

2 November 1988
OCA 3641-88

MEMORANDUM FOR: (SEE DISTRIBUTION)

FROM: Legislation Division
Office of Congressional Affairs

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SUBJECT: Drug Bill As Passed by Congress

1. Attached is H.R. 5210 (the "Anti-Drug Abuse Act of 1988"), the omnibus, anti-drug bill as passed by the Congress on 21 October 1988 and printed in the Congressional Record of that date (pp. H11108 - 11227). Provisions of interest are as follows.

"Drug Czar" - Title I

2. Title I of the bill (Sections 1001-1012) creates the position of "Director of National Drug Control Policy" (D/NDCP), commonly referred to as the "drug czar."

3. Cabinet Rank and NSC Advisor. Section 1002 provides that the D/NDCP shall have a "supply reduction deputy" and a "demand reduction deputy" and a "state and local affairs" deputy. All four are to be appointed by the President and confirmed by the Senate. The next President will appoint the first D/NDCP and his deputies. The D/NDCP enjoys Cabinet rank and, while not a member of the National Security Council, may attend NSC meetings at the President's direction in his capacity as principal advisor on national drug control policy.

4. The Office of National Drug Control Policy (ONDCP) is to be located in the Executive Office of the President. Section 1002(d) provides that location of the ONDCP in the Executive Office shall in no way reduce Congressional access to information in the ONDCP's possession.

5. D/NDCP Is A "Weak Czar." The D/NDCP is much closer to the "weak czar" model of prior legislation rather than the "strong czar" model. In fact, he is even "weaker" than some of

the earlier "weak" czar models. His principal duties are to promulgate annually the "National Drug Control Strategy" and to coordinate and oversee the efforts thereunder by "National Drug Control Program (NDCP) agencies" (Sections 1003(b), 1005). In the Strategy, the D/NDCP assigns NDCP agencies annual responsibilities in the anti-drug effort. They, in turn, submit to him annually a budget request to meet those responsibilities. He uses those requests to prepare the annual National Drug Control Program budget and transmit it to the President and the Congress.

6. In contrast to the "strong czar" of prior bills, however, the D/NDCP cannot modify an NDCP agency's budget but can only make a "certification" as to whether it is adequate to meet an agency's responsibilities under the Strategy (Section 1003(c)). Similarly, the D/NDCP cannot reallocate NDCP agency personnel or modify their policies or budgets. He can only make recommendations to the President on these subjects (Section 1003(b)(4)). He may obtain personnel from other federal agencies only with the agency head's concurrence but, once assigned, may write their performance evaluation and make performance awards to them. (Section 1003(d),(e)).

7. D/NDCP Controls Only "NDCP Agencies." Even these limited powers cannot be exercised by the D/NDCP over all federal agencies but only over NDCP agencies. Not all federal agencies are NDCP agencies: only those so designated by the President or jointly by the D/NDCP and the agency head (Section 1010(6)). Thus, in contrast to prior legislation in this area, neither the Central Intelligence Agency or other entities in the Intelligence Community come automatically under the czar. They will become NDCP agencies and thus directly subject to the czar only if the President so directs or the "drug czar" and the Director of Central Intelligence agree. One response to concerns about an intrusive future D/NDCP might be to designate only parts of the Agency or the Intelligence Community as NDCP agencies. It is not clear from the legislation, however, whether a portion of an agency or selected agency functions could be designated.

8. DCI Programmatic/Fiscal/Budgetary Protections Vis A Vis D/ONDC. In addition to all of the above general limitations on the D/NDCP, Section 1004(a)(2) of the bill specifically limits his activities with respect to the Director of Central Intelligence (DCI) and the Intelligence Community. Section 1004(a)(2) provides that the D/NDCP shall exercise his powers and duties "consistent with" the National Security Act of 1947. This provision is intended to preserve the DCI's programmatic and budgetary autonomy that flows from the 1947 Act. Moreover, although Section 1004 (a) (2) does not

specifically mention Executive Order 12333 and the DCI's authorities thereunder, an argument can be made that those powers and duties are also encompassed by the "consistent with" caveat of Section 1004(a)(2) since the Executive Order is promulgated in part under authority of the 1947 Act.

9. DCI Information Protection Authorities Vis A Vis D/NDCP. Section 1002(a) also provides that the DCI shall prescribe such regulations as may be necessary to protect intelligence information. This is intended to provide a mechanism by which the DCI can protect intelligence information furnished to the D/NDCP. It is in addition to the more general limitation on the D/NDCP's information-acquisition powers contained in Section 1002(a)(1). That section provides those powers are "subject to laws governing disclosure of information." This limitation would include the laws governing the disclosure of intelligence information.

10. Taken together, these provisions appear to give the DCI and the Intelligence Community a great deal of flexibility in dealing with the D/NDCP when he is finally selected. In practice, much will obviously depend on who is selected for D/NDCP, how the office is constituted and how much Presidential support the D/NDCP enjoys. We understand there is discussion of promulgating an Executive Order as a D/NDCP "charter." The relationship between the D/NDCP and the Intelligence Community would likely be set out in such a document. A final decision on the matter, however, would not likely be made by this Administration.

11. Abolition of Existing Federal Anti-Drug Structures. Section 1007 of the Act provides that thirty days after the first D/NDCP is confirmed by the Senate, the Drug Policy Board and the White House Office of Drug Abuse Policy are terminated (with the Board's records going to the D/NDCP) and the National Narcotics Act of 1984 is repealed.

12. Sunset Provision. Section 1009 provides that five years after the date of enactment, Title I is repealed. In effect, this means the entire D/NDCP structure will go out of existence in five years unless specifically reauthorized by the Congress.

Foreign Relations - Title IV

13. Title IV deals generally with international narcotics matters.

14. Latin American Regional Anti-Narcotics Force. Subtitle B of Title III contains provisions prodding the Administration to establish a multi-lateral Latin American anti-narcotics strike force.

15. Funding Restrictions On Individual Drug-Producing & Drug-Transiting Countries. Subtitle D conditions certain United States aid to selected drug producing and drug-transiting countries and levies new Congressional reporting requirements with respect to others. The countries involved include: Boliva (Section 4302); Peru (Section 4303); Mexico (Section 4304); Columbia (Section 4305), Pakistan (Section 4306); Afghanistan (Section 4308) and Laos (Section 4309). None of these restrictions involve intelligence activities.

16. Reporting Requirements Tightened. Subtitle E tightens the procedures for making various narcotics-related foreign assistance certifications to the Congress.

17. Miscellaneous Provisions. Subtitle F contains miscellaneous narcotics provisions.

18. Department of State Provisions. Subtitle G contains various narcotics provisions related to activities of the Department of State. Section 4601 makes the Secretary of State responsible for "coordinating" all United States government anti-narcotics foreign aid but excludes any intelligence activities (This parallels a provision related to the Department's role in anti-terrorism assistance). Section 4603 denies passports to certain convicted drug dealers. Section 4604 requires selected federal agencies to participate in a program to develop machine-readable visas. Section 4605 requires the Department to step up its work in the drafting and execution of anti-drug extradition and mutual legal assistance treaties and model anti-drug laws for use by foreign countries. Section 4607 is a sense-of-Congress statement that more Drug Enforcement Agency (DEA) agents ought to be assigned overseas.

19. International Banking Matters. Subtitle H deals with international banking matters and includes provisions prodding the Secretary of State to negotiate a tougher money-laundering treaty with major foreign banking nations.

20. Intelligence Community Anti-Narcotics Role. Subtitle F is a sense of the Congress resolution that the Intelligence Community should become more involved in efforts to combat illicit international drug trafficking. This version deleted a reference to the use of covert action to combat narcotics trafficking that had been contained in the original House-passed provision.

"Drug-Free Workplace" - Title V

21. Subtitle D of Title V contains the so-called "drug-free workplace" provisions, Section 5152 (contracts) and Section 5153 (grants), that were discussed in previous memoranda.

Title VI

22. Intelligence Community R&D Centers. The attached version of the bill as printed in Congressional Record mistakenly included two versions of the so-called Intelligence Community R&D Centers provision ("Use of Existing Federal Research and Development Facilities for Civilian Law Enforcement"): Section 6163 and Section 7605. The latter contains the language in subsection (d) stating that the provision gives the General Accounting Office no more access to Intelligence Community facilities than it otherwise would have. We had worked with the intelligence committees to have this language included in the bill. We understand that the final version of the bill as transmitted to the President will contain only the Section 7605 version of the provision.

21. Domestic Money-Laundering Provisions. Subtitle E of Title VI contains various provisions that attempt to impede money-laundering by imposing new reporting requirements on financial institutions with respect to certain currency and coin transactions. Section 6184 extends various provisions of the Bank Secrecy Act to "bank-like" institutions.

22. Right to Financial Privacy Act Amendments. Section 6186 of the bill amends the Right to Financial Privacy Act to allow bank regulatory agencies to furnish to law enforcement agencies for law enforcement/prosecutive purposes records compiled in the course of regulatory activities that indicate the commission of a federal crime.

23. Unauthorized Possession of Firearms in Federal Facilities. Section 6215 contains a provision prohibiting the unauthorized possession of firearms in federal facilities and requiring the posting of appropriate notices at such facilities.

24. Miscellaneous Personnel Benefits For Justice Personnel. Section 6281 authorizes the extension to personnel of the Department of Justice stationed overseas the benefits currently enjoyed by similarly situated members of the Foreign Service as contained in selected provisions of Section 901 of the Foreign Service Act of 1980. These benefits are currently enjoyed to varying degrees by employees of Intelligence

Community agencies. Section 6401 authorizes the payment of bonuses of up to 25% of base pay to employees of the Federal Bureau of Investigation and the Drug Enforcement Administration who use a language other than English in the performance of their duties.

25. Notice of "CIA Defense". Section 6483 of the bill amends the Federal Criminal Rules of Procedure to require a federal criminal defendant to give pretrial notice of an intention to assert the affirmative "public authority" defense that he acted on behalf of an intelligence agency, i.e., the so-called "CIA defense". This provision is similar to one the Intelligence Community sought to have presented to the Congress several years ago.

26. Crimes Against Intelligence Community Employees/Officials. Currently, the provisions of 18 U.S.C. §1114 make it a crime to kill designated federal employees officials. Among those so designated are officers and employees of Intelligence Community agencies. Section 6487 of the bill expands this protection by adding to the list of prohibited acts attempts to resist, oppose, impede, intimidate or interfere with such persons in the performance of their official duties. It extends these protections to persons who suffer such acts because they formerly occupied the designated positions and to persons who suffer such acts because they are an immediate family member of a person who occupies or occupied a designated position.

Title VII - Additional Miscellaneous Provisions

27. Obstruction of a Federal Audit. Section 7078 makes it a crime to obstruct "with intent to deceive or defraud the United States" a person "employed on a full- or part-time or contractual basis to perform an audit or quality assurance inspection for or on behalf of the United States". We defer to the Offices of General Counsel and Inspector General as to whether this encompasses Agency Inspector General audits.

28. Locksmithing Devices. Section 7090 restricts the mailability of locksmithing devices.

29. Pen Registers & Trap/Trace Devices. Section 7091 appears to loosen certain restrictions governing use of these devices.

Provisions Deleted From Final Bill

30. Alexander "Anti-Stonewalling Act" Amendment. The modified version of this provision that was contained in the House-passed bill was dropped from the final bill.

31. Justice Admission of Aliens Authority. The Senate version of the bill had contained authority for the Department of Justice to admit to permanent resident alien status certain aliens participating in the Alien Witness Cooperation Program. This provision was dropped from final version of the bill.

32. Please call us if you have any questions. We will advise you when the President acts on the bill as well as the status of any technical changes in the version transmitted to him for action.

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Attachment

OCA/LEG/ [] (1 November 1988)

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