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U.S. Department
Office of Legal Counsel

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Office of the
Assistant Attorney General

Washington, D.C. 20530

MAY 31 1989

C. Boyden Gray, Esq.
Counsel to the President
The White House
2nd Floor, West Wing
Washington, D.C. 20500

Dear Mr. Gray:

As you are aware, the pending State Department authorization bill, S. 928, contains several constitutionally troublesome provisions. The Department of Justice is particularly concerned about Sections 107 and 108 of the proposed bill, which would impermissibly restrict the President's constitutional authority and chill the conduct of our foreign relations.

We have already circulated to you and others in the Administration a draft letter formally analyzing S. 928. As a supplement to our draft letter, I enclose a two page, summary explanation of the very grave problems presented by Sections 107 and 108. Such an explanation should facilitate discussions within the Administration about the proper approach to Congress with respect to these provisions.

Please let me know if we can be of further assistance on this important matter.

Sincerely,

William P. Barr
Assistant Attorney General
Office of Legal Counsel

Sections 107 and 108, as amended, of S. 928

Section 107:

"Notwithstanding any other provision of law, no officer or employee of the United States Government may solicit the provision of funds or material assistance by any foreign government (including any instrumentality or agency thereof), foreign person, or United States person, for the purpose of furthering any military, foreign policy, or intelligence activity for which funds are expressly prohibited or restricted by United States law."

Criminal penalties are expressly provided for violations.

- ° Section 107 is unconstitutional. By prohibiting consultation between the USG and other sovereign nations about actions those nations may wish to take, it robs the President of his core authority to determine and articulate U.S. foreign policy. This defect is inherent in the purpose of Section 107.

- ° Section 107 would constantly undercut the President's ability to advance U.S. interests. E.g., current law prohibits the use of U.S. funds for law enforcement in foreign nations; under Section 107, USG could not encourage South American countries to spend more on drug interdiction within their borders. Similarly, current law prohibits most forms of U.S. assistance to countries that have defaulted on debts to the USG; under Section 107, USG could not encourage other countries to assist the typically impoverished countries subject to this restriction.

- ° Independent counsel could interpret Section 107 to prohibit USG from encouraging another nation to cooperate in any activity for which Congress has defined funding levels, i.e., any activity for which any funding has been provided.

- ° The mere threat of a broad reading by independent counsel would chill any official seeking to advance any activity for which U.S. funding is "restricted." This would radically inhibit the conduct of U.S. diplomacy.

- ° The phrase "[n]otwithstanding any other provision of law" would override current statutes regulating the conduct of intelligence activities, and greatly inhibit such activities.

Section 108:

"Whenever funds for any military, foreign policy or intelligence activity with respect to a specific foreign region, country, government, group or

individual are expressly prohibited or restricted by United States law, no United States assistance shall be provided to any third party which would have the purpose or direct effect of furthering or carrying out the prohibited or restricted activity."

Criminal sanctions would be available through other provisions such as the general conspiracy statute, 18 U.S.C. 371.

- ° Insofar as it affects the President's constitutional authorities, Section 108 is unconstitutional for the same reasons as Section 107. It would also have similar chilling effects.

- ° Section 108's "purpose" test would subject the President and others to unconstitutional prosecutions based on their state of mind and to frequent political accusations of illegal behavior based on speculation about their motives.

- ° The "direct effect" test would also chill legitimate diplomacy, because "direct effects" are unpredictable and impossible to define.

Both sections have been supplemented with language purporting to leave untouched the President's "full constitutional powers." This adds nothing, and compels the President to find out what his constitutional powers are in the course of criminal prosecutions of himself or his subordinates by independent counsel.