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WITHDRAWAL SHEET

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Collection Name ROBERTS, JOHN: FILES

Withdrawer

LOJ 7/31/2005

File Folder NICARAGUAN HUMANITARIAN ASSISTANCE OFFICE

FOIA

2005-139

Box Number

COOKE

14LOJ

ID Doc Type	Document Description	No of Pages	Doc Date	Restrictions
19488 MEMO	DRAFT TO SHULTZ, MEESE, WRIGHT, FIELDING, RE ESTABLISHMENT OF NHAO	2	ND	B1
19489 EXECUTIVE ORDER	DRAFT RE ESTABLISHMENT OF NHAO	2	ND	B1

Freedom of Information Act - [5 U.S.C. 552(b)]

B-1 National security classified information [(b)(1) of the FOIA]

B-2 Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]

B-3 Release would violate a Federal statute [(b)(3) of the FOIA]

B-4 Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]

B-6 Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]

B-7 Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]

B-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]

B-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

EXECUTIVE ORDER

- - - - -

ESTABLISHMENT OF NICARAGUAN HUMANITARIAN ASSISTANCE OFFICE

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 722 of the International Security and Development Cooperation Act of 1985 (Public Law No. 99-83) (the Act), chapter V of the Supplemental Appropriations Act of 1985 (Public Law No. 99-88) (the Supplemental Act), the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2151 et seq.) (the FAA), including but not limited to sections 621, 632, and 633 thereof (22 U.S.C. 2381, 2392, 2393), and section 301 of title 3 of the United States Code, it is hereby ordered as follows:

Section 1. Establishment. (a) There is hereby established the Nicaraguan Humanitarian Assistance Office (the Office).

(b) The Office shall, unless otherwise extended, terminate on April 1, 1986, or one week following completion of disbursement of the funds made available under section 722(g) of the Act by chapter V of the Supplemental Act, whichever date is later.

Sec. 2. Functions. The Office shall, in accordance with the FAA, section 722 (g) of the Act, chapter V of the Supplemental Act, and the provisions of this Order, administer the program of humanitarian assistance to the Nicaraguan democratic resistance authorized thereunder. The Office may, to the extent permitted by law and the provisions of this Order, enter into such grant agreements and contracts and take such other actions as may be necessary to implement the program effectively.

Sec. 3. Policy guidance. In accordance with the FAA, and to the end that such programs and activities are effectively integrated with and supportive of the foreign policy of the United States, the Secretary of State shall be responsible for the continuous supervision and general direction of the programs and activities carried out by the Office.

Sec. 4. Administration. (a) At the head of the Office there shall be a Director, who shall be an officer of the United States designated by the President. The Director shall exercise immediate supervision and direction over the Office.

(b) The Director may, to the extent permitted by law, including but not limited to section 621 of the FAA (22 U.S.C. 2381), employ and use such staff from Federal agencies as may be necessary, except that the staff shall be limited to twelve supervisory personnel, plus appropriate support personnel. No personnel from the Department of Defense or the Central Intelligence Agency may be detailed or otherwise assigned to the Office.

(c) The Secretary of State shall provide the Office with such administrative services, facilities and other support as may be necessary for the performance of its functions. Funds made available under section 722(g) of the Act by chapter V of the Supplemental Act shall be provided to the Office through the Department of State.

(d) At the request of the Director, and to the extent otherwise permitted by law, the agencies of the Executive Branch shall provide such information, advice, additional administrative services and facilities as may be necessary for the fulfillment of the Office's functions under this Order.

Sec. 5. Classification Authority. In accordance with section 1.2(a)(2) of Executive Order No. 12356 of April 1, 1982,

the Director is hereby designated as an agency official with authority to classify information originally as Top Secret. The Director shall ensure that the Office establishes and maintains controls for the safeguarding of classified information as provided in part 4 of that Order.

Sec. 6 Delegation of Functions. Subject to the provisions of this Order and Executive Order No. 12163 of September 29, 1979, as amended, and to the extent necessary to the efficient and effective implementation of this Order, there are hereby delegated to the Director the functions conferred upon the President (and not reserved to him) by sections 632(a) and (b) and 635 of the FAA and other provisions of that Act (including but not limited to those set forth in Part III of the FAA) that relate directly and necessarily to the conduct of the programs and activities vested in or delegated to the Director.

Sec. 7. Procurement. (a) In accordance with the provisions of section 633 of the FAA (22 U.S.C. 2393), it is hereby determined to be in furtherance of the purposes of the FAA that the functions authorized thereunder, as set forth in section 2 of this Order, may be performed by the Director without regard to the provisions of law and limitations of authority specified in Executive Order No. 11223 of May 12, 1965, as amended.

(b) It is directed that each specific use of the waivers of statutes and limitations of authority authorized by this section shall be made only when determined in writing by the Director that such use is necessary to the efficient and effective implementation and in furtherance of the purposes of this Order and in the interest of the United States.

Sec. 8. Reports. The Director shall assist the President in preparing the reports required by section 722(j)(2) of the Act, including a detailed accounting of the disbursements made to

provide humanitarian assistance with the funds provided pursuant to section 722(a) of the Act. The Director shall keep the President fully informed about the implementation of the program.

THE WHITE HOUSE,



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503
August 23, 1985

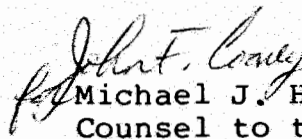
Hon. Fred F. Fielding
White House Counsel
West Wing
Washington, D.C.

Enclosed, pursuant to Executive Order No. 11030, as amended, is a revised version of a proposed Executive order entitled "Establishment of Nicaraguan Humanitarian Assistance Office".

Upon review of the initial draft the proposed order, the Department of Justice concluded that certain provisions of that version were not acceptable as to form and legality. In an effort to expedite the clearance of the order, consistent with the timetable discussed at the August 21 meeting, the Department of Justice has attempted to revise the proposed order in a manner that would be acceptable and that would satisfy the policy views expressed by the other interested agencies. The Department wishes to emphasize that it has prepared this version as a stimulus to further thinking and to provide a basis for further discussions. Justice is prepared to sit down immediately with the other agencies if the revised version inadvertently fails to accommodate their concerns.

I am prepared to convene a meeting as soon as possible at the convenience of the agencies -- either Friday afternoon, Saturday morning or first thing Monday morning, -- to resolve any outstanding problems with the order. Please contact John Cooney of this office (395-5600) by close of business Friday with agency views as to when the meeting should be convened and as to what issues remain to be discussed.

Sincerely,


Michael J. Horowitz
Counsel to the Director



U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

AUG 23 1985

MEMORANDUM TO JOHN F. COONEY
Assistant General Counsel
Office of Management and Budget

Re: Draft Executive Order: Establishment of
Nicaraguan Humanitarian Assistance Office

Attached please find a discussion draft of an executive order seeking to come as close as possible to the goals outlined at our recent meeting on the above referenced matter. This draft is offered in lieu of the earlier formulation, which we have concluded is not legally within the President's power.

I emphasize that this draft is designed merely to stimulate discussion and does not represent the recommendation of the Department of Justice. As you know, there are other options available to the decisionmakers with regard to this project, and this draft is not designed to foreclose any of them. We would be happy to discuss this matter further with any of the concerned parties and to provide whatever additional advice and assistance is necessary to resolve this matter expeditiously.

Ralph W. Tarr
Acting Assistant Attorney General

Attachment

Establishment of Nicaraguan Humanitarian Assistance Office

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 722 of the International Security and Development Cooperation Act of 1985 (Pub. L. No. 99-___) (the Act), chapter V of the Supplemental Appropriations Act of 1985 (Pub. L. No. 99-___) (the Supplemental Act), the Foreign Assistance Act of 1969, as amended (22 U.S.C. 2151 et seq.) (the FAA), including but not limited to sections 621, 632, and 633 thereof (22 U.S.C. 2381, 2392, 2393), and section 301 of title 3 of the United States Code, and as President of the United States of America, it is hereby ordered as follows:

Section 1. Establishment. (a) There is hereby established the Nicaraguan Humanitarian Assistance Office, hereinafter referred to as the Office.

(b) The Office shall, unless otherwise extended, terminate on April 1, 1986, or one week following completion of disbursement of the funds made available ^{672(b) of} under the Act ^{by} and ^{Chapter II of} the Supplemental Act, whichever date is later.

Section 2. Functions. The Office shall, in accordance with the FAA, section 722(g) of the Act, chapter V of the Supplemental Act, and the provisions of this order, administer the program of humanitarian assistance to the Nicaraguan democratic resistance authorized thereunder. (Funds made available ~~for that program~~ shall be provided to the Office through the Department of State.) The Office may, to the extent permitted by law and the provisions of this order, enter into such grant agreements and contracts and take such other actions as may be necessary to implement the program effectively.

Section 3. Policy guidance. In accordance with the FAA, and to the end that such programs and activities are effectively integrated with and supportive of the foreign policy of the United States, the Secretary of State shall be responsible for the continuous supervision and general direction of the programs and activities carried out by the Office.

Section 4. Organization and administration. (a) At the head of the Office there shall be a Director, who shall be an officer of the United States designated by the President. The Director shall exercise immediate supervision and direction over the Office.

(b) The Director may, to the extent permitted by law, including but not limited to section 621 of the FAA (22 U.S.C. 2381), employ and use such staff ^{CAN BE DROPPED} from [the Department of State] or other federal agencies as may be necessary, except that the staff shall be limited to twelve supervisory personnel, plus appropriate support personnel. No personnel from the Department of Defense or the Central Intelligence Agency may be detailed or otherwise assigned to the Office.

(c) The Secretary of State shall provide the Office with such administrative services, facilities and other support as may be necessary for the performance of its functions.

(d) At the request of the Director and to the extent otherwise permitted by law, the agencies of the Executive Branch shall provide such information, advice, additional administrative services and facilities as may be necessary for the fulfillment of the Office's functions under this order.

Section 5. Classification Authority. In accordance with section 1.2(a) (2) of Executive Order 12356 of April 1, 1982, the Director is hereby designated as an agency official with authority to classify information originally as Top Secret. The Director shall ensure that the Office establishes and maintains controls for the safeguarding of classified information as provided in part 4 of that order.

Section 6. Delegation of functions. Subject to the provisions of this order and Executive Order 12163 of September 29, 1979, as amended, and to the extent necessary to the efficient and effective implementation of this order, there are hereby delegated to the Director the functions conferred upon the President (and not reserved to him) by section 634B of the Foreign Assistance Act, as amended, and other provisions of that act that relate directly and necessarily to the conduct of the programs and activities vested in or delegated to the Director.

632(a)
632(b)
635(b)

Section 7. Procurement. (a) In accordance with the provisions of section 633 of the FAA (22 U.S.C. 2393), it is hereby determined to be in furtherance of the purposes of the FAA that the functions authorized thereunder, as set forth in section 2 of this order, may be performed by the Director without regard to the provisions of law and limitations of authority specified in Executive Order 11223 of May 12, 1965, as amended.

(b) It is directed that each specific use of the waivers of statutes and limitations of authority authorized by this section shall be made only when determined in writing by the Director that such use is necessary to the efficient and effective implementation and in furtherance of the purposes of this order and in the interests of the United States.

Section 8. Reports. The Director shall assist the President in preparing the reports required by section 722(j) (2) of the Act, including a detailed accounting of the disbursements made to provide humanitarian assistance with the funds provided pursuant to section 722(g) of the Act. The Director shall keep the President fully informed about the implementation of the program.

The White House

August __, 1985



U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

AUG 23 1985

MEMORANDUM FOR FRED F. FIELDING
Counsel to the President

RE: Implementation of Section 722(g) of the International Security and
Development Act of 1985

As you know, section 722(g) of the recently enacted International Security and Development Act (the Act) authorizes \$27 million to be appropriated "for humanitarian assistance to the Nicaraguan democratic resistance." That section provides, in relevant part, that:

Effective upon the date of enactment of this Act,
there are authorized to be appropriated \$27,000,000
for humanitarian assistance to the Nicaraguan
democratic resistance. Such assistance shall be
provided to such department or agency of the United
States as the President shall designate, except the
Central Intelligence Agency or the Department of
Defense.

131 Cong. Rec. H 6721 (daily ed. July 29, 1985). The President has not yet designated an agency or department to receive the assistance authorized by the Act. Certainly, this legislation authorizes the President to designate an existing agency or department of the United States, such as the State Department, the Agency for International Development, or the Executive Office of the President, to receive and thereupon to disburse the assistance. This designation could be accomplished in several ways, from a formal executive order to an oral directive from the President.

A more difficult question is whether the President could create a new entity within the Executive Branch, independent of existing agencies and departments, to receive the assistance and administer the program. We have reviewed this issue at some length and have concluded that in these circumstances the President lacks constitutional and statutory authority to do so.

Our conclusion arises out of the language in the Appointments Clause of the Constitution, Art. II, sec. 2, cl. 2, that appears to vest responsibility for creating offices of the United States in Congress:

[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; . . .

(Emphasis added.) Although to our knowledge the question has never been definitively adjudicated, the language of the Appointments Clause and the historic practice of the Executive and Legislative Branches suggests strongly that offices of the United States must be created by Congress. Professor Corwin has noted, for example, that:

The Constitution, . . . by the "necessary and proper" clause assigns the power to create offices to Congress, while it deals with the appointing power in the . . . words of Article II, section 2, paragraph 2 An appointment is, therefore, ordinarily to an existing office, and one which owes its existence to an act of Congress.

Corwin, The President: Offices and Powers 83 (1948) (emphasis in original). See also The Constitution of the United States of America, Analysis and Interpretation, 92d Cong., 2d Sess. 523 (1973) ("That the Constitution distinguishes between the creation of an office and appointment thereto for the generality of national offices has never been questioned. The former is by law and takes place by virtue of Congress' power to pass all laws necessary and proper for carrying into execution the powers which the Constitution confers upon the government of the United States and its departments and officers." (Emphasis in original.)).

This dichotomy between creation of the office and appointment to the office is consistent with the historic view of the Executive and Legislative Branches as to the proper division of constitutional responsibility. Congress has provided by statute for establishment of Executive Branch agencies and particular positions within those agencies, and the President or heads of those agencies select individuals to fill those positions. Except as specifically provided by law the President assigns responsibilities to those agencies and positions to carry out substantive laws. This understanding has also generally been reflected in the Executive Branch's acquiescence in the need for reorganization legislation in order to restructure or consolidate agencies within the Executive Branch.

We believe that any agency created by the President to implement section 722(g) would, of necessity, have to be directed by an officer of the United States within the meaning of Buckley v. Valeo, 424 U.S. 1, 126 (1976), who would occupy an "office" of the United States. Because that office would be created to be independent of any other agencies or departments of the Executive Branch, that office would clearly be a new office. Therefore we do

not believe that, absent statutory authorization, the President would have authority to create such an office.¹

We have not found adequate statutory authority either in the Act or in the Foreign Assistance Act of 1961, as amended, 22 U.S.C. 2151 *et seq.*, to allow the President to create a new office to implement the humanitarian assistance program. Under the Act, the President "shall designate" "such agency or department of the United States" as he deems appropriate to administer the program. On its face, that language appears to contemplate that the assistance will go to an existing agency or department. At least in the absence of some legislative history suggesting that Congress understood that the program would be administered through a new agency (which we have not found), we cannot read that language affirmatively to authorize the President to create an entity outside of existing agencies or departments. In similar language, the Foreign Assistance Act provides authority to the President to delegate functions "to such agency or officer of the United States Government as he shall direct." 22 U.S.C. 2381. Again, there is nothing in that language to suggest that Congress intended or contemplated that the President could use that language to create a wholly new administrative entity, outside the existing structures within the Executive Branch, to fulfill those statutory responsibilities. Therefore, we do not believe that the President could create a new agency outside of existing Executive Branch agencies and departments and designate that agency to receive the appropriated funds and implement the program of humanitarian assistance.

We are aware of one entity that has been advanced as precedent for presidential creation of such an agency. In Executive Order No. 11896 (Jan. 13, 1976), the President created the United States Sinai Support Mission to assist in the implementation of the "United States Proposal for the Early Warning System in Sinai." The letter prepared by the Office of Management and Budget to the Attorney General supporting the executive order recited that the mission was intended to be a "separate, independent mission, outside of the Department of State." Letter to the Attorney General from William M. Nichols, Acting General Counsel, OMB (Jan. 7, 1976). We do not believe that executive order is a clear precedent for creation of an independent agency to

¹ We do not mean to suggest that the President does not have some residuum of inherent constitutional authority to create offices or agencies, based on the direction in Art. II, sec. 1, that the "executive Power" shall be vested in the President and his mandate to "take Care that the Laws be faithfully executed." Such authority seems to be contemplated by 31 U.S.C. sec. 1347, which provides that "[a]n agency in existence for more than one year may not use amounts otherwise available for obligation to pay its expenses without a specific appropriation or specific authorization by law," and specifically refers to agencies "established by executive order." Section 1347 obviously cannot be read as an affirmative grant of authority to the President to create agencies by executive order, and we therefore do not believe we can rely on that language here to overcome the express language of the Appointments Clause. There may be cases, however, for example in a national emergency, in which we would conclude that the President may, in effect, create an office in order to carry out constitutional responsibilities that otherwise could not be fulfilled.

implement the Nicaraguan humanitarian aid program. As the OMB letter notes, the President was able in that instance to rely on the specific congressional authorization provided by section 631 of the Foreign Assistance Act of 1961, which gives the President the power to establish "missions" abroad. This specific authority would not appear to be available here. Second, the circumstances of the Joint Resolution of October 13, 1975, by which Congress authorized the establishment of a monitoring force to implement the "United States Proposal for the Early Warning System in Sinai," provide some evidence that Congress contemplated the creation of a new agency to fulfill the objective of the Resolution. Congress was specifically aware that a force of two hundred civilians was needed to monitor the system. As there were few precedents for such a civilian monitoring force and no agency with obvious expertise in providing such services, it is not unreasonable to infer that Congress contemplated that the President, pursuant to his broad authorization to implement the monitoring proposal, might create a new agency to serve as the monitoring force. Section 722(g) of the International Security and Development Cooperation Act of 1985, however, does not provide a similar factual background for an inference that Congress intended to empower the President to create a new agency, as we discussed above. Finally, the Sinai Support Mission received its allocation of funds from the Secretary of State rather than the President. See Ex. Order No. 11896, sec. 5. Moreover, the Secretary of State was ordered to exercise "continuous supervision and general direction" of the activities of the Mission. See *id.* at sec. 1(b). The vesting of the combined power to supervise and allocate funds in the Secretary raises serious question as to the formal independence of the Mission and suggests that the Mission should, as a technical matter, probably be considered to have been within the Department of State. Thus we do not view the creation of the Sinai Mission as particularly useful precedent here.

In conclusion, we believe that the assistance authorized for Nicaraguan humanitarian relief must be channeled through an existing department or agency of the United States. The choice of which agency or department is obviously a policy choice; aside from the prohibition against use of the Central Intelligence Agency or the Department of Defense, the Act gives no guidance and places no limitations on the choice of agency or department. However, we believe that creation of a new agency to administer the program, outside of the confines of existing agencies and departments, would raise substantial constitutional questions, and we therefore could not legally approve a presidential directive purporting to establish such an agency.

Ralph W. Tarr
Acting Assistant Attorney General
Office of Legal Counsel

cc: The Attorney General

JV

ID # 313151 CU

CO114

WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence
Received (YY/MM/DD) 1/1

Name of Correspondent: Cong. Lee H. Hamilton

☐ MI Mail Report

User Codes: (A) (B) (C)

Subject: Letter to Robert McFarlane re: press accounts of
alleged activities by the NSC regarding the contras in Nicaragua

ROUTE TO:

ACTION

DISPOSITION

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CUHOLL	ORIGINATOR	85/08/26			1/1
CUAT18	I	85/08/26			1/1
		1/1			1/1
		1/1			1/1
		1/1			1/1
		1/1			1/1

ACTION CODES:

A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet
to be used as Enclosure

I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:

A - Answered
B - Non-Special Referral
C - Completed
S - Suspended

FOR OUTGOING CORRESPONDENCE:

Type of Response = Initials of Signer
Code = "A"
Completion Date = Date of Outgoing

Comments:

FYI

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BOB McEWEN, OHIO

THOMAS K. LATIMER, STAFF DIRECTOR
MICHAEL J. O'NEIL, CHIEF COUNSEL
STEVEN K. BERRY, ASSOCIATE COUNSEL

ROOM H-405, U.S. CAPITOL
(202) 225-4121

U.S. HOUSE OF REPRESENTATIVES

PERMANENT SELECT COMMITTEE

ON INTELLIGENCE

WASHINGTON, DC 20515

AUG 21 1985

43151 cu

August 20, 1985

Honorable Robert C. McFarlane
Assistant to the President
for National Security Affairs
The White House
Washington, D.C. 20500

Dear Mr. McFarlane:

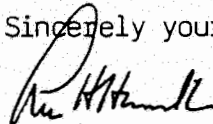
Recent press accounts of the alleged activities by the National Security Council regarding the contras in Nicaragua raise some questions.

If the NSC did engage in actions that supported the military activity of the contras, I am curious about what actions were taken by the NSC to support the activities of the contras during the period after the enactment of the Boland amendment and before its recent modification.

I would like to receive a full report on the kinds of activities regarding the contras that the NSC carried out and what the legal justification is for such actions given the legislative prohibitions that existed last year and earlier this year.

With best wishes, I am

Sincerely yours,



Lee H. Hamilton
Chairman

To Office-in-charge:
Appointments Center
Room 060, OEOB

288-6729

Please admit the following appointments on Wednesday, August 21, 1985

for Admiral John M. Poindexter of White House
(Name of person to be visited) (Agency)

TELEPHONE

State

Michael H. Armacost
James H. Michel

632-2471
632-8562

Justice

T. Kenneth Cribb
Ralph Tarr

633-3892
633-2041

OMB

Philip DuSault
John Cooney

395-4770
395-5600

White House

Richard Houser
John Roberts

456-6611
456-7953

NSC

Oliver L. North

395-3345

MEETING LOCATION

Building White House

Requested by Kay LaPlante

Room No. Roosevelt Room

Room No. 392 Telephone 395-7353

Time of Meeting 4:00 p.m.

Date of request August 21, 1985

Additions and/or changes made by telephone should be limited to three (3) names or less.

DO NOT DUPLICATE THIS FORM

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B-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

TAB

A

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