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SIPDIS

WHA FOR A/S TOM SHANNON

L FOR HAROLD KOH AND JOAN DONOGHUE

NSC FOR DAN RESTREPO

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TAGS: PGOV, KDEM, KJUS, TFH01, HO

SUBJECT: TFH01: OPEN AND SHUT: THE CASE OF THE HONDURAN COUP

REF: TEGUCIGALPA 578

Classified By: Ambassador Hugo Llorens, reasons 1.4 (b and d)

1. (C) Summary: Post has attempted to clarify some of the legal and constitutional issues surrounding the June 28 forced removal of President Manuel "Mel" Zelaya. The Embassy perspective is that there is no doubt that the military, Supreme Court and National Congress conspired on June 28 in what constituted an illegal and unconstitutional coup against the Executive Branch, while accepting that there may be a prima facie case that Zelaya may

have committed illegalities and may have even violated the constitution. There is equally no doubt from our perspective that Roberto Micheletti's assumption of power was illegitimate. Nevertheless, it is also evident that the constitution itself may be deficient in terms of providing clear procedures for dealing with alleged illegal acts by the President and resolving conflicts between the branches of government. End summary.

2. (U) Since the June 28 removal and expulsion of President Zelaya by the Honduran armed forces, the Embassy has consulted Honduran legal experts (one cannot find a fully unbiased professional legal opinion in Honduras in the current politically charged atmosphere) and reviewed the text of the Honduran Constitution and its laws to develop a better understanding of the arguments being parlayed by the coup's supporters and opponents.

Arguments of the Coup Defenders

3. (SBU) Defenders of the June 28 coup have offered some combination of the following, often ambiguous, arguments to assert it's legality:

- Zelaya had broken the law (alleged but not proven);
- Zelaya resigned (a clear fabrication);
- Zelaya intended to extend his term in office (supposition);
- Had he been allowed to proceed with his June 28 constitutional reform opinion poll, Zelaya would have dissolved Congress the following day and convened a constituent assembly (supposition);
- Zelaya had to be removed from the country to prevent a bloodbath;
- Congress "unanimously" (or in some versions by a 123-5 vote) deposed Zelaya; (after the fact and under the cloak of secrecy); and
- Zelaya "automatically" ceased to be president the moment he suggested modifying the constitutional prohibition on presidential reelection.

4. (C) In our view, none of the above arguments has any substantive validity under the Honduran constitution. Some are outright false. Others are mere supposition or ex-post rationalizations of a patently illegal act. Essentially:

- the military had no authority to remove Zelaya from the country;
- Congress has no constitutional authority to remove a Honduran president;
- Congress and the judiciary removed Zelaya on the basis of a hasty, ad-hoc, extralegal, secret, 48-hour process;
- the purported "resignation" letter was a fabrication and was not even the basis for Congress's action of June 28; and
- Zelaya's arrest and forced removal from the country violated multiple constitutional guarantees, including the prohibition on expatriation, presumption of innocence and right to due process.

Impeachment under the Honduran Constitution

5. (U) Under the Honduran Constitution as currently written, the President may be removed only on the basis of death, resignation or incapacitation. Only the Supreme Court may determine that a President has been "incapacitated" on the basis of committing a crime.

6. (U) There is no explicit impeachment procedure in the 1982 Honduran Constitution. Originally, Article 205-15 stated that Congress had the competence to determine whether "cause" existed against the President, but it did not stipulate on what grounds or under what procedure. Article 319-2 stated that the Supreme Court would "hear" cases of official or common crimes committed by high-level officials, upon a finding of cause by the Congress. This implied a vague two-step executive impeachment process involving the other two branches of government, although without specific criteria or procedures. However, Article 205 was abrogated in 2003, and the corresponding provision of Article 319 (renumbered 313) was revised to state only that the Supreme Court would hear "processes initiated" against high officials. Thus, it appears that under the Constitution as currently written, removal of a president or a government official is an entirely judicial matter.

7. (U) Respected legal opinion confirms that the removal of a president is a judicial matter. According to a 2006 book by respected legal scholar Enrique Flores Valeriano -- late father of Zelaya's Minister of the Presidency, Enrique Flores Lanza -- Article 112 of the Law of Constitutional Justice indicates that if any government official is found to be in violation of the Constitution, that person should be removed from office immediately with the ultimate authority on matters of Constitutionality being the Supreme Court.

8. (U) Many legal experts have also confirmed to us that the Honduran process for impeaching a President or other senior-level officials is a judicial procedure. They assert that under Honduran law the process consists of formal criminal charges being filed by the Attorney General against the accused with the Supreme Court. The Supreme Court could accept or reject the charges. If the Court moved to indict, it would assign a Supreme Court magistrate, or a panel of magistrates to investigate the matter, and oversee the trial. The trial process is open and transparent and the defendant would be given a full right of self-defense. If convicted in the impeachment trial, the magistrates have authority to remove the President or senior official. Once the President is removed, then the constitutional succession would follow. In this case, if a President is legally charged, convicted, and removed, his successor is the Vice President or what is termed the Presidential Designate. In the current situation in Honduras, since the Vice President, Elvin Santos, resigned last December in order to be able to run as the Liberal Party Presidential candidate, President Zelaya's successor would be Congress President Roberto Micheletti. Unfortunately, the President was never tried, or convicted, or was legally removed from office to allow a legal succession.

The Legal Case Against Zelaya

9. (C) Zelaya's opponents allege that he violated the Constitution on numerous grounds, some of which appear on their face to be valid, others not:

-- Refusing to submit a budget to the Congress: The Constitution is unambiguous that the Executive shall submit a proposed budget to Congress by September 15 each year (Art. 367), that Congress shall approve the budget (Art. 366) and that no obligations or payments may be effectuated except on the basis of an approved budget (Art. 364);

-- Refusing to fund the Congress: Article 212 states that the Treasury shall

apportion quarterly the funds needed for the operation of the Congress;

-- Proposing an illegal constitutional referendum: The Constitution may be amended only through two-thirds vote of the Congress in two consecutive sessions (Art. 373 and 375); a constituent assembly to rewrite the constitution, as Zelaya promoted, is therefore unconstitutional; however, it is not clear that proposing a constituent assembly in itself violates the constitution, only that any changes ensuing from that assembly would be invalid;

-- Defying the judgment of a competent court: Zelaya insisted on pushing ahead with his constitutional reform opinion poll after both a first-instance court and an appeals court ordered him to suspend those efforts; however, while he clearly intended to follow through with the poll, he never actually did it;

-- Proposing to reform unreformable articles: Since Zelaya's proposed constituent assembly would have unlimited powers to rewrite the constitution, it violated Article 374, which makes certain articles unamendable; once again, though, Zelaya never actually attempted to change the so-called "carved in stone" articles; it was only assumed he intended to;

-- Dismissing the armed forces chief: The Supreme Court's Constitutional Hall ruled June 25 that Zelaya was in violation of the Constitution for dismissing Defense Chief Vasquez Velasquez; the Constitution (Art. 280) states that the President may freely name or remove the chief of the armed forces; but the court ruled that since Zelaya fired him for refusing to carry out a poll the court had ruled illegal, the firing was illegal.

10. (C) Although a case could well have been made against Zelaya for a number of the above alleged constitutional violations, there was never any formal, public weighing of the evidence nor any semblance of due process.

The Article 239 Cannard

11. (U) Article 239, which coup supporters began citing after the fact to justify Zelaya's removal (it is nowhere mentioned in the voluminous judicial dossier against Zelaya), states that any official proposing to reform the constitutional prohibition against reelection of the president shall immediately cease to carry out their functions and be ineligible to hold public office for 10 years. Coup defenders have asserted that Zelaya therefore automatically ceased to be President when he proposed a constituent assembly to rewrite the Constitution.

12. (C) Post's analysis indicates the Article 239 argument is flawed on multiple grounds:

-- Although it was widely assumed that Zelaya's reason for seeking to convoke a constituent assembly was to amend the constitution to allow for reelection, we are not aware that he ever actually stated so publicly;

-- Article 239 does not stipulate who determines whether it has been violated or how, but it is reasonable to assume that it does not abrogate other guarantees of due process and the presumption of innocence;

-- Article 94 states that no penalty shall be imposed without the accused having been heard and found guilty in a competent court;

-- Many other Honduran officials, including presidents, going back to the

first elected government under the 1982 Constitution, have proposed allowing presidential reelection, and they were never deemed to have been automatically removed from their positions as a result.

13. (C) It further warrants mention that Micheletti himself should be forced to resign following the logic of the 239 argument, since as President of Congress he considered legislation to have a fourth ballot box ("cuarta urna") at the November elections to seek voter approval for a constituent assembly to rewrite the constitution. Any member of Congress who discussed the proposal should also be required to resign, and National Party presidential candidate Pepe Lobo, who endorsed the idea, should be ineligible to hold public office for 10 years.

Forced Removal by Military was Clearly Illegal

14. (C) Regardless of the merits of Zelaya's alleged constitutional violations, it is clear from even a cursory reading that his removal by military means was illegal, and even the most zealous of coup defenders have been unable to make convincing arguments to bridge the intellectual gulf between "Zelaya broke the law" to "therefore, he was packed off to Costa Rica by the military without a trial."

-- Although coup supporters allege the court issued an arrest warrant for Zelaya for disobeying its order to desist from the opinion poll, the warrant, made public days later, was for him to be arrested and brought before the competent authority, not removed from the county;

-- Even if the court had ordered Zelaya to be removed from the country, that order would have been unconstitutional; Article 81 states that all Hondurans have the right to remain in the national territory, subject to certain narrow exceptions spelled out in Article 187, which may be invoked only by the President of the Republic with the agreement of the Council of Ministers; Article 102 states that no Honduran may be expatriated;

-- The armed forces have no/no competency to execute judicial orders; originally, Article 272 said the armed forces had the responsibility to "maintain peace, public order and the 'dominion' of the constitution," but that language was excised in 1998; under the current text, only the police are authorized to uphold the law and execute court orders (Art. 293);

-- Accounts of Zelaya's abduction by the military indicate he was never legally "served" with a warrant; the soldiers forced their way in by shooting out the locks and essentially kidnapped the President.

15. (U) The Armed Forces' ranking legal advisor, Col. Herberth Bayardo Inestroza, acknowledged in an interview published in the Honduran press July 5 that the Honduran Armed Forces had broken the law in removing Zelaya from the country. That same day it was reported that the Public Ministry was investigating the actions of the Armed Forces in arresting and deporting Zelaya June 28 and that the Supreme Court had asked the Armed Forces to explain the circumstances that motivated his forcible exile.

16. (C) As reported reftel, the legal adviser to the Supreme Court told Poloff that at least some justices on the Court consider Zelaya's arrest and deportation by the military to have been illegal.

Congress Had no Authority to Remove Zelaya

17. (C) As explained above, the Constitution as amended in 2003 apparently gives sole authority for removing a president to the judiciary. The Congressional action of June 28 has been reported in some media as acceptance of Zelaya's resignation, based on a bogus resignation letter dated June 25 that surfaced after the coup. However, the June 28 Congressional resolution makes no mention of the letter, nor does it state that Congress was accepting Zelaya's resignation. It says Congress "disapproves" of Zelaya's conduct and therefore "separates" him from the office of President -- a constitutional authority Congress does not have. Furthermore, a source in the Congressional leadership told us that a quorum was not present when the resolution was adopted, rendering it invalid. There was no recorded vote, nor a request for the "yeas" and "nays."

18. (C) In sum, for a constitutional succession from Zelaya to Micheletti to occur would require one of several conditions:

Zelaya's resignation, his death, or permanent medical incapacitation (as determined by judicial and medical authorities), or as discussed previously, his formal criminal conviction and removal from office. In the absence of any of these conditions and since Congress lacked the legal authority to remove Zelaya, the actions of June 28 can only be considered a coup d'etat by the legislative branch, with the support of the judicial branch and the military, against the executive branch. It bears mentioning that, whereas the resolution adopted June 28 refers only to Zelaya, its effect was to remove the entire executive branch. Both of these actions clearly exceeded Congress's authority.

Comment

19. (C) The analysis of the Constitution sheds some interesting light on the events of June 28. The Honduran establishment confronted a dilemma: near unanimity among the institutions of the state and the political class that Zelaya had abused his powers in violation of the Constitution, but with some ambiguity what to do about it. Faced with that lack of clarity, the military and/or whoever ordered the coup fell back on what they knew -- the way Honduran presidents were removed in the past: a bogus resignation letter and a one-way ticket to a neighboring country. No matter what the merits of the case against Zelaya, his forced removal by the military was clearly illegal, and Micheletti's ascendance as "interim president" was totally illegitimate.

20. (C) Nonetheless, the very Constitutional uncertainty that presented the political class with this dilemma may provide the seeds for a solution. The coup's most ardent legal defenders have been unable to make the intellectual leap from their arguments regarding Zelaya's alleged crimes to how those allegations justified dragging him out of his bed in the night and flying him to Costa Rica. That the Attorney General's office and the Supreme Court now reportedly question the legality of that final step is encouraging and may provide a face-saving "out" for the two opposing sides in the current standoff. End Comment. LLORENS