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NATIONAL SECURITY COUNCIL  
WASHINGTON, D.C. 20506

May 11, 1989

INFORMATION

MEMORANDUM FOR BRENT SCOWCROFT

FROM: NICHOLAS ROSTOW *N*

SUBJECT: U.S. Rights and Obligations with Respect to the Defense of the Panama Canal under the Panama Canal Treaties

I. Summary

The Panama Canal Treaties impose on the United States primary responsibility for the defense of the Canal and grant broad rights with respect to the discharge of this responsibility. They include the right to determine what constitutes a threat to the security or neutrality of the Canal and the right to move troops freely and without impediment of any kind within Panamanian territory. Limiting the exercise of such rights are equally binding treaty prohibitions on interference in Panama's internal affairs, including infringement on Panamanian political independence. The grant of authority is so broad, however, that one might argue that the United States could rightfully move its troops in such a way as to interpose them between Noriega's forces and the opposition without necessarily violating the principle of nonintervention in Panama's internal affairs.

Bilateral treaties do not suspend or modify the overriding law of the United Nations Charter. Thus, U.S. treaty rights are to be interpreted in light of the principles of international law governing the international use of force set forth in that Charter and the Charter of the Organization of American States. For example, neither Panama nor the United States renounced its inherent right of self-defense by concluding the Panama Canal Treaties.

II. The Treaties

The Panama Canal Treaties (Panama Canal Treaty, Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, Agreement in Implementation of Article III of the Panama Canal

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Treaty, Agreement in Implementation of Article IV of the Panama Canal Treaty, Agreement on Certain Activities of the United States of America, and other agreements establishing a joint military board and combined committees) together with the instruments of ratification containing important Senate amendments, reservations, and conditions, comprise an enormous and complex body of law defining Panamanian and U.S. rights and obligations with respect to the management, operation, and defense of the Canal. The Treaties elaborate defense rights in terms of defending the neutrality and effective operation of the Canal against all threats as determined to exist in the unilateral judgment of either party. This broad grant of authority to use armed force under the Treaties is limited for the United States by the commitment also set forth in the Treaties themselves not to interfere in the internal affairs of Panama. The President's Annual Report to Congress on the Canal Treaties (April) concluded that, despite harassments of Canal personnel, the Canal's effective operation has not been threatened.

A. Provisions Added At Ratification

In exchanging instruments of ratification on June 16, 1978, the United States and the Republic of Panama accepted amendments, conditions, reservations, and understandings adopted by the Senate in its resolution of March 16, 1978, recommending ratification of the Treaties. One reservation to the Panama Canal Treaty clarifies and limits the exercise of U.S. rights with respect to assuring that the Canal "remain open, neutral, secure, and accessible." The reservation provides that any action in exercise of such rights "shall be only for" such purposes "and shall not have as its purpose or be interpreted as a right of intervention in the internal affairs of the Republic of Panama or interference with its political independence or sovereign integrity."

The Senate adopted equally important amendments and conditions to the Neutrality Treaty. Thus, the Senate incorporated into the Neutrality Treaty text an understanding reached between Panama and the United States interpreting the responsibility of the parties to assure that the Canal remains open and secure to ships of all nations. "The correct interpretation of this principle is that each of the two countries shall, in accordance with their respective constitutional processes, defend the Canal against any threat to the regime of neutrality and consequently shall have the right to act against any aggression or threat directed against the Canal or against the peaceful transit of vessels through the Canal. This does not mean, nor shall it be interpreted as the right of intervention of the United States in the internal affairs of Panama. Any United States action will be directed at insuring that the Canal will remain open, secure and

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accessible, and it shall never be directed against the territorial integrity or political independence of Panama." This amendment to the text of the Neutrality Treaty must be read in conjunction with the condition adopted by the Senate as a term of its advice and consent to ratification of that Treaty: "that, notwithstanding the provisions of Article V [of the Neutrality Treaty affirming Panama's right to operate the Canal and maintain defense forces and sites on its territory] or any other provision of the treaty, if the Canal is closed, or its operations are interfered with, the United States of America and the Republic of Panama shall each independently have the right to take such steps as it deems necessary, in accordance with its constitutional processes, including the use of military force in Panama, to reopen the Canal or restore the operations of the Canal as the case may be." We have understood these rights to include the right to defend Canal personnel (and property) so as effectively to assure the secure operation and maintenance of the Canal.

The amendment and the condition appear to provide the United States with ample rights to use military force to defend the Canal against threats perceived by the United States. The United States bound itself not to abuse such rights to interfere in the internal affairs of Panama or to take action directed against Panamanian political independence and territorial integrity. Given the overriding international law of the U.N. Charter, the Treaties probably should be understood as extending the inherent right of the United States to use force in self-defense to cover the defense of the Canal.

#### B. The Treaties' Texts

Article IV of the Panama Canal Treaty, the Agreement on the Implementation of Article IV, and the Neutrality Treaty set forth the rights and obligations of the United States with respect to defending the Canal. These texts are to be read in light of the amendments, reservations, and conditions imposed by the Senate and accepted by the United States and Panama.

Article IV of the Treaty commits each party "to protect and defend the Panama Canal" with the United States having "primary responsibility." "To the extent possible consistent with its primary responsibility for the protection and defense of the Panama Canal, the United States will endeavor to maintain its armed forces in the Republic of Panama in normal times at a level not in excess of that of" U.S. armed forces in the former Canal Zone immediately prior to the Treaties' entry into force. According to a State Department article-by-article analysis prepared for Senate consideration of the Treaties, the United States maintained 9,300 troops in Panama in 1978. The Agreement on Implementation of this Article (which expires on December 31, 1999) further provides that U.S. armed forces in Panama may move

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freely within Panamanian territory, air space, and waters without impediment and without paying licensing fees. The only condition on such freedom of movement is an obligation to consult with the Combined [U.S.-Panamanian military] Board with respect to the movement of military convoys or large numbers of vehicles as a single unit in order to permit proper traffic arrangements.

The Neutrality Treaty established the permanent neutrality of the Canal and the agreement of Panama and the United States to maintain it. Specific U.S. rights with respect to the defense of the Canal as well as the limitation on such rights are set forth in the amendments, reservations, conditions, and understandings adopted by the Senate in its resolution of ratification and accepted by both parties at the time instruments of ratification were exchanged.

### III. Conclusion

The Panama Canal Treaties have three purposes: the conveyance to Panama of the Canal with the concomitant termination of U.S. sovereignty over the Canal Zone and the treaties concluded under the regime of the Zone; the establishment of a regime of neutrality for the Canal; and the continuation of primary U.S. responsibility for the defense of the Canal, of its neutrality, and of its secure operation and maintenance. The Treaties convey extensive rights to the United States so that it may discharge its responsibilities for Canal security. Some of those rights, such as the special and specially broad right to move armed forces freely in Panamanian territory and airspace, may be exercised -- or arguably may be exercised -- in the present crisis in ways that would help the opposition to Noriega without too blatantly interfering in Panama's internal affairs. Nonetheless, my reading is that U.S. rights flow from its obligation to defend the Canal, not from any residual sovereignty over the former Canal Zone. No matter how broadly worded in the Treaties as amended and conditioned, those rights do not obviously come into play, notwithstanding the view of at least one Senator in 1978 that a labor strike would provide sufficient justification for a use of force by the United States. While one may argue that the present unrest and uncertainty implies a threat to the Canal, I believe we would not long be comfortable making the case. Such a course likely would evoke public (if not necessarily private) protests from Latin American governments and fuel calls for abrogation of the Treaties.

At the same time, we bear important responsibility for the present situation. While armed intervention may be difficult to justify at this time, other forms of intervention, including the movement of troops inside Panama, may be devised that would help vindicate the outcome of the May 7 election and that would be

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consistent with discharging our long-term primary responsibility to assure the security and accessibility of the Canal.

cc: David Pacelli  
Virginia Lampley

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