) (no. 83-1398). The district court in that case stated:

"* * * [H]ere the Court faces a dispute as to whether a small number of American military personnel who apparently have suffered no casualties have been introduced into hostilities or imminent hostilities. The subtleties of fact-finding in this situation should be left to the political branches. If Congress doubts or disagrees with the Executive's determination that U.S. forces in El Salvador have not been introduced into hostilities or imminent hostilities, it has the resources to investigate the matter and assert its wishes. The Court need not decide here what type of congressional statement or action would constitute an official congressional stance that our involvement in El Salvador is subject to the [War Powers Resolution], because Congress has taken absolutely no action that could be interpreted to have that effect. Certainly, were Congress to pass a resolution to the effect that a report was required under the [War Powers Resolution], or to the effect that the forces should be withdrawn, and the President disregarded it, a constitutional impasse appropriate for judicial resolution would be presented." Crockett v. Reagan, 558 F. Supp. 893, 899 (D.D.C. 1982).

Although this Office is not bound by the political question doctrine, we agree that, due to the "subtleties of fact-finding" necessary to a resolution, the Congress itself would be a more appropriate forum in which to decide the question.

Unless you indicate to us otherwise, this opinion will be made publicly available after 30 days.

Sincerely yours,

for 
Comptroller General
of the United States