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Presidential Determination  
No. 2005-32

MEMORANDUM FOR THE SECRETARY OF STATE  
THE SECRETARY OF DEFENSE

SUBJECT: Continuation of U.S. Drug Interdiction  
Assistance to the Government of Colombia

Pursuant to the authority vested in me by section 1012 of the National Defense Authorization Act for Fiscal Year 1995, as amended (22 U.S.C. 2291-4), I hereby certify, with respect to Colombia, that (1) interdiction of aircraft reasonably suspected to be primarily engaged in illicit drug trafficking in that country's airspace is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and (2) that country has appropriate procedures in place to protect against innocent loss of life in the air and on the ground in connection with such interdiction, which shall at a minimum include effective means to identify and warn an aircraft before the use of force is directed against the aircraft.

The Secretary of State is authorized and directed to publish this determination in the Federal Register and to notify the Congress of this determination.



OSD 16471-05

**Memorandum of Justification for the 2005 Presidential Certification  
Regarding U.S. Airbridge Denial Program Assistance to the  
Government of Colombia**

**I. Overview**

Since the re-initiation of the Colombian Airbridge Denial ("ABD") Program in August 2003, the Departments of State and Defense have maintained policy oversight of its implementation and of the U.S. Government's ("USG's") and Government of Colombia's ("GOC") compliance with the improved policies and procedures adopted in the aftermath of the April 2001 Peruvian Air Force accidental shootdown of an aircraft carrying U.S.-citizen missionaries. Such means of oversight include the use of frequent interagency and bilateral reviews of the Program and the involvement of U.S. personnel in the daily operations of the ABD Program.

Under U.S. law, in order for the USG to continue to provide assistance to a foreign country's counternarcotics air interdiction program that involves the use of lethal force, the President must make an annual certification about the nature of the security threat posed to that country by narcotrafficking and about the safety procedures which that country has in place to protect against loss of innocent life in connection with interdiction.

Consistent with USG oversight of the Colombian ABD Program, and in anticipation of the need to seek such an annual re-certification for Colombia in August 2005, a USG interagency certification team traveled to Colombia in July 2005 to fully reassess the Colombian ABD Program. The team reviewed GOC and USG implementation of the required civil aviation, training, operational, and logistical provisions contained in the bilateral ABD Agreement. These provisions were established to protect against loss of innocent life in the air and on the ground in connection with the ABD Program, thereby meeting U.S. statutory requirements. At the end of the weeklong review, the USG interagency certification team concluded that GOC and USG ABD Program implementation continued to operate in full compliance with the bilateral agreement.

Between August 2004 and July 2005, the Colombian Air Force has successfully forced drug trafficking aircraft out to the Colombia border areas with Venezuela and Brazil, thereby gaining air sovereignty over a greater part of Colombia. They have forced down 5 civilian aircraft reasonably

suspected of narcotics trafficking, of which 4 were destroyed on the ground, 9 additional aircraft were impounded in Colombia, and 4 aircraft were impounded outside of Colombia as a result of Colombian ABD actions. Approximately 2.65 metric tons of cocaine was seized from the aircraft in Colombia. There were no known instances in which lethal force was used against innocent civilian aircraft and no known fatalities. These field results are consistent with the team's findings that procedures and safeguards remain intact and functional.

The U.S. Ambassador to Colombia, William Wood, endorsed the certification team's findings, and on July 19, 2005, cabled his recommendation to the Secretary of State, who in turn has recommended to the President that he renew the Presidential Determination allowing USG assistance to continue for another year to the Colombian ABD Program.

Based on extensive interagency and bilateral consultations, a new threat assessment for Colombia, and a certification that those safety procedures set forth in the bilateral Airbridge Denial Agreement have been and continue to be properly implemented, the ABD Program in Colombia is ready to be recertified on the basis of a Presidential Determination under 22 U.S.C. § 2291-4 (hereinafter, the "immunity statute").

## **II. The Immunity Statute**

Section 1012 of the National Defense Authorization Act for Fiscal Year 1995, as amended by Section 503 of the Intelligence Authorization Act for Fiscal Year 2002 (codified at 22 U.S.C. § 2291-4, as amended), states in relevant part:

(a) Notwithstanding any other provision of law, it shall not be unlawful for authorized employees or agents of a foreign country . . . to interdict or attempt to interdict an aircraft in that country's territory or airspace if--

(1) that aircraft is reasonably suspected to be primarily engaged in illicit drug trafficking; and

(2) the President of the United States has, during the 12-month period ending on the date of the interdiction, certified to Congress with respect to that country that--(A) interdiction is necessary because of

the extraordinary threat posed by illicit drug trafficking to the national security of that country; and (B) the country has appropriate procedures in place to protect against innocent loss of life in the air and on the ground in connection with interdiction, which shall at a minimum include effective means to identify and warn an aircraft before the use of force directed against the aircraft.

(b) Notwithstanding any other provision of law, it shall not be unlawful for authorized employees or agents of the United States (including members of the Armed Forces of the United States) to provide assistance for the interdiction actions of foreign countries authorized under subsection (a). The provision of such assistance shall not give rise to any civil action seeking money damages or any other form of relief against the United States or its employees or agents (including members of the Armed Forces of the United States).

### **III. The Threat Posed By Illicit Drug Trafficking to Colombia's National Security**

Despite progress against narcotics trafficking by the Government of Colombia, narcotics production and trafficking continues to pose a grave threat to the national security of Colombia. Colombia remains the world's leading producer of cocaine and a key supplier of heroin to the U.S. market. Colombia's coca and opium poppy crops have declined significantly since reaching record highs in 2001 - coca by some 33 percent and opium poppy by 68 percent - in large measure because of sustained high levels of aerial eradication. Although the United States and Europe remain the primary markets for Colombian cocaine, recently joined by Brazil, Colombia itself also faces a significant and growing domestic cocaine abuse problem that poses a threat to Colombia's rule of law. Moreover, Colombian drug trafficking organizations use their significant profits from their lucrative illicit drug trade to suborn Colombian officials and pay illegal armed groups to protect their organizations. The illegal revenue generated by the Colombian drug trade also disrupts the licit Colombian economy; presents a long-term corrosive threat to democratic institutions of government and law enforcement by promoting a culture of violence; and continues to serve as the primary funding source for the Revolutionary Armed Forces of Colombia ("FARC"), the hemisphere's largest and oldest terrorist group and a significant funding source for the Colombian United Self-Defense Forces ("AUC") and the Colombian National Liberation Army ("ELN"). All three

of these organizations are classified as Foreign Terrorist Organizations by the Department of State.

The FARC and AUC and, to a lesser degree, the ELN play a direct role in producing and trafficking illicit drugs throughout Colombia. Using narcotics-derived revenue, these terrorist groups control or disrupt significant outlying areas of Colombia, thwarting GOC efforts to establish a licit rural economy, extend the rule of law, and sustain democratic governing institutions. For these reasons, U.S. and Colombian authorities believe that the Colombian national security threat presented by narcotics trafficking has significant areas of overlap with the Colombian national security threat posed by Colombian terrorism.

Aerial drug trafficking is a critical component of combating the national security threat posed by Colombian drug trafficking. Air transshipment of drugs and drug proceeds occurs within Colombia, to other countries in the region, and north to the drug transit zones of the Caribbean and Central America. While it is believed that most Colombian cocaine moves out of Colombia over maritime routes. U.S. and Colombian (b)(1),1.4(d) reports indicate that internal air transshipments of drugs, drug-related money, and arms is a swift, effective and important means of transportation used by Colombian traffickers. Anecdotal evidence (b)(1),1.4(d) (b)(1),1.4(d) reports suggest that, over the past year, the Colombian ABD Program has made traffickers relocate to remote border areas where there is less risk associated with flying and has influenced transportation decisions and routes as a result.

#### **IV. Safety Procedures To Protect Against Loss of Innocent Life**

The ABD Bilateral Agreement established rigorous procedures to protect against the loss of innocent life in the air and on the ground in connection with aerial interdiction. Under the concept of ABD operations, certain aircraft flying in specifically designated areas of Colombia are subject to special scrutiny by U.S. and Colombian ground and aerial detection equipment to determine whether the aircraft are reasonably suspected to be primarily engaged in illicit drug trafficking. Carefully developed safety procedures for intercepting and, when necessary, interdicting such aircraft were incorporated into the Agreement and subsequently into a safety checklist for the aircrews on the Colombian and U.S. trackers and Colombian interceptor aircraft, as well as any other aircraft

included in the ABD Program. The USG interagency certification team verified that all GOC and USG participants in the ABD Program use these procedures.

The GOC has an infrastructure capable of handling the ABD Program, including ground-based radars, a modern Command and Control Center, modern aircraft and other equipment, a technically competent, professional, and experienced Air Force, and an effective communications system between the Center and its aircraft, as well as with GOC civil aviation authorities. Although the GOC is solely responsible for all operational actions relating to each ABD event, a U.S. representative is on board GOC tracking aircraft to monitor the implementation of the safety checklist. In addition, a U.S. representative is located in the Colombian Command and Control Center to monitor air interceptions and interdictions from the ground. Any U.S. ABD participant may notify the GOC of any objection to an operational decision made by the GOC. If a U.S. participant makes such an objection, the USG, while attempting to resolve the source of the objection, will cease to provide assistance to that event. If the GOC ignores that objection, the USG will review the event and decide whether to suspend its assistance to the Program.

The Agreement defines an aircraft "primarily engaged in illicit drug trafficking" to mean "an aircraft in flight, or otherwise in service (as defined in the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, signed at Montreal September 23, 1971), where the primary purpose of the flight or operation of the aircraft is:

- the illicit transport of narcotic drugs or psychotropic substances (as defined in the 1988 [United Nations] Convention [against Illicit Traffic in Narcotic Drugs and Psychotropic Substances]) or the travel of the aircraft to the place where it illicitly receives narcotic drugs or psychotropic substances or the return of the aircraft after illicitly moving narcotic drugs or psychotropic substances, or
- the transport of proceeds that directly result from an illicit transaction in such narcotic drugs or psychotropic substances (or the travel of the aircraft to the place where it delivers or receives the proceeds)."

If an aircraft is suspected to be engaged in drug trafficking, the Colombian Air Force ("CAF") will take several steps to identify,

communicate with, warn, and, if necessary, take action to coerce the aircraft down without using deadly force against the aircraft in the air. International Civil Aviation Organization ("ICAO") procedures for visual and electronic means of communication would be closely adhered to during the identification and communications phases. A successful force-down of a suspect aircraft would constitute landing at a location specified by the CAF.

The highest priority for the ABD Program is to have the intercepted aircraft land safely at the nearest landing strip, where law enforcement personnel may take control of the aircraft. However, a suspect aircraft that does not respond to the full range of checklist actions, including warning shots, could be fired upon, as a last resort, upon authorization from the Commander of the CAF.

In principle, the pilot, crew, and passengers of all aircraft subject to action under the ABD Program are presumed not to be engaged in illicit drug trafficking. Further, if any participant in the ABD Program has reason to believe that innocent persons are on board an aircraft, that aircraft will not be considered to have a primary purpose of illicit drug trafficking.

With certain exceptions, implementation of Phases II and III of the Colombian ABD Program (as discussed below) are restricted to designated Special Zones of Air Control (in Spanish, "ZECAs"). The ZECAs, which have been designated by the CAF in connection with Colombia's civil aviation authority, are clearly defined. The ZECAs cover only those areas that are reasonably believed, on the basis of information about actual use, to be particularly attractive as drug trafficking areas. The ZECAs are not designated over areas that are heavily populated. The Agreement establishes a process by which both Parties may review the size and location of the ZECAs in the future; the USG has the right to suspend the Program unless it concurs with the GOC's proposed change to a ZECA. To date, there has been one change in the ZECAs originally established in the April 2003 Agreement: an addition of a (coastal) Western ZECA, which was notionally contemplated in the original agreement (though not actually activated) and which the USG interagency community subsequently verified as an area of aerial narcotics trafficking.

The GOC has insisted on retaining the right to interdict civil aircraft outside a ZECA; however, no USG assistance will be used to assist in any such interdictions except as provided in Article III.C. of the Agreement. In

any event, the GOC will use the same three phase process described below to conduct interdictions outside a ZECA and has committed not to engage in the use of lethal force against civil aircraft over heavily populated areas. Therefore, the GOC has adequate safety procedures in place to protect against innocent loss of life in interdictions conducted throughout its airspace.

There is an annual certification process to ensure that USG and Colombian implementation of the ABD program principles and safety procedures remain consistent with the bilateral ABD Agreement. The USG interagency certification process for 2005 was led by the Department of State, and included the participation of the Departments of Defense, Homeland Security, and Justice, the Federal Aviation Administration, and other agencies as appropriate. Future certification teams will be similarly constituted.

#### **V. Specific Principles In The Agreement**

When the GOC detects or is informed of an aircraft operating in a ZECA that is a candidate for possible ABD action, information on that aircraft shall be gathered by the GOC from all reasonably available sources to begin to determine whether the aircraft is reasonably suspected to be primarily engaged in illicit drug trafficking. If the GOC determines or has preliminary reasons to believe that an aircraft is primarily engaged in illicit drug trafficking, the aircraft will be tracked and monitored. If tracking is intermittent, positive re-identification will be made with reasonable certainty before the ABD event may continue. If the GOC has been unable to identify the track of interest as a legitimate track, the aircraft will be considered suspect by the CAF and may be intercepted.

The Agreement with the GOC calls for a three phase process in identifying, evaluating, and taking action against an aircraft reasonably suspected of illicit drug trafficking. The three phases consist of Phase I (Interception); Phase II (Use of Warning Shots), and; Phase III (Firing of Weapons at Intercepted Aircraft in the Air). The GOC has disseminated information to civil aviators notifying them about requirements for flying in GOC airspace, about what procedures to follow if intercepted, and about the consequences of non-compliance.



In no event will warning shots (Phase II) or lethal force (Phase III) be used under the ABD Program, other than in self-defense, against aircraft that are state aircraft or commercial aircraft not engaged in illicit drug trafficking; aircraft that are operating on legitimate flight plans; aircraft whose pilot appears to be incapacitated; or aircraft that appear to have been hijacked.

#### Interception (Phase I)

In Phase I the GOC shall attempt to:

- Determine with greater certainty the identity of the intercepted aircraft. The tracking or intercepting aircraft shall take all reasonable measures to identify the intercepted aircraft by visual or electronic observation of the nationality markings, registration number, license number, or identifying features of the intercepted aircraft;
- Gather further information regarding the intercepted aircraft that may help determine whether the intercepted aircraft is reasonably suspected to be primarily engaged in illicit drug trafficking;
- Establish communications with the intercepted aircraft through radio communications or visual signals; and
- Order the intercepted aircraft to land at the nearest suitable airfield, if factors continue to support a determination that the aircraft is primarily engaged in illicit drug trafficking.
- The intercepting aircraft shall maneuver relative to the intercepted aircraft in conformance with the interception maneuver procedures promulgated by ICAO and codified in Annex 2 to the Chicago Convention.
- Phase I may be performed anywhere in GOC airspace, not just in the ZECAs.

#### Use of Warning Shots (Phase II)

Phase II consists of the firing of warning shots, using ammunition containing tracer rounds, to demonstrate to the pilot of the intercepted aircraft that he must comply with the interceptor's order. If all of the required procedures are followed, if the information gathered continues to indicate that an aircraft is suspect, and if the aircraft fails to respond to the interceptor's order to land, the GOC may, in accordance with the following, move to Phase II.

In Phase II, the Colombian intercepting aircraft shall not fire warning shots until he requests and receives authorization. All such requests must be reviewed by the Commander of the Colombian Air Force (COCAF), or the Acting Commander in his absence, who may approve the request after verifying that all procedures required have been followed.

In advance of firing warning shots, the intercepting aircraft shall attempt to warn the intercepted aircraft, using ICAO radio communications procedures, that warning shots will be used if the intercepted aircraft refuses to comply. The aircraft firing the warning shots shall make every reasonable effort to avoid shooting the intercepted aircraft, other aircraft in the vicinity, or persons on the ground.

Phase II may only be performed within a ZECA.

#### Firing of Weapons at Intercepted Aircraft in the Air (Phase III)

If, after warning shots are fired, the intercepted aircraft does not acknowledge or follow the interceptor's directions, the Colombian interceptor aircraft may only fire weapons at the intercepted aircraft if it requests and receives permission to do so from the COCAF.

All such requests must be reviewed by the COCAF, who may approve such request after verifying that all procedures required under the ABD Agreement have been followed. Upon receipt of the COCAF's authorization, the intercepting aircraft shall warn the intercepted aircraft, using ICAO radio communications procedures, that it will be fired upon if it refuses to comply.

The force used against the intercepted aircraft shall not be in excess of the minimum necessary to disable it, starting with a minimum level of fire in an attempt to persuade the intercepted aircraft to land as directed. The

intercepted aircraft shall be given a reasonable opportunity to obey the previously issued orders to land before the interceptor uses additional force. Levels of force may be increased if the intercepted aircraft continues to refuse to follow the interceptor's directions. The USG and GOC acknowledge that even the minimum level of force could result in the loss of life.

The GOC will make all reasonable efforts to ensure that Phase III is initiated only within a ZECA. However, although not desirable, it is possible that Phase III might occur outside a ZECA, prompted by an identification of a suspect aircraft inside a ZECA, because of the time involved in completing the procedures.

#### Intercepted Aircraft on the Ground

The Agreement provides for special measures for intercepted aircraft that land on the ground or that are located on the ground in the first instance:

If the intercepted aircraft lands at an airfield at which units of the Colombian National Police ("CNP") or military forces are present, those units shall attempt to take control of the aircraft for law enforcement purposes.

If the intercepted aircraft lands at an airfield at which units of the CNP or military forces are not present, or the GOC otherwise locates an aircraft at such an airfield, units of the CNP or military forces shall make all reasonable attempts to reach the aircraft and take control of it for law enforcement purposes.

If units of the CNP or military forces cannot arrive at the location of the intercepted or located aircraft within a reasonable period of time or in sufficient numbers to control the situation, they will notify the CAF. Once the CAF is so notified, the COCAF may consider whether to use airborne weapons against the intercepted aircraft. Use of airborne weapons against the intercepted aircraft on the ground must be expressly authorized by the COCAF.

If the GOC locates an aircraft on an illegal landing strip, but has not conducted any identification or communications procedures with that

aircraft while that aircraft was in the air, the GOC shall perform specific procedures detailed in the ABD Agreement.

The force used against an aircraft on the ground shall not be in excess of the minimum necessary to prevent it from taking off.

#### **VI. Liability of U.S. Personnel**

During initial interagency discussions about how to structure a revised ABD Program in 2002, one of the primary questions was about the circumstances in which a civil aircraft could be said to be "reasonably suspected to be primarily engaged in drug trafficking," which is the standard set forth in the immunity statute. The Department of Justice's Office of Legal Counsel provided several opinions on the meaning of the immunity statute, including a December 13, 2002 opinion that addresses whether a particular set of facts would demonstrate the existence of "reasonable suspicion" under that statute. That opinion concludes that there would be reasonable suspicion that an aircraft is primarily engaged in illicit drug trafficking when a number of factors are met. For example, reasonable suspicion exists if:

- the air safety procedures contained in the Agreement discussed above are followed;
- the aircraft that is a candidate for interception is flying in restricted airspace without a clearance;
- that aircraft takes action that would support an inference that its pilot wishes to avoid detection;
- the pilot of that aircraft fails to respond to all attempts at communication;
- there is no contrary information suggesting that the aircraft being intercepted is not primarily engaged in illicit drug trafficking; and
- the factors listed in the Appendix to the Agreement and thus used as guidance by Program participants tend to indicate, in the opinion of experts, that an aircraft is primarily engaged in illicit drug trafficking.

The opinion thus provides a clear framework in which U.S. participants can operate without fear of criminal liability in the United States once a Presidential Determination is in place. The opinion also emphasized that there could be many other circumstances in which "reasonable suspicion" might attach.

## **VII. Conclusion**

A U.S. interagency certification team comprised of representatives from the Departments of State, Defense, Homeland Security, and Justice, as well as the Federal Aviation Administration, has determined that the USG and GOC have adequately implemented their obligations under the ABD Agreement. Therefore, since interdiction of aircraft reasonably suspected to be primarily engaged in illicit drug trafficking is necessary because of the extraordinary threat that such trafficking poses to Colombia's national security, and since the ABD Program has appropriate safety procedures in place to protect against the loss of innocent life in the air and on the ground, the interagency community recommends that the President make a certification under 22 U.S.C. § 2291-4 for Colombia so that intelligence sharing and other assistance to Colombia related to the ABD Program may continue.

**Drafted: INL/LP - J Furloni; July 22, 2005 x77830**

**Cleared:** INL - Jonathan Farrar - ok  
WHA/AND - (b)(6) - ok  
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DOD/OSD CN - Mr. (b)(6) - ok

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