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Military Law Review

"FINDING THE LAW"—THE VALUES, IDENTITY, AND FUNCTION OF THE INTERNATIONAL LAW ADVISER
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DEVELOPING A SECURITY STRATEGY FOR INDOCHINA
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ELECTRONIC SURVEILLANCE AND RELATED INVESTIGATIVE TECHNIQUES
M. Wesley Clark

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"FINDING THE LAW"--THE VALUES, IDENTITY, AND FUNCTION OF THE INTERNATIONAL LAW ADVISER

by Captain Matthew E. Winter*

[P]articularly in approaching the study of international law, a basic concern should be to understand one's values, identity, and function in relation to the vast process of social interaction with which international law deals. Much of the confusion that has characterized discussion in the field is attributable to misunderstandings and ambiguities at this fundamental level?

I. INTRODUCTION

Myres McDougal and Harold Lasswell, two leading proponents of "policy-oriented'' jurisprudence,[2] have addressed the importance of understanding and acknowledging one's position within a legal system, the values one brings to that system, and one's identity in relation to other participants within that system.[3] This emphasis on ''self-

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Tipson, *The Lasswell-McDougal Enterprise: h a r d a World Public Order of Human Dignity*, 14 Va. J. Int'l L. 535, 572 (1971).

[2] ''Policy-oriented'' jurisprudence has also been called the "New Haven Approach," "Yale School," and the ''McDougal-Lasswell system." *Id.* at 535 n.4. It is a post-legal realist approach that includes a theory of the law as well as a theory about the law. *Id.* at 536 n.5. Some of the most significant features of the policy-oriented jurisprudence include "a means of describing social process and the role of law within it, techniques for systematic research into legal problems, and a framework for analysis of theories about law." Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 Va. L. Rev. 662, 665 (1968). *See also infra* note 5; Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. Calif. L. Rev. 362 (1971) [hereinafter Lasswell & McDougal, *Criteria]*; McDougal, *Jurisprudence for a Free Society*, 1 Ga. L. Rev. 1 (1966) [hereinafter McDougal, *Free Society]*; Tipson, *supra* note 1; McDougal, Lasswell & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 Va. J. Int'l L. 188 (1968) [hereinafter McDougal, Lasswell & Reisman, *Configurative Jurisprudence]*; Lasswell & McDougal, *Jurisprudence in Iblicy-Oriented Perspectives*, 9 U. Fla. L. Rev. 486 (1967) [hereinafter Lasswell & McDougal, *Policy-Oriented Perspectives*].

[3] Lasswell & McDougal, *Criteria*, *supra* note 2, at 375-76.

orientation''[4] is only one element of their policy-oriented approach to the law,[5] but it is a crucial and decisive one.

McDougal and Lasswell recognize that ''values" are those subjective considerations that determine the "desirability and effectiveness of particular policies or practices.''[6] The absence of explicit values or a failure to recognize those values severely limits the capacity for rational decisionmaking.[7] McDougal and Lasswell use the term "identity" to refer to a participant's identification with groups or communities.[8] They argue that a person's identification has considerable bearing on how one integrates values and policy into decisionmaking.[9] The term "function" refers to a person's role within the legal system.[10] McDougal differentiates between three different roles: scholar; claimant; and decisionmaker." The particular role of an individual determines that person's objectives, strategies, and attitudes toward the law.[12]

McDougal's perceptions are especially insightful for the study and understanding of international law. Because of the ''pervasive ambiguity''[13] and lack of clear black-letter law in the international law field, value and policy choices are endemic.[14]

For both the decisionmaker and the observer, clarity of role and

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[4] *Id.*; *see also* Tipson, *supra* note 1, at 572.

[5] Other key elements of McDougal and Lasswell's approach include the following: 1) conception of the subject matter (emphasis on the decision process rather than rules); 2) use of a comprehensive framework of inquiry (analysis of values, interests, decision functions, and phases); and 3) performance of necessary intellectual tasks (clarification of goals, description of past trends, analysis of conditioning factors, projection of future trends, and invention of policy alternatives). *See supra* note 2.

[6] Tipson, *supra* note 1, at 572.

[7] *Id.*; *see also* Lasswell, *Clarifying Value Judgement: Principle of Content and Procedure*, 1 Inquiry 87 (1958); Myrdal, Value in Social Theory (Streeten ed. 1958).

[8] Tipson, *supra* note 1, at 573; Lasswell, *Future* Systems of *Identity in the World Community*, in 4 The Future of the International Legal Order 3 (C. Black & R. Falk eds. 1972).

[9] Lasswell, *supra* note 8; *see also* Lauterpacht, *The Place of Policy in International Law*, 2 Ga. J. Int'l & Comp. L. 23 (Supp. 2 1972).

[10] Tipson, *supra* note 1, at 573; McDougal, Lasswell & Reisman, *Configurative Jurisprudence*, *supra* note 2, at 199.

[11] McDougal, Lasswell & Reisman, *Configurative Jurisprudence*, *supra* note 2, at 199-200; Lasswell & McDougal, *Criteria*, *supra* note 2, at 379.

Tipson, *supra* note 1, at 573 (citing McDougal, Lasswell, & Reisman, *Configurative Jurisprudence*, *supra* note 2, at 199-200).

[13] Schachter, *The Place of Policy in International Law*, 2 Ga. J. Int'l & Comp. L. 5, 7 (Supp. 2 1972).

[14] *Id.* at 6-7. By way of example, Professor Schachter points to the lack of clear guidelines for determining whether a practice has been sufficiently longstanding to constitute customary international law. *Id.* at 7.

explicitness of value choices are essential.[15] A participant who understands and appreciates his or her own identity, function, and values is capable of making decisions and judgments with conscious appreciation of the explicit and implicit considerations that are part of that decisionmaking process. Similarly, identifying the values, identity, and function of the decisionmaker allows other individuals involved in the process to appreciate the considerations that have gone into the advice and to weigh the advice accordingly.[16] "Specification of valuation aids in reaching objectivity since it makes explicit what otherwise would be only implicit . . . . Only when the premises are stated explicitly is it possible to determine how valid the conclusions are."[17]

This article seeks to identify and examine the values, identity, and function of the military lawyer assigned duties as an international law adviser. In the course of identifying and examining those factors, the article will consider the following issues: What is the influence of policy and value choice on the legal adviser's ability to "find" the law? What functional role and values should the legal adviser incorporate? What functional roles do legal advisers play in the armed forces of a few representative countries? What roles do legal advisers play in the United States? What are the policy considerations and risks inherent in each role?

11. LEGAL ADVISERS AND THE LAW OF WAR

Legal advisers have become an integral part of the planning and conduct of military operations. Military lawyers, or "judge advocates,"[18] participate in a multitude of tasks that involve issues of international law. Historically, this involvement has been in the area of public international law known as the "law of war" or the "law of armed conflict."[19]

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[15] Gunnar Myrdal, a political economist, is a prominent proponent of the inevitability of value choice and the need for that choice to be explicit. *See* Myrdal, *supra* note 7.

[16] *Id.* at 154-55.

[17] *Id.* at 155.

[18] In the operational law and law of war arena, the terms "judge advocate" and "legal adviser" are considered to be synonymous. *See* Memorandum of the Joint Chiefs of Staff 59-83, subject: Implementation of the DOD Law of War Program, 1 June 1983 [hereinafter MJCS 59-83].

[19] The term "humanitarian law" is sometimes used interchangeably with the terms "law of war" and "law of armed conflict." The United States uses the term "law of war," although other countries (e.g., United Kingdom) use the term "law of armed conflict." There is no substantive difference. "Humanitarian law" is often confused with human rights law and is therefore the least accurate term. *See* Guillamette, *Legal Advisers in Armed Forces*, in Implementation of International Humanitarian Law 132 (F. Kalshoven and Y. Sandoz eds. 1989).

The law of war is both written and unwritten,[20] and it is often divided into two distinct categories:[21] 1) conflict management (rules to reduce or eliminate conflict within the international community);[22] and 2) rules of hostilities (rules that are applicable to the actual conduct of combat).[23] The latter area is the one most likely to be encountered by the judge advocate.[24]

The rules of hostilities are an attempt to minimize the evil aspects of war by:

a. Protecting both combatants and noncombatants from unnecessary suffering;
b. Safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and
c. Facilitating the restoration of peace.[25]

The law of war is designed as a practical and useful tool to balance military needs with humanitarian concerns.[26] It is not intended to be an idealistic proscription against war and its associated violence and destruction.[27]

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[20]The law of war, like other concepts of international law, has numerous sources. These sources include international agreements, custom and practice, general principles of law, judicial decisions, and the teachings of highly qualified publicists. *See* Statute of the International Court of Justice, art. 38, 59 Stat. 1031, T.S. No. 993, *3* Bevans 1179.

[21]Dep't of Army, Pam. 27-161-1, Law of Peace: Volume I, para. 1-1 (1 Sept. 1979) [hereinafter DA Pam 27-161-1].

[22]The primary source of law concerning conflict management is the U.N. Charter and its provisions of self-defense and intervention. 59 Stat. 1031, T.S. 993, 3 Bevans 1153.

[23]*See generally* Dep't of Army, Field Manual 27-10, The Law of Land Warfare (1 July 1956) [hereinafter FM 27-10].

[24]In fact, according to one prominent commentator, "[t]he only rules that count **for** the armed forces are those that must be applied in war. The question as to who is at the origin of a conflict and who is the victim is a matter belonging to the realm of politics and is of no concern to members of the armed forces." de Mulinen, *The Law of War and the Armed Forces,* 18 Int'l Rev. of the Red Cross, 18, 20 (1978).

[25]FM 27-10, para. 2.

[26]*See infra* text accompanying note 50. UN General Assembly Resolution 2444, Human Rights in Armed Conflict, noted that the following principles are basic to the law of armed conflict:

1) That the rights of the Parties during armed conflict to adopt means of injuring the enemy are not unlimited,
2) That it is prohibited to launch attacks against the civilian population as such, and
3) That a distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.

[27]*See* Dep't of Army, Pam 27-161-2, International Law Vol. II, at *35* (23 Oct. 1962) [hereinafter DA Pam 27-161-2].

The principal sources of law for the rules of hostilities are the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land,[28] the four 1949 Geneva Conventions for the Protection of War Victims,[29] and the two 1977 Protocols Additional to the Geneva Conventions of 1949.[30] Article 82 of Protocol I demonstrates the international community's recognition of the complexity of the law of war[31] and greatly expands the role of the legal adviser *vis a* vis the law of war. Article 82 provides:

> The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.[32]

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[28] 36 Stat. 2277, T.S. No. 539.

[29] Geneva Convention of August 12, 1949, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter GWS]; Geneva Convention of August 12, 1949, for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 [hereinafter GWS (Sea)]; Geneva Convention of August 12, 1949, Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter GPW]; Geneva Convention of August 12, 1949, Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter GC].

[30] 16 I.L.M. 1391-1449 (1977); Dep't of Army, Pam. 27-1-1, Protocols to the Geneva Conventions of August 1949 (1 Sept. 1979) [hereinafter DA Pam 27-1-11. The Protocols had been negotiated between 1974 and 1977. The United States signed the Protocols on 12 December 1977, subject to three understandings:

A) Protocol I

1. It is the understanding of the United States of America that the rules established by this protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons.

2. It is the understanding of the United States of America that the phrase "military deployment preceding the launching of an attack" in Article 44, Paragraph 3, means any movement towards a place from which an attack is to be launched.

B) Protocol II

It is the understanding of the United States of America that the terms used in Part III of this protocol which are the same as the terms defined in Article 8 of Protocol I shall so far as relevant be construed in the same sense as those definitions.

DA Pam 27-1-1, at 138-39.

[31] *See* Parks, *The Law of War Adviser*, 31 JAG J. 1, 4 (1980). Mr. Parks points to the fact that the Hague Convention IV of 1907, the four Geneva Conventions of 1949, and the two 1977 Protocols contain over six hundred articles governing the conduct of hostilities and related matters. *Id.*

[32] DA Pam 27-1-1, at 62.

Although the United States has not yet ratified the protocols,[33] the Armed Forces have nevertheless continued to expand the role played by legal advisers in military operations.[34] The United States has made a firm commitment to the integration of legal considerations into the military planning and operational process. In fact, at the time of the drafting of article 82 the United States was already substantially in compliance with its provisions.[35]

Numerous service regulations, Department of Defense directives, Department of Defense instructions, and other regulatory sources within the military provide various tasks relative to the law of war for the judge advocate to perform. The legal adviser is directed to: 1)disseminate the law of war;[36] 2) administer the law of war through the administration of article 5, GPW, tribunals and the prisoner of

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[33]A state may express its consent to be bound to a treaty by various means, including: 1) signature, followed by ratification; 2) accession; or 3) a declaration of succession. *See* Vienna Convention on the Law of Treaties, arts. 11-17, U.N. Doc. A/CONF. 39/27 (1969), 63 A.J.I.L. 875 (1969), 8 I.L.M. 679 (1969). As of January 1, 1989, 62 states had signed Protocol I and 84 states were party to Protocol I. There have been 30 ratifications, 54 accessions, and 13 declarations pursuant to article 90 (by which a state recognizes the competence of the International Fact-Finding Commission provided for in article 90). Also as of January 1, 1989, 58 states had signed Protocol II and 74 states were party to Protocol II. There have been 27 ratifications and 47 accessions. In contrast, there are 61 signatories to the Geneva Conventions of 12 August 1949, all of whom have ratified the Conventions. There are 166 states who are party to the Conventions, with 61 ratifications, 64 accessions, and 41 declarations of succession. *Ratifications and Accessions to the Geneva Conventions and/or the Additional Protocols Between 1 Jan. 1989 and 30 April 1988,* Dissemination: Magazine on Dissemination of International Humanitarian Law and of the Principles and Ideals of the International Red Cross and Red Crescent Movement (Aug. 1989). On January 29, 1987, the President submitted Protocol II to the Senate for advice and consent. No action has been taken to ratify Protocol I. For an excellent description of some of the U.S. concerns with the protocols, see Burger, *Unconventional Warfare: Legal Conventions Reviewed,* ABA Law and National Security Intelligence Report, Nov. 1989, at 1.

[34]*See infra* note 40.

[35]*See* Department of Defense Law of War Working Group Review and Analysis of Protocols I and II Adopted by the Diplomatic Conference on International Humanitarian Law at I-82-2 (1977).

[36]The requirement to teach the law of war is included in article 26 of the 1906 Geneva Convention for the Wounded and Sick, 35 Stat. 1885, T.S. No. 464; Article 27 of the Geneva Convention of July 27, 1929, for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 47 Stat. 2074, T.S. No. 847, 118 L.N.T.S. 303; Article 47, GWS; Article 48 GWS (Sea); Article 127, GPW; and Article 144, GC. These requirements have been implemented in Dep't of Defense Directive 5100.77, DOD Law of War Program (July 10, 1979) [hereinafter DOD Dir. 5100.771; Chief of Staff Regulation 11-2, Implementation of DOD Law of War Program (7 May 1975) [hereinafter CSR 11-2]; Army Reg. 35-216, The Geneva Conventions of 1949 and Hague Convention No. IV of 1907 (7 Mar. 1975) [hereinafter AR 35-216].

war program;[37] 3) review new weapons systems to ensure they are in compliance with international law;[38] 4) review operations plans for compliance with the law of war;[39] 5) determine rules of engagement;[40] 6) determine lawful targets;[41] and 7) provide advice and support on investigation and evaluation of information concerning war crimes.[42]

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[37]Article 5 tribunals determine whether a captured individual is entitled to prisoner of war status. At least one judge advocate is normally assigned to the tribunal, and in Vietnam, the entire program was administered by judge advocates. Parks, *supra* note 31, at 13-14; see also Green, *The Concept of "War" and the Concept of "Combatants" in Modern Conflicts,* Revue de Droit Penal Militaire et de Droit de la Guerre 267 (1971).

[38]Dep't of Defense Directive 5500.15, Review of Legality of Weapons Under International Law (Oct. 16, 1974) [hereinafter DOD Dir. 5500.151. In addition to reviews of individual weapons, The Judge Advocate General has also reviewed the use of a weapon system for a particular purpose. For an example of such a review, see Memorandum of Law, *The Use of Lasers as Antipersonnel Weapons,* The Army Lawyer, Nov. 1988, at 3.

[39]*See, e.g.,* Message, Forces Command, 2914002 Oct. 84, subject: SJA Review of Operations Plans (requires judge advocate review of all operations plans).

[40]Rules of engagement are not pure law of war determinations. Although they must comply with the law of war, they are influenced by domestic law, command policies, and international politics. They are limitations that are self-imposed by the National Command Authority. Rules of engagement are defined as: "Directives issued by competent superior authority which delineate the circumstances and limitations under which US forces will initiate and/or continue engagement with other forces." The Judge Advocate General's School, International Law Deskbook, The Graduate Course Law of War Deskbook, at 3-9 (Aug. 1988) [hereinafter LOW Deskbook] (quoting Joint Chiefs of Staff Publication 1, Dictionary of Military and Associated Terms (1 June 1987)). In peacetime, rules of engagement serve to prevent the inadvertent initiation of hostilities. In wartime, such rules limit the escalation of conflict to what is necessary to achieve a particular national policy goal. *Lawyers' Role in Combat,* Fed. Bar News & J., March 1983, at 163, 164; *see* also Parks, *Righting the Rules of Engagement,* Proceedings, May 1989, at 83.

Rules of engagement are part of a relatively new area of the law called operational law, one that includes domestic law considerations as well as law of war issues. *See* Graham, *Operational Law (OPLAW)—A Concept Comes of Age,* The Army Lawyer, July 1987, at 9. Operational law has been defined as: "That body of law, both domestic and international, impacting specifically upon legal issues associated with the planning for and deployment of U.S. forces overseas in both peacetime and combat environments." The Judge Advocate General's School, International Law Division, The Judge Advocate and Military Operations Seminar Deskbook, at i (Dec. 1987) [hereinafter JAMO Deskbook]. Operational law, in practice, involves the military lawyer in such activities as reviewing operation plans, advising on rules of engagement and the law of war, providing legal assistance to deploying personnel, contracting for supplies in a combat environment, and providing claims support to reimburse soldiers and civilians for losses incurred through service. Although all these activities are of vital importance to the Armed Forces, this article will not consider the judge advocate's role in providing legal assistance, claims support, or contracting services.

[41]FM 27-10, para. 40 (C1, 15 July 1976).

[42]Parks, supra note 31, at 6.

Numerous articles have been written about the legal adviser.[43] Because many of these articles were written at a time when legal advisers were first being integrated into the planning and conduct of military operations, these articles have concentrated on the *procedural* role of the legal adviser. They have addressed such issues as the position of the legal adviser in the military hierarchy, the tasks of the legal adviser, and the legal adviser's qualifications.[44] The articles do not directly address the question of how the legal adviser *determines* the law. Because this issue is not discussed, the articles tend to contain confusing instructions for the legal adviser. Although the writers encourage the adviser to provide "objective and well-reasoned legal advice,"[45] they also emphasize that the legal adviser should not be "an ombudsman or a decisionmaker."[46] The legal adviser is cautioned "not [to] fall into the 'can do' syndrome," but is

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[43] *See, e.g.*, Parks, *supra* note 31; Fleck, *The Employment of Legal Advisers and Teachers of Law in the Armed Forces*, 13 Int'l Rev. of the Red Cross 173 (1973); Draper, *Role of Legal Advisers in Armed Forces*, 18 Int'l Rev. of the Red Cross 6 (1978); de Mulinen, *supra* note 24; Gonsalves, *Armed Forces and the Development of the Law of War*, 21 Revue de Droit Penal Militaire et de Droit de la Guerre 189 (1982); Rogers, *Armed Forces and the Development of the Law of War*, 21 Revue de Droit Penal Militaire et de Droit de la Guerre 201 (1982); Skarstedt, *Armed Forces and the Development of the Law of War*, 21 Revue de Droit Penal Militaire et de Droit de la Guerre 227 (1982); Prugh, *Armed Forces and the Development of the Law of War*, 21 Revue de Droit Penal Militaire et de Droit de la Guerre 227 (1982); Moritz, *Legal Advisers in Armed Forces: Position and Functions*, 21 Revue de Droit Penal Militaire et de Droit de la Guerre 483 (1982); Shefi, *The Status of the Legal Adviser to the Armed Forces: His Functions and Powers*, 100 Mil. L. Rev 119 (1983); Norsworthy, *Organization for Battle: The Judge Advocate's Responsibility Under Article 82 of Protocol I to the Geneva Conventions*, 93 Mil. L. Rev. 9 (1981); Burger, *International Law--The Role of the Legal Adviser, and Law of War Instruction*, The Army Lawyer, Sept. 1978, at 22.

[44] Many of the articles noted at *supra* note 43 were written in response to questionnaires sent to participants of the Ninth International Congress of the International Society of Military Law and Law of War that was held at Lausanne, Switzerland, in September 1982. The questionnaire requested each participant to discuss numerous issues involving the implementation of Protocol I. The questionnaire included the following questions concerning the legal adviser:

1. Position.
   a) At what levels, within the military organization are there or should there be legal advisers?
   b) Does the legal adviser have, or should he have a staff officer function or, on the contrary, should he have a special status? In the latter case, which one?
2. Function.
   a) In what cases does the legal adviser assume a personal responsibility?
   b) Is a double technical and functional subordination of the legal adviser conceivable? Do you see a different answer in time of peace and in time of war?
   c) What function does the legal adviser have or could he have with regard to teaching to the armed forces?

Questionary of the Topic, *Armed Forces and the Development of the Law of War*, 21 Revue de Droit Penal Militaire et de Droit de la Guerre 57, 61 (1982).

[45] Walsh, *Role of the Judge Advocate in Special Operations*, The Army Lawyer, Aug. 1989, at 4, 6.

[46] Persons, Va. L. Weekly, *DICTA*, Vol. 31, No. 21, p. 1 (1979).

also told to "convince commanders and staff members that he is a force multiplier and can assist in the accomplishment of the mission."[47] Finally, the adviser is told "not only to state what the law is, but to show the tactical and political soundness of his interpretation of the law."[47]

111. FINDING THE LAW

How does the legal adviser "find" the law? Of course, the legal adviser begins the same way any attorney would begin—by looking at the relevant materials. Unlike domestic areas of the law, however, the law of war contains "more gray areas than black and white."[49]

The law of war is based on three very subjective principles: military necessity; the prevention of unnecessary suffering; and proportionality.[50] Military necessity is defined as ''that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible."[51] The principle of preventing unnecessary suffering is based on the prohibition against the use of "arms, projectiles, or material calculated to cause unnecessary suffering."[52] Proportionality requires that "the loss of life and damage to property . . . not be out of proportion to the military advantage to be gained."[53]

These principles all require subjective determinations and a balancing of factors. Consider the following problem, taken from the Army Training Circular on the Law of War.[54]

> The entire supply line to enemy units opposing the division passes through a city. Extensive supplies for these units are stored in the city's warehouses. The staff concludes the enemy must be prevented from using the city as a transportation and supply center. The chief of staff urges that the city be destroyed by combined air and artillery bombardment. He further argues that since "military necessity" urgently requires this destruction, protection of the civilian population may be subordinated.[55]

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[47]Walsh, *supra* note 45, at **4**, 6.
[48]Parks, *supra* note 31, at 40.
[49]Parks, *supra* note 31, at 40. ''[R]igid interpretations which may be unnecessary are viewed as a threat to men's lives or to the mission." *Id.*
[50]LOW Deskbook, at 3-2.
[51]FM 27-10, para. 3a.
[52]FM 27-10, para. 34.
[53]FM 27-10, para. 41.
[54]Dep't of **Army,** Training Circular 27-10-1, Selected Problems in the Law **of** War (June 1979) [hereinafter TC 27-10-1].
[55]TC 27-10-1, at 44.

The discussion to this problem suggests that "it is necessary to determine the extent to which bombardment of individual targets is called for on military grounds."[56] How does the legal adviser make that determination? What factors may be considered by the legal adviser in arriving at his or her decision? The three key factors—values, identity, and function—determine how the legal adviser "finds" the law.

A. *VALUES*

All of the legal adviser's tasks involve choices. The legal adviser is constantly making decisions and judgments, whether he or she is rendering a legal opinion on a proposed weapon system, advising the commander on legal methods to prevent reinforcement of a town, or providing advice to commanders concerning legal implications of proposed operations. These choices share the basic characteristics of legal decisionmaking;[57] they involve a choice of rule, a choice of facts, a syntactic interpretation, and a semantic interpretation.[58]

Rule choice occurs when a decisionmaker determines what guidelines and rules to apply to a particular factual situation. Judge Abraham D. Sofaer, Legal Adviser to the State Department, provided an excellent example of rule choice when he discussed the problems resulting from our need to extricate terrorists from other sovereign nations.[59] Although he acknowledged that such an action might require a violation of the territorial integrity of another state, Judge Sofaer stated that "[t]erritorial integrity is not the only principle of international law that deserves protection."[60] In another example of rule choice, Judge Sofaer chose to classify certain military actions as "active self-defense," rather than as reprisals.[61] These categorizations determine what rule of law will be applied to the factual situation.

Fact choice occurs when the decisionmaker determines what facts are relevant to his or her decision. Reviews of weapons for compliance with international law[62] often involve numerous fact choices.

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[56] *Id.*

[57] L. Allen & M. Caldwell, 28 *Modern Logic and Judicial* ***Decision*** *Making:* ***A Sketch*** *of One View*, Law and Contemporary Problems 213, 226 (1963). Although there are numerous decision models in existence, many share the basic characteristics of Mr Allen's.

[58] *Id.*

[59] Sofaer, *Terrorism, the Law, and* ***the*** *National* ***Defense,*** 126 Mil. L. Rev. 89, 109-13 (1989).

[60] *Id.* at 106.

[61] *Id.* at 95.

[62] *See* Memorandum of Law, *supra* note 38.

In a memorandum discussing the legality of using lasers as antipersonnel weapons, W. Hays Parks, Chief of the International Law Team, International Affairs Division, Office of The Judge Advocate General of the Army, selected the technical characteristics of lasers that he considered relevant.[63] The motives, goals, prejudices, and values of the decisionmaker determine which facts he or she considers. These fact choices may well be determinative.

Syntactic interpretations occur when decisionmakers analyze a rule by examining the arrangement of the words within the rule.[64] In the laser memorandum, the key question that Mr. Parks had to answer was whether lasers used as antipersonnel weapons would cause "unnecessary suffering."[65] A syntactic interpretation of this rule would involve the question of whether the ordering of the two words in the phrase "unnecessary suffering" implies that there is such a thing as "necessary suffering."[66]

Semantic interpretations involve an analysis of individual words.[67] A semantic interpretation of the laser issue would involve the question of what is "unnecessary."[68] An excellent example of semantic interpretation can be found in a recent memorandum concerning the legality of assassination, in which Mr. Parks reviewed nine different definitions of assassination.[69]

These choices necessarily involve certain subjective determinations. Whether termed "value choices"[70] or "policy choices,"[71] they involve an orientation on goals. Because of the subjectivity inherent in all law, but especially apparent in international law, policy "is not

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[63] *Id.* at 4.

[64] Syntax—"in grammar, the arrangement of words as elements in a sentence to show their relationship; sentence structure." Webster's New Twentieth Century Dictionary Unabridged 1852 (2d ed. 1976).

[65] Memorandum of Law, *supra* note 38, at 3.

[66] *Id.*

[67] Semantic—"of meaning, especially meaning in language." Webster's New Twentieth Century Dictionary Unabridged 1648 (2d ed. 1976).

[68] Unfortunately, this is not directly addressed in the laser memorandum.

[69] Memorandum of Law, *EO 12333 and Assassination*, The Army Lawyer, Dec. 1989, at 3.

[70] *See, e.g.*, Myrdal, *supra* note 7.

[71] *See, e.g.*, McDougal, *Jurisprudence for a Free Society*, 1 Ga. L. Rev. 1 (1966); Lasswell & McDougal, *Jurisprudence in a Policy-Oriented Perspective*, 19 U. Fla. L. Rev. 486 (1967); McDougal, *Some Basic Theoretical Concepts About International Law: A Policy-Oriented Framework of Inquiry*, 4 J. of Conflict Resolution 337 (1960).

only relevant but often decisive."[72] Consider the definition of policy generally accepted by many international law scholars: a "preference or preferred outcome, whether expressed as a general goal or as a specific result or as a principle of fairness or justice."[73] Most post-realist American international law scholars would agree that policy considerations are integral elements of international law.

The view of many prominent English legal scholars, however, is that policy too often equates with politics, which is clearly outside the legal realm.[74] They argue that questions that cannot be resolved by reference to a clearly applicable and specific rule are not true legal decisions.[75] Accordingly, these questions should not be answered by lawyers, but should instead be referred to politicians.[76]

In contrast, the American view accepts the consideration of "extra-legal" factors. In fact, some ethical codes address the consideration of policy. For example, Rule 2.1 of the Army Rules of Professional Conduct specifically notes that "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant."[77]

B. IDENTIFICATION

Although there are an infinite number of potential preferred outcomes, there are essentially four policies that the decisionmaker in international law can choose to identify with: 1) the policy of a particular state; **2)** the community policy; **3)** the policy of the international organization making the decision (for example, if the world court were the decisionmaker, it might look to its own policy); or **4)** the policy of the law itself—integrity, predictability, and objectivi-

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[72]Schachter, *supra* note 13, at 6. Note, however, that there is not universal agreement on the place of policy in the law. Many English scholars believe that there is, or at least should be, a clear distinction between law and policy. "If our American colleagues believe that international law is a tool of social engineering, ours to build with, the British prefer to emphasize its neutrality in respect of social values, and further suggest that *policy* rapidly becomes indistinguishable from *politics.*" Higgins, *Diverging Anglo-American Attitudes to International Law: Introductory Statement*, 2 Ga. J. Int'l & Comp. L. 1 (Supp. 2 1972). The introduction of policy considerations, many British legal theorists would argue, makes international law unscientific and unpredictable.

[73]Schachter, *supra* note 13, at 6; *see also* Lauterpacht, *supra* note 9, at 23.

[74]*See, e.g.*, Higgins, *supra* note 72.

[75]*Id.*

[76]*Id.*

[77]Dep't of Army, Pam. 27-26, Legal Services: Rules of Professional Conduct for Lawyers, Rule 2.1 (31 Dec. 1987) [hereinafter R.P.C.]. For an analysis of the Rules, see Ingold, *An Overview and Analysis of the New Rules of Professional Conduct for Army Lawyers*, 124 Mil. L. Rev. 1 (1989).

ty.[78] The outcome of the decisionmaking process is drastically affected by which policy the decisionmaker chooses as his or her primary concern.

Assuming the relevance of policy, the next question to be addressed is *which* policy should take precedence. Several theories have been espoused. Judge Lauterpacht believes that one can legitimately apply only considerations of policy that are derived from the nature of the law itself and the policy of an international organization.[79] He believes that the other two policies—state and community—are too subjective to be of any value.[80]

In contrast, Professor Schachter argues that the policy choice is "in principle a choice that must itself be made or justified on grounds of the values of the community and not those of an individual or an individual government."[81]

There are some individuals who believe that the policy of the state must always remain paramount. Judge Sofaer has stated that "the law must not be allowed improperly to interfere with legitimate national security measures."[82] In fact, Judge Sofaer tasks lawyers "to identify and to revise or reject unjustifiable legal restrictions on our nation's capacity to protect its security."[83]

Finally, McDougal and Lasswell urge identification with world or community policy.[84] One example of reliance on community policy can be seen when a legal adviser argues for a decision that will "benefit . . . the community at large."[85]

The policy that the legal adviser considers most important will determine that adviser's choice of rule, choice of facts, semantic interpretation, and syntactic interpretation. It will, in essence, determine the law that he or she will "find."

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[78]Lauterpacht, *supra* note 9, at 23-28.
[79]*Id.* at 26.
[80]*Id.* at 28.
[81]Schachter, *supra* note 13, at 5, 13.
[82]Sofaer, *supra* note 59, at 90.
[83]*Id.* at 91.
[84]Lasswell, *Introduction,* to M. McDougal & F. Feliciano, Law and Minimum World Public Order xxiv (1961).
[85]Lauterpacht, *supra* note 9, at 25. When Judge Lauterpacht argued on behalf of Belgium in the Barcelona Traction Case, 1970 I.C.J. 3, he argued that it would be beneficial to the world community to extend protection to the shareholders in the company. This argument was based on community policy.

C. FUNCTION

1. Possible Roles of the Legal Adviser

The varied tasks that the legal adviser must perform involve very different functional roles. For example, the legal adviser who is reviewing a weapons system for compliance with international law is not serving in the same role as the legal adviser who is advising the commander on the legal implications of attacking a particular target. The advisers' objectives, strategies, and attitudes will be directly related to their perceptions about their roles in the system and to their identification with certain groups or individuals.[86]

Legal advisers may serve in one or more of the following four roles:[87]

1) The "advocate," who zealously argues the client's case and fashions legal arguments to support the needs and desires of the commander;

2) The "judge," who acts in a quasi-judicial capacity and makes decisions based on the law;

3) The "counselor," who advises the commander on ways to use the law to the client's best interest and who considers the client's goals when advising on the advantages and disadvantages of alternative courses of action; and

4) The "conscience," who presents the humanitarian viewpoint unadulterated by any other considerations.

A full understanding of these functional roles requires an examination of the role intended for the legal adviser by the drafters of article 82 of Protocol I and a familiarity with how this requirement has been implemented by various countries.

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[86] *See supra* text accompanying notes 1-12. This identification impacts on the internalization of goals and values.

[87] Although McDougal and Lasswell distinguish between the roles of scholar, claimant, and decisionmaker (McDougal, Lasswell & Reisman, *Configurative Jurisprudence*, *supra* note 2, at 199-200), the unique position of legal advisers in international law makes it useful to categorize their roles in a slightly different manner.

2. *Drafter's Intent*

Prior to the drafting of Protocol I, the 1907 and 1949 Conventions discussed only one activity that required the assistance of legally trained personnel—dissemination of information.[88] The idea of providing international law advisers to military commanders was first introduced by a representative of the Canadian Red Cross at the Red Cross Experts' Conference of 1971.[89] It was again discussed at the Government Experts' Conference of 1972.[90] At that time, the proposal was presented by the Federal Republic of Germany and was accompanied by a model draft of the article that explained the functions of legal advisers, their place in the military hierarchy, and their supervisory functions regarding military instructions and breaches of international law.[91] The model draft reads, in part, as follows:

> Within the armed forces, qualified lawyers will be employed as legal advisers in major units and as teachers of law in military schools and academies.
>
> I. Legal Advisers
>
> > The legal adviser acts, in time of peace as in time of armed conflict, as the Commander's personal adviser in all service matters involving questions of international law. Within this scope, the legal adviser is called upon to participate in the military decision-making process and to support the commander in the execution of his command authority.

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[88] Dissemination responsibilities include conducting instruction and preparing manuals on the law of war. *See* Article I of Hague Convention IV, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631 (requires the Contracting Parties to "issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present Convention"); Article 26 of the 1906 Geneva Convention for the Wounded and Sick, 35 Stat. 1885, T.S. No. 464 (requires the signatory states to "take necessary steps to acquaint their troops, and particularly the protected personnel, with the provisions of this convention and to make them known to the people at large"). Note that article 27 of the 1929 Convention for the Wounded and Sick and each of the four Geneva Conventions of 1949 contained similar language.

[89] Fleck, *supra* note 43, at 174 (citing ICRC, Conference of Red Cross Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, The Hague, 1-6 March 1971, *Report on the Work of the Conference*, Geneva, April 1971, at 29); *see also* M. Bothe, K. Partsch & W. Solf, New Rules for Victims of Armed Conflicts 499 (1982).

[90] M. Bothe, K. Partsch, & W. Solf, *supra* note 89, at 499-500.

[91] Fleck, *supra* note 43, at 173 (citing Model *for the Employment of Legal Advisers and Teachers of Law in the Armed Forces*, submitted by the Experts of the Federal Republic of Germany, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Second Session, Geneva, 3 May-3 June 1972, CE/COM IV/23).

> 1. *Control:* The legal adviser is placed under the direct administrative control of the commander to whom he is attached and to whom he reports directly. Control in legal matters, however, is exercised by the senior legal adviser attached to the major unit's superior headquarters.
>
> 2. *Tasks*: The legal adviser shall provide advice to his commander and subordinate echelons of command, supervise legal instruction provided to the forces in the exercise and training programmes, and instruct officers in legal matters. More specifically, his tasks include the rendering of professional advice on envisaged orders involving questions of international law. *He is under the obligation to draw attention, unequivocally and on his own initiative, to all breaches of law observed.*[92]

This proposal was remarkable for its comprehensiveness. It focused on the legal adviser as a "check" on illegal action. Great care was taken to create an independent technical chain of control (to reduce the legal adviser's identification with the commander) and to emphasize the independent obligation of the legal adviser to draw attention to any proposed or conducted illegal actions (to focus on the importance of community policy). The legal adviser was to function as the "conscience" of the staff.

During negotiations the proposal was considerably reduced in scope. The drafters removed the provision that prescribed the levels at which the legal advisers should be employed, reduced the legal adviser's responsibility from advising commanders on international law to advising commanders only on the application of the Convention and the Protocol, and added the requirement that the legal adviser provide appropriate instruction (although it gave them no control over the instruction or enforcement of the Conventions).[93] Numerous other revisions were made in the process, including the deletion of the requirement that legal advisers be "legally qualified."[94]

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[92] *Id.* at 180-81 (emphasis added).

[93] M. Bothe, K. Partsch & W. Solf, *supra* note 89, at 500-01.

[94] *Id.* As a result of this change, some commentators have argued that a military commander who has been trained in the law of war would satisfy the requirement of article 82. *See* Guillamette, *supra* note 19.

The draft provision, then article 71, read as follows:

> The High Contracting Parties shall employ in their armed forces, in time of peace as in time of armed conflict, qualified legal advisers who shall advise military commanders on the application of the Conventions and the present Protocol and who shall ensure that appropriate instruction be given to the armed forces.[95]

According to Mr. Antoine Martin of the International Committee of the Red Cross (ICRC), who introduced the draft article at the convention, many violations of the law of armed conflict were the result of unfamiliarity with the applicable rules.[96] The intent of the ICRC was to make sure that commanders were accompanied by legal advisers "whose main task would be to ensure that the armed forces received appropriate instruction, and to answer any questions put to them."[97]

Brazil proposed an amendment to limit the applicability of the article. Their proposed article stated:

> The High Contracting Parties shall endeavor to employ in their armed forces, both in time of peace and in time of armed conflict, qualified legal advisers for the purpose of assisting military commanders in the dissemination of the Conventions and the present Protocol among the armed forces and in the application of the said instruments.[98]

The amendment made two key distinctions: 1) the article was to be hortatory, not compulsory; and 2) the legal adviser was to *assist*, but in no way supervise, the commander.[99] By the end of negotiations, the article had been significantly altered.[100] The changes all worked to reduce the level of obligation.[101]

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[95] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 1974-1977, Vol. III, p. 24 (Bern 1978).

[96] H. Levie, 4 Protection of War Victims: Protocol 1 to the 1949 Geneva Conventions 162 (1981) (citing CDDH/I/SR.37; VIII, 390) (referring to Official Records of the Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, summary record of the 37th meeting volume 8, page 390).

[97] *Id.*

[98] *Id.*

[99] M. Bothe, K. Partsch & W. Solf, *supra* note 89, at 500; H. Levie, *supra* note 96, at 162 (citing CDDH/I/265).

[100] For a discussion of the positions taken by the individual delegates to the committee, see H. Levie, *supra* note 96, at 162-66.

[101] M. Bothe, K. Partsch & W. Solf, *supra* note 89, at 500; Draper, *supra* note 43, at 9.

> The general impression gained from a comparison of the texts of 1973 and 1977 is that Governments were not prepared to accept obligations unless there was some flexibility as to the level of commanders who must have the benefit of legal advice on the Conventions and the Protocol and as to the timing when such advice ought to be proffered by the advisers or sought by the commanders. Further, Governments did not desire an obligation on the part of legal advisers to ensure the *giving* of appropriate instruction, but to have their role so defined as to include advising, on the appropriate instruction, a very different matter. Finally, Governments realised that the mandatory use of legal advisers in their armed forces would be more than many States could contrive, if that meant that such legal advisers must be legally qualified.[102]

These changes evidenced a reprioritization of policy interests to ensure that the policy of the state remained preeminent. Additionally, the changes indicated a shift of the functional role of the legal adviser to that of a counselor or advocate. The adviser was to identify with and adopt the goals of the commander—advising and supporting the commander, rather than acting as a check on the commander's power.

The drafters' focus was not on the sophisticated integration of the legal adviser into the strategic and tactical planning process. Rather, the key issue before the drafters was whether the legal adviser should play any role at all.[103] Article 82 was purposely stripped of all functional language; instead, its purpose was procedural and process-oriented. The goal was to ensure that the military commanders were at least aware of the law of war.

3. The Legal Adviser in the United States

In the United States, international law advisers are normally assigned to the Office of the Staff Judge Advocate of the supported division or corps. The advisers are usually called "operational law" attorney~ !At~division level, the judge advocate is typically a cap-

[102]Draper, *supra* note 43, at 10.

[103]The representatives at the convention shared the common concern expressed by many legal advisers: "The question is not whether international law will be controlling, but the more modest one of whether it will be taken into account'' Parks, *supra* note 31, at 21 (quoting Moore, *Law and National Security,* Foreign Affairs, January 1973, at 408).

[104]*See supra* note 40.

tain. Operational law attorneys may have varying degrees of military experience or training. They are often new judge advocates, whose sole training in strategy and tactics is limited to three hours of classroom instruction.[105] Fortunately, some operational law advisers have previous experience as line officers.

At some major commands, such as United States Army Europe and Seventh Army (USAREUR), there is an international affairs division to provide advice and support to the commander. At USAREUR, that division consists of one lieutenant colonel, two majors, and two senior civil service attorneys (a GM-14 and a GM-13). The individuals within the international affairs division, like the operational law attorney at division level, work under the supervision of the senior judge advocate in the command. That senior judge advocate, either the staff judge advocate of the division or corps or the judge advocate of USAREUR, is under the control of the commander he or she supports. In this way, the technical and operational chain of command of the law of war legal adviser includes other attorneys/judge advocates as well as the supported commander.

"The legal adviser is a staff officer and has relatively clearly defined staff responsibilities, all dealing with matters of legal advice, knowledge of the applicable law, and the initiation of proposals for enforcement and implementation of the applicable law, whether domestic or international."[106] These staff responsibilities have been defined through a series of Department of Defense directives, memorandums of the Joint Chiefs of Staff, and individual service regulations.[107] Often, these directives or regulations emphasize the importance of identifying with, and providing support to, the commander. For example, a memorandum of the joint chiefs of staff requires legal advisers

> to provide advice concerning LOAC [law of armed conflict] compliance during joint and combined operations. Such advice on LOAC compliance shall be provided in the context of the broader relationships of international and US and allied domestic law to military operations, *and among other matters, shall address* ***not*** *only legal restraints upon operations but also legal rights to employ force.*[108]

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[105]Program of Instruction, Judge Advocate Officer Basic Course, Phase I.
[106]Prugh, *supra* note **43,** at **277.**
[107]*See supra* notes **36-42.**
[108]MJCS **59-83** (emphasis added).

4. The Legal Adviser in Other Countries

Other countries have varying views of the role of the legal adviser. The Netherlands, for example, considers the legal adviser's primary responsibility one of dissemination and affords the legal adviser no special status, for fear that it would isolate him.[109] The Netherlands takes field officers with at least ten years of military service and sends them to a university to study the law of war.[110] As a result, the legal advisers are well-versed in military arts *and* legal matters.

In the Federal Republic of Germany, the legal adviser has a dual status.[111] In peacetime, the legal advisers are senior civil servants who must be qualified to hold judicial office.[112] In wartime they are given status as staff officers so that they receive combatant and POW status.[113] They have a separate technical chain of command, but administrative control over the legal advisers is exercised only by the commander to whom they are assigned.[114]

> Their civilian status in peacetime, the professional channel of reporting, and the continued exercise of administrative control only by military commanders, etc. in times of armed conflict are designed to ensure the greatest possible degree of personal independence of legal advisers so as to enable them to give impartial legal advice.[115]

Much like the legal adviser in the United States, the legal adviser in the Federal Republic of Germany is "an administrative specialist to whom he [the commander] must pay proper attention, while remaining personally responsible for all military decisions which may be made."[116] Although the Federal Republic of Germany's draft proposal created an independent obligation on the part of the legal adviser to draw attention to illegality,[117] "[t]he legal adviser has no direct authority to ensure that his advice is followed by the military commander, etc., to whom he is attached."[118]

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[109]Gonsalves, *supra* note **43,** at 197.
[110]L.C. Green, Essays on the Modern Law of **War** 80 (1985).
[111]Moritz, *supra* note **43,** at 80.
[112]*Id.*
[113]*Id.*
[114]*Id.*
[115]*Id.* at 80-81.
[116]Green, *supra* note 110, at 80.
[117]*See supra* note 91 and accompanying text.
[118]Moritz, *supra* note **43,** at 81.

Almost all countries agree on three things: 1) the legal adviser should be relatively independent;[119] 2) the legal adviser should be a staff officer and should advise but not supervise the commander;[120] and 3) the legal adviser must be well-versed in military and legal matters.[121]

Most countries have zealously guarded against interference by the legal adviser and, in doing so, have created a somewhat powerless and impotent adviser. The policy of the state remains the paramount concern, and care is taken to ensure that the legal adviser understands the supremacy of national security concerns. In many ways, the only functional role that has been assigned to the legal adviser is that of an outsider.

> They have been considered as outsiders, isolated from the decision-making process. Their subordination to commanders has paralyzed their action. It was clear at the Diplomatic Conference of 1974 to 1977 that a legal adviser should be attached to the military commands and his task was to assist and not supervise. It implies that once his advice is given, the legal adviser is in no way responsible for the conduct of the commander.[122]

The legal adviser has been forced into the system with only superficial guidance and almost no authority. Complicating the situation even more, the legal adviser is really asked to perform many different functional roles. The following sections of the article will attempt to clarify these different roles.

5. *The Legal Adviser as an Advocate*

a. Definition

An advocate is "[o]ne who pleads the cause of another[,] . . . one who defends, vindicates, or espouses a cause by argument."[123] The advocate is the "hired gun" of the legal profession. An effective ad-

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[119] *See, e.g.*, Skarstedt, *supra* note 43, at 253. See *also* Rogers, *supra* note 43, at 222 (United Kingdom-"the lawyer should be able to give his legal opinion without being unduly influenced by the military commander").

[120] *See, e.g.*, Fleck, *supra* note 43, at 176.

[121] *See, e.g.*, Draper, *supra* note 43, at 13. "He will have to be fully conversant with the language and modes of thinking of military planners and with the latest technological developments in weaponry systems, their use and deployment." *Id.*

[122] Guillamette, *supra* note 19, at 137 (citations omitted).

[123] Webster's New Twentieth Century Dictionary Unabridged 28 (2d ed. 1976).

vocate can always fashion a legal argument to support his or her client's case. The legal adviser who acts as an advocate identifies with and recognizes the ultimate supremacy of only one value and policy—the client's. The advocate neither balances the considerations of the community policy against those of the state nor considers the policy of the law itself. To the advocate, national interests are the only interests worthy of support. In this scenario, the law is not a guide, but a tool.[124]

It is necessary to distinguish between an adviser who acts as an advocate *during* the decisionmaking process and an adviser who assumes an advocate role *after* the decision is made. The latter, although appearing to be nothing more than a "yes man" and a mouthpiece for the decisionmaker, may have provided objective, considered, and independent advice *during* the decisionmaking process. For example, although the Legal Adviser to the State Department may fervently and zealously support the legality of an action taken by the President, that does not necessarily mean that he blindly supported that position during the advisory process. For foreign policy reasons, it is essential that the Legal Adviser support decisions once they are made. Candor and objectivity are crucial during the decisionmaking process, although loyalty becomes the critical factor after the decision is made. This section will focus on the legal adviser who acts as an advocate *during* the decisionmaking process.

b. Example

Some of the most vivid examples of legal advisers acting as advocates can be found in totalitarian regimes such as Nazi Germany. Werner Best, Hitler's Minister of Justice, "considered the law merely as a weapon to be used in the struggle for power, a 'codification of the outcome of a preceding phase of struggle--accession of power on one side, loss of power on the other.' "[125] The law was "an instrument of policy; it was promulgated as needed, and judges obligingly assisted in its reinterpretation."[126]

An advocate uses the fact that an argument can be made to support almost any position. Using the flexibility and subjectivity in the

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[124]Geberding, *International Law and the Cuban Missile Crisis*, in International Law and Political Crisis 209-10 (L. Scheinman & D. Wilkinson eds. 1968). "International law is, in sum, a tool and not a guide to action . . . ." *Id.*

[125]H. Hohne, The Order of the Deaths Head: The Story of Hitler's S.S. (1970) (quoting Junger: Krieg und Krieg 153 (1930)).

[126]L. Kuper, Genocide 121 (1981).

four choice points, the advocate "decides whether a particular norm is the norm or ought to be the relevant norm of international law."[127]

The ability to choose a rule that supports one's position is only one tool available to the advocate. The other three choice points—fact choice, semantic interpretation, and syntactic interpretation[128]—also allow the use of the law. Because numerous balancing tests comprise the law of war, the facts that are balanced will directly affect the legal conclusion.[129] As previously discussed, when asked whether a weapon system causes unnecessary suffering, the legal adviser chooses what facts to consider,[130] what definition of "unnecessary" to adopt,[131] and what analysis of "unnecessary suffering" is appropriate.[132] The advocate picks and chooses among the available options to provide support for the desired result.

The role of the advocate is the role played by most lawyers involved in domestic legal practice in the United States. Zealous representation is not merely permitted in our system, it is required by most ethical codes.[133] This adversarial tradition is founded on the assumption that there will be a neutral judge who hears both arguments and determines the truth.[134] On the battlefield, however, there is no independent arbiter of truth.

The role of the advocate has been discussed in relation to the question of whether the Executive has the authority to violate international law.[135] Assuming that a legal argument can be made for almost any position, Professor Abram Chayes, Felix Frankfurter Professor of Law at Harvard University, opined that the President will never acknowledge violating international law.[136] Rather, Professor Chayes believes that the Executive will always have a memorandum of law from the State Department to support his action.[137] For an action that

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[127] *The Authority of the Executive to Interpret, Articulate or Violate the Norms of International Law*, 80 Am. Soc'y of Int'l L: Proceedings of the 80th Annual Meeting 297, 299 (1986) [hereinafter ASIL Proceedings].

[128] *See* Allen and Caldwell, *supra* note 57 and accompanying text.

[129] *See supra* note 63 and accompanying text.

[130] *Id.*

[131] *See supra* text accompanying note 68.

[132] *See* supra note 65 and accompanying text.

[133] Model Code of Professional Responsibility DR 7-101(A) (1969).

[134] *See* ASIL Proceedings, *supra* note 127, at 303.

[135] *Id.* at 297.

[136] *Id.* at 297-99.

[137] *Id.* at 303. At the American Society of International Law meeting in 1986, Professor Abram Chayes attempted to answer the question of how a Legal Adviser to the State Department decides what the international law is. He, like many others, realized that the difficulty in answering that question is the "advocate-judge" problem. He believes that the executive branch acts as both a judge of the legality of the action and as an advocate for the action.

objectively might be in violation of international law, "the President will get a thin memorandum of law, maybe very thin, advising him that his actions are in conformity with international law."[138]

c. Risks

One of the key risks created by an advocate is the total influence this role has on the decisionmaking process. Choice of rule, choice of facts, semantic interpretation, and syntactic interpretation will all be affected by the advocate's total and exclusive identification with only one policy. Discussing the choice of the relevant norm of international law (rule choice), Professor Maier, Professor of Law at Vanderbilt University, noted that "the problem is that the decision of what the norm is will be arrived at only in the light of an advocate analysis, which may skew the resulting judgment."[139] Allowing an adviser to advocate "would be pernicious, because it means that there are no constraints . . . as a practical matter."[140] Given the amorphous and subjective character of international law, almost every determination can be supported by a rule of international law.[141]

This method of rule choice is an extreme example of policy-controlled decisionmaking. The law becomes a tool for legitimizing decisions. Legal advisers become "useless appendages to the state apparatus except for the justification and concealment of atrocities and to furnish a smoke-screen of legality for gross and persistent illegalities."[142]

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[138] *Id.* at 298.
[139] *Id.* at 299-300.
[140] *Id.* at 304.
[141] Geberding, *supra* note 124, at 209-10.
[142] Draper, *supra* note 43, at 14. It is interesting to consider whether there is a difference between the legal adviser who acts as an advocate and the 16 defendants in "The Justice Case" who were tried for "crimes against humanity through the abuse of the judicial process and the administration of justice." Is there a distinction between a judge who uses the judicial process to legitimize crimes against humanity and a legal adviser who, acting as an advocate, fashions a tenuous argument that a proposed operation is legal under international law?

> What will be the position, therefore, if the legal adviser gives advice which is in accordance with his own country's views of the customary law of war but does not coincide with the view of the enemy in whose hands the commander who has acted in accordance with that advice might find himself? Would the commander be able to plead that he has acted in accordance with that advice, honestly though mistakenly believing it to be correct? Would the legal adviser in question be liable to stand trial in accordance with the *ignorantia juris* maxim or the principle that he who holds himself out as an expert must show the expertise of an expert, bearing in mind that the legally qualified accused in *Sawada* was more severely punished than his non-qualified co-accused?

L.C. Green, *supra* note 110, at 79 (citation omitted).

In the military environment, where loyalty to one's commander is considered the hallmark of professionalism, there is a real danger of losing one's identity as an independent adviser and assuming the goals, objectives, and strategies of the client. When this environment is augmented with a strict hierarchical relationship, the danger becomes more pronounced. A junior captain advising a brigade or division commander who is a seasoned combat veteran is likely to defer to the commander's judgment and obediently defend it.

It is also essential to distinguish between a legal adviser to the President and a legal adviser to the military commander. The first, and most obvious difference, is the authority of their clients. Much has been written about whether the President has the authority to violate international law.[143] Although the answer to that question may not be clear, it is at least arguable that he has such authority. The President undoubtedly has a great deal of discretion in interpreting and deciding issues under international law. The military commander, on the other hand, has much more limited discretion in interpreting international law and has absolutely no authority to violate it.[144] Therefore, while it may be appropriate for an adviser to the President to state that "the law must not be allowed improperly to interfere with legitimate national security measures,"[145] the *military commander* may not subordinate the law to his tactical objective. The Bush administration's battle to ensure that international law is consistent with our national security interests[146] is not authority for military commanders to violate the law of war, nor should it be used as an example for military legal advisers in the field.

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[143] *See* L. Henkin, Foreign Affairs and the Constitution 221-22 (1972); Goldklang, *Back on Board the Paquette Habana: Resolving the Conflict* Between *Statutes and Customary International Law,* 25 Va. J. Int'l L. 143, 145 (1984); Paust, *Is the President Bound by the Supreme Law of the Land?—Foreign Affairs and National Security Reexamined,* 9 Hastings Const. L.Q. 719 (1982).

[144] Department of Defense policy is to ensure that "[t]he law of war and the obligations of the U.S. Government under that law are observed and enforced by the U.S. Armed Forces." DOD Dir. 5100.77. The individual service regulations also require compliance with the law of war. *See, e.g.*, Marine Corps Order 3300.3, Marine Corps Law of War Program (2 Aug. 1984); Air Force Reg. 110-32, Training and Reporting to Insure compliance With the Law of Armed Conflict (2 Aug. 1976); Secretary of the Navy Instruction 3300.1A, Law of Armed Conflict (Law of War) Program to Insure Compliance by the Naval Establishment (2 May 1980).

[145] Sofaer, *supra* note 59, at 90.

[146] "The battle to influence the law and to ensure that it serves the interests of freedom and the civilized world is therefore far from some abstract exercise. It is a struggle to determine whether the rule of law will prevail. It is baseless to contend that the United States no longer supports the rule of law merely because it is engaged in this struggle. We are not struggling against the rule of law, but for a rule of law that reflects our values and methods: the values of custom, tolerance, fairness, and equality; and the methods of reasoned, consistent, and principled analysis." *Id.* at 122.

The question arises whether it is ever appropriate for a military legal adviser to act as an advocate. An advocate does not provide input to the decisionmaking process. Instead, the advocate provides an argument to support the decision. The dangers of such a situation are enhanced when the advocate function is being performed by someone called a legal adviser. There is the appearance of some legal input into the decisionmaking process, although, in fact, none occurs.

The legal adviser may often be asked to play the role of an advocate. Although the legal adviser may be drawn to that function, he or she must resist any such temptation. There is only one place for an advocate in international law—arguing before an international tribunal.

6. The Legal Adviser as *a Judge*

a. Definition

A judge is "[o]ne who has the skill, science, or experience to decide upon the merits, value, or quality of anything."[147] The legal adviser is often asked to provide a legal opinion concerning a proposed action. The legal adviser is looked to as an authority on the law and as someone capable of making a determination or a judgment concerning the law. This role explicitly recognizes the decisionmaking element of international law and places full responsibility for that decision on the legal adviser.

> He is not being asked to argue a case or to design a legal strategy to attain his client's ends; he is called upon for an opinion or ruling on the applicability of law or, more precisely, on the existence of a legal obligation or a legal right. It is moreover expected that he would provide an "objective" decision, that is, one that does not simply reflect his own likes or dislikes but is well founded in "law."[148]

Some scholars, especially British international law experts, believe that this role should be policy-neutral.[149] "Would it not compromise the integrity of his function if he permitted 'policy' to influence his decision as to the existence of a legal obligation or right?"[150] Some

[147]Webster's New Twentieth Century Dictionary Unabridged 989 (2d ed. 1976) (second definition of "Judge").
[148]Schachter, *supra* note 13, at 5, 6.
[149]*See* Higgins, *supra* note 72 and accompanying text.
[150]Schachter, *supra* note 13, at 6-7.

scholars, like McDougal and Lasswell, would argue that this role is not policy-neutral and that a decisionmaker should consider the policy of the law itself and the effect of his or her decision on the legal process.[151]

b. Example

"Legal advice can be provided in various ways, as, for example, by legal opinion on the question of the use of certain weapons, the status of civilians taking part in hostile operations, and immunities of certain bodies or of certain targets in time of war."[152] It may also extend to "clearing" operational directives issued from higher commands.

One of the most clear-cut examples of the legal adviser acting in a quasi-judicial capacity is the legal adviser's review of the legality of weapon systems under Department of Defense Directive 5500.15 and Army Regulation 27-53.[153] This review is conducted by The Judge Advocate General of the service involved in the development of the weapon. It is intended to ensure that "their intended use in armed conflict is consistent with the obligations assumed by the United States under all applicable international laws including treaties to which the United States is a party and customary international law, in particular the laws of war."[154]

This same role is performed by the judge advocate who is presented with a set of facts and is asked, "Is it legal for me to take the following action?" Recall the example problem taken from the Army's Law of War Training Circular.[155] A legal adviser asked to decide if the bombardment of the town is permissible is clearly acting in a quasi-judicial capacity.

c. Risks

Because of the nature of law of war determinations, the legal adviser must integrate military considerations into the decisionmaking process.[156] This inevitably and unavoidably requires that the legal

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[151] *See* McDougal, Lasswell & Reisman, *Configurative Jurisprudence*, *supra* note 2, at 199.
[152] Shefi, *supm* note 43, at 125.
[153] *See supra* note 38 and accompanying text.
[154] DOD Dir. 5500.15.
[155] *See supra* note 55 and accompanying text.
[156] *See supra* note 50 and accompanying text.

adviser have a background and expertise in military strategy and tactics. A new judge advocate, thoroughly schooled in international law, may be capable of advising on what the law is, but would be totally incapable of applying that law and rendering a decision of legality. For this reason, legal advisers must receive comprehensive training in the military arts.

As the legal adviser becomes increasingly integrated into the military planning process, there is a risk that the legal adviser will be asked to make decisions more properly made by the commander. For example, consider the hypothetical law of war problem again. It is relatively easy to identify that the legal adviser who is asked about the legality of the proposed bombardment is serving in a quasi-judicial capacity. The more important question, however, is whether the legal adviser should be the one making this determination.

The rule of necessity is one of the most subjective rules of the law of war. It requires the decisionmaker to determine if the means chosen for achieving a particular military objective involves the minimum possible destruction of the civilian population and property.[157] The legal adviser's proper role in this situation would be to advise the commander of the existence of the rule of necessity and of its implications. The legal adviser need not be the one (and indeed *should* not be the one) to perform the balancing. Given the ultimate responsibility of the commander under the law of war,[158] a decision such as this should be the commander's, not the legal adviser's. Whenever possible, the legal adviser should explain the applicable rule to the commander and allow the commander to make the decision. The commander will then have the benefit of legal advice, but will be able to rely on his own expertise and judgment in military matters.

The concept of reprisals provides another example of the need to keep the decision with the responsible individual. A reprisal is an otherwise illegal act done in response to a prior illegal act by the enemy.[159] The purpose of a reprisal is to enforce compliance with the law of war.[160] A reprisal is authorized under the law of war (subject

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[157]TC 27-10-1, at **44.**

[158]FM 27-10, para. 501. In fact. commanders may be held criminally liable for the war crimes committed by subordinates. This may occur in either of two ways: 1) if the acts were committed in pursuance of the commander's order; or 2) if the commander knew or should have known that the act was about to be committed and took no steps to ensure compliance with the laws of war.

[159]FM 27-10, para. 497.

[160]FM 27-10, para. 497*a*.

to certain limitations)[161] under the following conditions: 1)it must be timely; 2) it must be responsive to the enemy's act; 3) there must be an exhaustion of available alternative forms of redress; and 4)the response must be proportional.[162]

Of critical importance is the fact that the *only* individual authorized to order a reprisal is "the highest accessible military authority"[163]—the military commander. The commander is totally responsible for the legality of the decision, and an incorrect decision may subject the commander to criminal liability for violating the law of war.[164]

The proper role of the legal adviser is to advise the commander of the requirements and considerations required by the law of war, but it is not to assume the function of the decisionmaker. Because commanders may view this as a "legal" question, there may be a tendency for the legal adviser and the commander to shift roles. This must be resisted.[165]

7. *The Legal Adviser as a Counselor*

a. Definition

The legal adviser acting as a counselor is a problem-solver, someone who advises "on ways of using law and on the risks involved in pro-

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[161]For instance, a reprisal may not be taken against prisoners of war. FM 27-10, para. 497*c*.

[162]FM 27-10, para. 497; LOW Deskbook, at 3-8; M. McDougal & F. Feliciano, Law and Minimum World Public Order 686-88 (1961).

[163]FM 27-10, para. 497*d*.

[164]FM 27-10, para. 497*d*.

[165]The commander would be wise to maintain the decisionmaking authority, but to rely on advice of his legal adviser. Although mistake of law is not a universally accepted defense to war crimes, there is a persuasive argument that such a defense is available if the commander relies on incorrect legal advice.

> Suppose that a soldier suspects that a certain act which he intends to carry out is unlawful, and proceeding with caution, consults someone who is not his commander but is considered an authority on international law . . . and gets an erroneous opinion to the effect that the act, subsequently determined a war crime, is perfectly legal . . . .
>
> When the husk is removed, we get to the kernel of the principle, namely, that mistake of law is a valid defence under international law.

Y. Dinstein, The Defence of "Obedience to Superior Orders" in International Law 34 (1965). Therefore, the prudent commander may well want to seek the advice of his legal adviser. Of course, if the commander were to disregard this advice that correctly stated the law, he would have absolutely no basis for a defense. Green, *supra* note 110, at 78-79.

posed or alternative courses of action."[166] The counselor is a facilitator who enables the commander to accomplish his or her goals within the law. Many of the law of war materials in the United States create the counselor role for the legal adviser; they are identifiable by their emphasis on what the law of war allows the commander to do, rather than on what the law of war prohibits. For example, a Memorandum of the Joint Chiefs of Staff directs the legal adviser to "address not only legal restraints upon operations but also legal rights to employ force."[167] One former Judge Advocate General of the Army quoted Lord Denning and noted that "[t]he function of lawyers is to find a solution to every difficulty presented to them, whereas the function of professors is to find a difficulty with every solution. The Law of War adviser, if he is to be effective, must remember that he is a lawyer."[168]

b. Example

The legal adviser who is asked how to prevent resupply of the town within the limitations of the law of war is acting as a counselor. A counselor explains to the commander how to accomplish the desired military objective within the law. It is a matter of timing. Providing legal input during the development of the operation plan allows the legal adviser to act as a counselor. If the legal adviser only has an opportunity to *review* the plan, then the legal adviser can only act in a quasi-judicial capacity and may be viewed as an obstructionist.

c. Risks

The ability of a legal adviser to perform in the role of a counselor presupposes two things: 1)that the legal adviser is aware of the goals of the commander/client; and 2) that the legal adviser will not be making the final decision, but will be proposing alternatives to the commander. Although the counselor is a perfectly appropriate role for a corporate attorney advising the CEO on the best way to take over another company, in the law of war context there are some risks.

As discussed previously, most of the laws of war are an attempt to balance military requirements and humanitarian concerns.[169] Therefore, a decisionmaker will weigh the two competing interests

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[166]Schachter, *supra* note 13, at 6.
[167]MJCS 59-83.
[168]Persons, *supra* note 46, at 4.
[169]*See supra* text accompanying note 50.

and determine which one should take precedence. The danger is that humanitarian concerns will be "diluted" because they are balanced against military necessity twice, once by the legal adviser and once by the commander.

It is true that a counselor must understand the goals of his or her client. That is not to say, however, that the counselor should identify exclusively with the client and ignore other policy considerations. The policy of the community is still an appropriate consideration for the counselor. Although the legal adviser's input "will be considered along with that of the operations, intelligence and logistics staff officers,"[170] all the other staff officers will be focusing entirely on one policy—the military requirements of the mission. Only the legal adviser brings into the decision process a special awareness of the community policies. The counselor must always be aware of this responsibility.

One final problem with the counselor role is that it assumes that there will always be legally permissible ways to accomplish the commanders goals. By setting up the issue as "Find me a way to do X," the commander avoids the possible ''obstructionist" legal adviser who, if asked, "Is this method legal?" would respond negatively. When called upon to "solve problems," the legal adviser must not lose sight of the fact that there may not always be a legal way to accomplish a set objective. A counselor who stretches to find a tenuous answer may actually assume the role of an advocate.

8. The Legal Adviser as the "Conscience"

a. Definition

The "conscience" advises on the law of war with an emphasis on the policy of the world community.[171] The conscience is the humanitarian viewpoint and is diametrically opposed to the legal adviser who believes in the subservience of humanitarian considerations for national security reasons.[172] A legal adviser acting in this capacity makes a conscious effort not to balance humanitarian requirements against military necessity. In theory, the conscience does not even consider military requirements.

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[170] Persons, *supra* note 46, at 4.
[171] *See* Lauterpacht, *supra* note 9.
[172] *See* text accompanying note 145.

Given the role of the commander as the person ultimately responsible for his command and the mission, the military considerations of a proposed mission will be foremost in his mind. All the members of the commander's staff are tasked to support that mission to the best of their abilities. The supply officer may advise the commander on the logistical considerations of a mission, but his or her goal will always be the same as the commander's—the accomplishment of the mission. As previously noted, the law of war questions and issues that may arise will require the balancing of military needs against humanitarian concerns.

Because all the other staff members are advisers on the military needs, the conscience argues that the most useful role for the legal adviser is to present the humanitarian viewpoint, before it is balanced, diluted, or otherwise distorted. The conscience believes that the presentation of alternative goals does not necessarily imply that the divergent viewpoint will somehow become obstructionist.

The conscience disagrees with commentators who caution that "the law of war adviser must be constantly aware of the need to balance the concepts of military necessity and the infliction of suffering and casualties, or 'humanitarian considerations,' and to beware the pitfall of translating imprecise principles into strict rules of law."[173] The conscience believes that this advice is more appropriately directed at the commander, not at the legal adviser.

b. Example

The Conscience is the legal adviser who advises that bombing a village would kill unarmed civilians and, although it is technically "necessary and proportional," it is therefore wrong.

c. Risks

The obvious risk is that the conscience will be viewed as an obstructionist and will be totally ignored by the commander. A legal adviser who presents totally idealistic and unrealistic advice will not be an effective member of the commander's staff. The legal adviser may appear to be assuming the role of an ombudsman or a policeman of morals and ethics. As previously noted,[174] the critical question is usually not whether the legal adviser's advice will be heeded, but

[173] Parks, *supra* note 31, at 386
[174] *See supra* note 103.

whether it will even be considered. The conscience runs the risk of being totally disregarded.

This does not necessarily imply that there is no place for the conscience. In fact, this role can be extremely useful. It does not require the legal adviser to present totally idealistic and unrealistic positions. Instead, when tough value choices become necessary, the legal adviser can consider the humanitarian viewpoint as his or her highest priority and clearly and explicitly state that fact. By explicitly stating this choice and its ramifications, the legal adviser may bring a new and forgotten perspective to the decisionmaking process. This role is especially useful in peacetime planning, where detached and time-consuming reflection is acceptable. It is also useful in training. If soldiers and commanders are conditioned to consider the humanitarian viewpoint, it may become second nature to them in combat. It must be sparingly used, however, and care must be taken to avoid appearing as an unrealistic and out-of-touch obstructionist.

IV. CONCLUSION

The legal adviser occupies a unique position within international law. Asked to perform a multitude of functions, the legal adviser presents "advice" in various ways. The form and content of the legal adviser's "advice" depends on his or her functional role, values, and identity.

Policy considerations are an integral element of legal decisionmaking. These considerations are dependent upon and reflective of the legal adviser's "self-orientation." Through examining these factors, the legal adviser is better able to clarify those factors that enter into the decisionmaking and analysis process.

For the other participants in the system, this explicitness of value choice allows a greater appreciation and understanding of the legal adviser's analysis. It allows those participants insight into the biases, prejudices, and value structure of the legal adviser. For those occasions when the legal adviser's advice will be a basis for the commander's decision, understanding the legal adviser's values, identity, and function will allow the commander to properly weigh and evaluate the advice he or she is receiving.

Examining these factors also helps clarify certain requirements in the process. The legal adviser must be technically proficient and legally competent, regardless of which role he or she is performing.

A legal adviser acting as a counselor or as a judge must have a thorough knowledge of military strategy and tactics. A legal adviser acting as a judge or as the "conscience" must have a great deal of independence. These three factors—legal competence, knowledge of military arts, and independence—must form the basis of all plans for the development and use of legal advisers.

In addition to clarifying the qualities of an effective legal adviser, this analysis also points out the risks inherent in the legal adviser's job. One of the most prominent risks is that the legal adviser will facilitate the use of the law as a tool, rather than as a set of guidelines and controls. This risk is most prevalent when the legal adviser is an advocate. The other major risk the legal adviser faces is when he or she assumes the opposite role. When the legal adviser perceives himself or herself as a legal commissar or ombudsman, the legal adviser runs the risk of being ignored. The legal adviser must fight the tendency to assume either role, unless the particular situation mandates such identification with the extreme ends of the spectrum.

The most important lesson to be learned, however, is that, whatever value choices, identity, and functional role the legal adviser chooses, the legal adviser will better serve the client if he or she is explicit about these decisions. Only if such choices are apparent can the participants in the process properly weigh and evaluate the advice given.

DEVELOPING A SECURITY STRATEGY FOR INDOCHINA

by Major Jeffrey F. Addicott*

I. INTRODUCTION

Spurred on by the fluidity of current events, America stands at a watershed in developing a security strategy for Indochina. As "democracy" movements take root in Eastern Europe and promises of Soviet troop restructuring capture world headlines, the United States is rapidly assessing the impact that substantial American force reductions will have on global security responsibilities? While most of the focus seems to be in the NATO arena, serious thought must be given to the equally complex problem of U.S. military retrenchments in the Pacific Rim. In this context, one of the most troubling issues is the impact of significant military reductions on those developing nations in the Asian Basin that currently have no garrison of U.S. troops, but are nonetheless friendly to and necessary for American interests. Indeed, almost all of friendly Indochina is affected, with Thailand, Malaysia, and Indonesia being of particular significance. Accordingly, the time has come for policymakers to begin to formulate a post-reduction security strategy for Indochina.

Regrettably, the United States has yet to comprehend the full implications of Pacific Rim troop reductions; analysts seem to focus only on the viability of the major garrisoned nations in Asia.[2] With their eyes on NATO, they plan no further than to concede that it is only a question of when, not whether, such reductions in America's Pacific forces will take place.[3] With respect to Indochina, this European-

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*Address by Secretary of State James Baker, *U.S. Foreign Policy Priorities and FY 1991 Budget Request* (Washington, Feb. 1, 1990), *reprinted in* U.S. Dep't of State, Current Policy, No. 1245 (Feb. 1990).

[2]McNeil and Sato, The Future of U.S.-Japan Relations, A Conference Report, 1989 Council on Foreign Relations 16 [hereinafter *Maui*].

30n the other hand, numerous leading international law experts are not in favor of unilateral U.S. reductions. Professor John Norton Moore, a former Counsel on International Law to the Department of State, stresses the importance of deterrence and would support reductions only if asserted with a real decrease in threat. Interview with Professor John Norton Moore, Walter L. Brown Professor of Law and Director of the Graduate Program, University of Virginia School of Law, in Charlottesville, Virginia, April 25, 1990.

style appraisal is insufficient for two reasons. First, the friendly countries of Southeast Asia will still require some form of a military umbrella to deter external aggression from neighboring totalitarian states. "In Asia either there has been no movement toward political openness (Mongolia and North Korea), or there has been some progress followed by a retreat (China and Vietnam)."[4] Second, unlike America's industrialized allies, many of these developing countries are embroiled in all of the internal problems associated with low intensity conflict (LIC)[5] environments.

While South Korea and Japan may be capable of maintaining an adequate self-defense posture once reductions are made (as is expected from our NATO partners), Southeast Asia will not. Thus, in connection with Indochina, there looms a dilemma that mandates that the United States accomplish something at which it has never been very successful—constructing a comprehensive security strategy capable of protecting the stability of developing countries, many in potential or actual LIC environments, without the use of a large standing armed force. In the absence of a security strategy capable of meeting this requirement, it is inevitable that there will be a significant deterioration in American strategic interests in Southeast Asia. If these countries "do not believe that we intend to remain fully engaged, it will seriously hamper our efforts in other areas such as . . . the settlement of regional conflicts."[6]

Concentrating on security assistance, combined training military exercises, and the peacetime use of special forces (SF), this article will survey these "force multipliers" as essential elements of a coordinated U.S. approach towards Southeast Asia.

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[4]Scalapino, *Asia and the United States: The Challenges Ahead*, 69 Foreign Affairs 89 (1990).

[5]The term "low intensity conflict" is defined as

> Political-military confrontation between contending states or groups below conventional war and above the routine, peaceful competition among states. It frequently involves protracted struggles of competing principles and ideologies. Low intensity conflict ranges from subversion to the use of armed force. It is waged by a combination of means, employing political, economic, informational, and military instruments. Low intensity conflicts are often localized, generally in the Third World, but contain certain regional and global security implications.

Dep't of Army & Dep't of Air Force, Field Manual 100-20, Military Operations in Low Intensity Conflict, December 1989, at 14 [hereinafter FM 100-20].

[6]Clark, *FY 1990 Foreign Assistance Request for East Asia and the Pacific*, DISAM Journal, Summer 1989, at 49.

11. WITHDRAWAL OF AMERICAN FORCES

Since President Jimmy Carter's 1978 public announcement that he was considering major American troop reductions in the Republic of Korea, planners in the Pentagon and Congress alike have grappled with the consequences such cuts would have on U.S. military-political interests in the Asian Basin.' While the Reagan era buildup of military strength dispelled those concerns for a time,[8] it is now generally anticipated that not only will significant reductions in U.S. military personnel and equipment take place in the Republic of Korea within the next decade, but also that deep cuts may well occur throughout much of the Pacific Rim area.[9] Moreover, this is not due solely to the current upheavals in the Communist Bloc or other Soviet peace initiatives.[10] Prior to the apparent fundamental changes in the Soviet Union, leaders such as General Louis C. Menetrey, the Commander of U.S. forces in Korea, predicted that major cuts in Korean-based forces would take place before the turn of the century!'

Confronted with fiscal concerns at home, America seems more open than ever to disengagement of its overseas forces. As one expert at the Cato Institute recently noted, "it is hard to see how the United States can remain competitive when it affords so many allies an artificial advantage by allowing them to concentrate their resources on civilian investment and to commit the bulk of their government research and development monies to nonmilitary purposes."[12]

Finally, much of the impetus for such reductions comes from the

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The United States maintains approximately 43,000 troops in South Korea with a current yearly cost of about $2.6 billion. In 1978 President Carter indicated that he intended to cut that number to 14,000, but pressure from both Congress and the Pentagon defeated the initiative. In September 1989 a proposal to cut troop strengths in Korea was defeated in the Senate by a 65 to 34 vote. Mann, ***News Analysis; Stance Shifts on U S Forces in S. Korea,*** L.A. Times, Oct. 19, 1989, at A18, col. 1. Cutbacks for 1990, however, will see the withdrawal of at least 5,000 U.S. troops. Sanger, ***Seoul Officials See Accord on U S Troop Cut,*** **N.Y.** Times, Feb. 1, 1990, at A15, col. 1.

[8] ***See generally*** Arms Control Association, Arms Control and National Security 33-37 (1989).

[9] The Joint Chiefs of Staff are currently studying U.S. commitments in the Pacific Rim. ***US troops could leave South Korea in 10 years,*** 12 Jane's Defense Weekly 328 (1989) [hereinafter US troops]. ***See also*** Bandow, ***Leaving Korea,*** Foreign Policy, Winter 1989-90.

[10] ***See*** Rogers, ***Glasnost and Perestroika: An Evaluation of the Gorbachev Revolution and Its Opportunities for the West,*** 16 Denver J. of Int'l Law & Pol'y 209, 209-46 (1988).

[11] US troops, ***supra*** note 9, at 328.

[12] Bandow, ***supra*** note 9, at 90.

Asians themselves, and justifiably so.[13] As the Asian Tigers[14] flex their political and economic might, the message that was old when Rome was a Republic is heard once again—no nation desires to have foreign troops stationed indefinitely on its territory. The questionable tenure of American bases in the Philippines[15] and the recurring local protests over U.S. facilities in Korea and Okinawa certainly reflect this attitude. For the most part, however, these calls for military autonomy are not so much a rejection of the United States as an important ally as they are a reflection of a growing sense of independence and nationalism made possible by unprecedented economic expansion.[16] Thriving for decades under the American security umbrella, the garrisoned nations have grown into significant world powers in their own right. In general, they have been grateful.

When reductions do take place, Americans will not be departing as hated occupying forces. One can be assured that the host countries will retain a strong desire for continued American military contact and support in some fashion. In this respect, the United States has established a dialogue with its allies that will survive troop withdrawals. Pullouts will not be made in the middle of the night.

In the most simplistic terms, a combination of changing perceptions about the Soviet threat and the growing economic and military strength of the nations where American forces are currently stationed make force and budget reductions extremely attractive to both the public and Congress. However disastrous this prospect may seem to some, most of the Asian nations that currently garrison U.S. troops will probably be able to develop a more than adequate self-defense posture, given sufficient lead time.

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[13] Richburg, *Southeast Asia Debates U.S. Security Umbrella*, Washington Post, Aug. 31, 1989, at A18, col. 1. *See also* Bandow, *supra* note 9.

[14] The four Asian Tigers are South Korea, Taiwan, Hong Kong, and Singapore. Each of these nations has achieved a real growth rate in the 8-12 percent range by embracing capitalist economic theory. Thailand and the Philippines, presently enjoying significant, but lesser economic growth, may soon become the fifth and sixth nations to join the Asian Tigers. Association of the United States Army, *Change and Challenge · The Search for Peace in 1988: A Global Assessment* 34 (1989) [hereinafter *Global Assessment]*.

[15] Leases on Subic Bay Naval Station and Clark Air Base expire in 1991. Negotiations for an extension "are expected to be more acrimonious than in the past because of a growing sense of nationalism among many Filipinos who see the bases as an affront to the country's sovereignty." *Soviet Pullout Could Spark Debate in U.S. · 2 American Bases in Philippines at Issue*, Washington Post, Jan. 20, 1990, at A16, col. 1.

[16] Address by Robert M. Kimmitt, Undersecretary for Political Affairs, *The US. and Japan: Defining Our Global Partnership, Foreign Correspondents Club of Japan* (Tokyo, Oct. 9. 1989), *reprinted in* U.S. Dep't of State, Current Policy, No. 1221 (Nov. 1989).

111. STABILITY FOR THE NON-GARRISONED NATIONS

The most difficult issue will revolve around providing a viable methodology for protecting the stability and security of the less powerful non-garrisoned states in the region. Of critical importance are the remaining pro-western powers in Southeast Asia. Situated at or near important sea lanes that link the Pacific to Africa and Europe, the most geostrategic countries are Thailand, Malaysia, Indonesia, Singapore, and Brunei.[17] With the industrial revolution rapidly shifting into the region, it is almost axiomatic that all of these nations are vital to the economic and political interests of the United States, and yet no U.S. military bases rest on their soil.[18]

Having witnessed closely the practical effects of the "domino principle," many of these developing countries, to put it mildly, are extremely apprehensive about American withdrawals from the soil of their neighbors. A recent conference in Maui, sponsored by the Council on Foreign Relations and the Asia Pacific Association, summed up the concern: "[A] withdrawal of the United States from Pacific concerns would be intensely destabilizing. There are certain roles, particularly the buffering role of U.S. military forces . . . , which only the United States can undertake in a way that is perceived as non-threatening by Asian nations."[19] All of the friendly non-garrisoned states in Indochina share "an interest in maintaining a robust American presence in Asia in order to balance other 'close in' powers which they fear most."[20]

Currently, the sole collective bond in Indochina is membership in a loosely organized six nation economic alliance called the Association of Southeast Nations (ASEAN).[21] To date, Indochina has found protection and comfort in the shadow of the large American presence cast from other parts of the Pacific.

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[17]The governments of Thailand and Malaysia are constitutional monarchies. Indonesia and Singapore are republics, and Brunei is a constitutional sultanate. Only Thailand has any form of security understandings with the United States, dating from the Manila Pact of 1952 and the Rusk-Thanat communique of 1962. *See Global Assessment*, *supra* note 14, at 40.

[18]Clark, *supra* note 6, at 47-48.

[19]*Maui*, *supra* note 2, at 14.

[20]Zagoria, ***Soviet Policy in East Asia: A New Beginning?,*** 68 Foreign Affairs 121 (1988-89).

[21]The Association of Southeast Asian Nations was created in 1967 with the signing of the Bangkok Declaration. The original five members are Indonesia, Malaysia, the Philippines, Singapore, and Thailand. Brunei Darussalam became the sixth member in 1984. Although a small secretariat is located in Jakarta, ASEAN is an association with limited authority. U.S. Dep't of State, ***Gist,*** June 1988 [hereinafter *ASEAN*].

A. EXTERNAL THREATS

Faced with the Soviet Union's military complex at Cam Ranh Bay,[22] surrounding hostile totalitarian regimes prone to military adventurism,[23] and the volatile situations in Cambodia[24] and Burma,[25] these handful of fledgling powers essentially constitute the forward defense of the United States for Southeast Asia. Since the withdrawal of U.S. forces from Vietnam in 1975, they have played a vital role in the American policy of containing the Soviet Union and its clients. In his 1989 trip to Singapore, Vice President Quayle reaffirmed the necessity of checking Soviet influence from the region, indicating that the "containment of Soviet power remains a cornerstone of American foreign policy."[26] In addition, the Leninist states throughout Asia show no signs of moving towards democratic pluralism; they too must be checked. "The strong prospect for the intermediate future is that the Asian Leninist states, rather than moving toward parliamentary government, will evolve toward an authoritarian-pluralist system."[27]

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[22]Cam Ranh Bay is located in Vietnam. It is the largest permanent Soviet naval base outside the Soviet Union and is considered a threat to regional stability. *See* Dep't of Defense, Soviet Military Power: An Assessment of the Threat (1988).

[23]With the fourth largest military in the world, the central concern has always been Vietnam. Al Bernstein, former chairman of the strategy department at the Naval War College in Newport, Rhode Island, has also pointed out that a continuing military presence in Southeast Asia will be necessary to deter military adventurism by other local nations. Ingwerson, *US Grapples With How to Respond to New World Scene*, Christian Science Monitor, Dec. 6, 1989, at 1, col. 3. Professor Bernstein is currently the Assistant Undersecretary for Policies and Planning in the State Department. Telephone interview with Professor Bernstein, Office of the State Department (Jan. 8, 1989). *See also* Bernstein, *Mrs. Aquino and the Joe Kapp Syndrome*, National Interest, Winter 1989-90, at 79. *But see* Vause, *Doing Business With Vietnam · Prospects and Concerns for the 1990s*, 4 Florida Int'l L.J. 231 (1989).

[24]Cambodia, also known as Kampuchea, is still reeling after a decade of inconclusive warfare. Although Vietnam allegedly withdrew most of its occupation forces in late 1989, Communist military and economic support continues to Hanoi's surrogate regime in Phnom Penh led by Hun Sen and Heng Samrin. Pol Pot's Khmer Rouge and other competing factions are attempting to gain control of the country; attempts to form a coalition government have been unsuccessful. The United States supports those forces loyal to Prince Sihanouk. Address by Richard H. Solomon, Assistant Secretary for East Asian and Pacific Affairs, *Cambodia and Vietnam: Trapped in an Eddy of History?*, International Symposium on the Future of U.S.-Indochina Relations (Sept. 8, 1989), *reprinted in* U.S. Dep't of State, Current Policy, No. 1206 (Oct. 1989).

[25]The nation has a Marxist-Leninist heritage. The present military junta led by General Saw Maung took power in a bloody coup in September 1988. Although Saw Maung ended the 26 year dictatorship of Ne Win and changed the name of the country to Mayanmar, the form of government is still totalitarian. Popular elections in May 1990 have not translated into a shift of power.

[26]Address by Vice President Quayle, *American Leadership in the Pacific*, American Business Council (Singapore, May 3, 1989), *reprinted in* Department of State Bulletin, August 1989, at 52.

[27]Scalapino, *supra* note 4, at 90.

Indeed, the Soviets have yet to undertake any meaningful force reductions in the Pacific Rim;[28] nor have they reduced their military aid and support to regimes hostile to American interests.[29] Additionally, other dark clouds on the horizon add credence to the proposition that these nations are vital to American strategic interests. With the coming incorporation of Hong Kong, and perhaps even Macao and Taiwan, into Communist China, the U.S. can ill afford to jeopardize its ties to these remaining pivotal states.[30] "Glasnost" may resound for now on the Berlin Wall, but the voices are silent in Tiananmen Square. It is only through the continued autonomy of key states such as Thailand that the West can be assured that the balance of power will be maintained in Southeast Asia.

B. INTERNAL THREATS

In assessing the external threats to the sovereignty and security of these developing countries, planners must also understand that many of these nations are beset with all of the equally critical internal problems associated with LIC environments. Thus, there remains a continued need not only to assist the incumbent governments in combating overt demonstrations of LIC such as terrorism, but also to help neutralize the various economic, social, and political sources that often promote conflict. The dynamic factors associated with LIC include "discontent, poverty, violence, and instability . . . . [T]hese interact to create an environment conducive to LIC."[31]

Even to the optimist, this is not an easy task; critical domestic troubles are often massive in scope and have plagued many of these countries almost from their entrance into the modern era. It is no

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[28]Gorbachev's 1988 offer to abandon Cam Ranh Bay if the U.S. pulled out of the Philippines was rejected. In January 1990 the Soviets claimed to have unilaterally removed all MIG-23 fighter aircraft and some TU-16 bombers from Cam Ranh Bay. This posturing is seen by some as increasing pressure on the U.S. to reduce its military forces in the region. *Soviets Said to Withdraw Fighters and Bombers From Vietnam Base*, Washington Post, Jan. 18, 1990, at A6, col. 1.

[29]Warner, *No Change in Soviet Military Buildup*, Pacific Defense Reporter, March 1989, at 40. *See also* Edmundson, *The Carnival in Berlin*, Officer Review, January 1990.

[30]*See generally* Mushkat, *The International Legal Status of Hong Kong Under Post-Transitional Rule*, 10 Hous. J. Int'l L. 1 (1987). Efforts to incorporate Taiwan into Communist China are also being proposed. In June 1989 representatives of the Republic of China on Taiwan and the People's Republic of China met in Tokyo to discuss the "political, economic, social, and cultural issues that divide them." At the conclusion of the conference, the participants agreed that there was "only one China and anticipate[d] its ultimate reunification." International Security Council, *Symposium on Peace and Security in the Taiwan Straight* 17 (1989).

[31]FM 100-20, para. 1-3.

secret, for example, that Thailand, Indonesia, and Malaysia are faced with a collage of serious domestic challenges that reflect both the causes and manifestations of LIC, including refugees, drug cartels, ethnic strife, bandits, terrorists, and even low level insurgencies. Left unchecked, these internal weaknesses provide fertile ground for unfriendly elements in their quest to endanger, destabilize, or even control the incumbent governments.

IV. FORMULATING A POLICY APPROACH FOR U.S. SUPPORT OF INDOCHINA

If these non-garrisoned countries are strategically important, *a fortiori*, provisions must be taken to guarantee that they are protected from the inevitable negative repercussions caused by force retrenchments in the Asian Basin. Even from a strict Machiavellian viewpoint, ignoring the continuing benefits of freedom and prosperity to Indochina, the United States must find a methodology to maintain at least a status quo. Until these nations are able to defend themselves, either individually or through the formation of an effective collective security confederation, strategic needs have not grown smaller. Even to those who predict a reduced single threat from the Soviets, the U.S. must still project itself as a dynamic balancer in the regional strifes.

If external threats attract the greatest attention once the U.S. begins a standing down of forces, establishing a strategy that can simultaneously address LIC issues will offer the greatest overall challenge. Although some form of military support will most certainly be required to deter outside aggression, bullets will not solve domestic troubles. What, then, should be the central fulcrum of the U.S. policy for protecting these non-garrisoned countries?

A. *JAPAN'S ROLE*

The first issue to address in the search for an Indochina security formula is the frequently raised notion that Japan can offer the necessary protection to Southeast Asia by increasing it's military prowess, that America need not take the lead. This is not a popular idea, either in the region or in Japan itself.[32] Given its peace constitution, Japan has shown no predilection towards accepting this

[32]Sneider, *Japan Shuns Leading World Role*, Christian Science Monitor, Nov. 27, 1989. at 11, col. 1. *See also* Japan Daily News, Feb. 22, 1990, at 1. Japanese Foreign Minister Taro Nakayama characterized the U.S. military role in the Asian-Pacific region as "unchangeable and essential."

function. The chief proponents for such a role are in the United States. On the other hand, Indochina emphatically rejects a Japanese-centered security umbrella. Probably speaking in general for the rest of the Asian community, a South Korean official recently noted that "you can ask them [Japan] to share the burden, but the strategic and military role played by the U.S. in this region should remain."[33] Presumably, part of the explanation for Japan's timidity and Indochina's recalcitrance rests in their respective World War II experiences.

There is also the matter of Chinese and Soviet responses to the efficacy of Japanese militarization. The Maui conference revealed this concern:

> Were Japan to go "autonomous," alarms would go off all over Asia, prompting China, in particular, to make dispositions to meet a potential threat from Japan and spurring a Soviet response as well. The region would pass from the stability supported by the Japan-US. alliance to one of maneuver designed to check what would be called everywhere, regardless of Japan's intent, resurgent militarism.[34]

It must be emphasized that Japan is a strong ally of the United States and does not seek to challenge America's leadership role in Indochina, only to support that function.[35] For the immediate future, Japan's influence is likely to remain an economic one.[36] While the U.S. will undoubtedly receive Japanese help in sharing and supporting a Southeast Asian strategy, the nucleus and pivot of a workable security model will have to be supplied by the United States. In order to retain control of operations, however, the U.S. will still have to shoulder the majority of the costs.[37]

B. THE AMERICAN SOLDIER

To assert that those opposed to American interests will view the U.S. military reductions in Asia as a sign of weakened American resolve would merely be to state the obvious. The real issue is one of determining how antagonists will react to the proposed replace-

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[33] *Id.*

[34] *Maui, supra* **note 2, at 16.**

[35] *See generally* **Zagoria,** *Soviet Policy in East Asia: A New Beginning?,* 68 **Foreign Affairs 120** (1988-89).

[36] Kimmitt, *supra* **note 16.**

[37] Remarks of **Vice Admiral Henry Mauz, Jr., Washington** Post, **Feb.** 8, 1990, **at A32, col.** 1.

ment strategy. Thus, the quintessential criteria for a successful Indochina policy is that it must convince hostile forces that American support is genuine and continuous; the new strategy must go beyond merely beefing up Prepositioned War Reserve Stocks (PWRS) in Indochina.

At the same time, however, the policy must not violate the range of reasonable responses. The security model must abide by what Richard Falk describes as a part of the international "rules of the game."[38] Rules of the game stem from standards of expected behavior, not necessarily of legal origins, a departure from which might cause a disproportionate escalation in tensions or an unwanted retaliation from one's adversaries. For instance, if the U.S. proposed to solve the Indochina support question by introducing nuclear weapons into the region, this would violate the rules of the game to such a degree as to prompt "adversely affected actors . . . to make or threaten a credible response."[39] Indeed, if the U.S. model is deemed too drastic, hostile forces might attempt to assert claims of "anticipatory self-defense" in initiating uses of force. Thus, the model must fall within the norm of foreseeable expectations; the actions must clearly represent a purely defensive posture for Indochina.

Paradoxically, because the adversaries of Western values will appreciate nothing less as they witness this general reduction in the garrisoned nations, the *modus vivendi* of any Indochina model must directly emphasize the use of American soldiers performing high visibility activities on the soil of host nations. If only to communicate American steadfastness, the requirement to include U.S. soldiers is absolutely fundamental. Any policy that does not incorporate the use of American troops is like the squeamish man's response to the blood drive: "I'll give money, but not my blood." Without it, the signal is certain—commitment is limited; the U.S. has abandoned Southeast Asia.

The caveat, of course, is that great care must be taken in how troops will be employed, and in what numbers. This means not only abiding by the rules of the game, but also that appropriate sensitivity must be afforded to the needs of both the sending and receiving states. The days when the United States could unilaterally "invite" itself into a third state are past. Post U.N. Charter developments in international law, both customary and codified, make such an ethnocen-

[38] R. Falk, F. Kratochwil, and S. Mendlovitz, International Law: A Contemporary Perspective 134 (1985).
[39] *Id.*

tricity totally untenable. ''Theprinciple of non-intervention in internal affairs is, in effect, an attempt to limit outside neo-colonial attempts to influence events in other countries for the interests of the intervening country.''[40]

1. Indochina'sPerspective

Requiring a tremendous amount of diplomatic suave and pliant, the U.S. will have to advance a strategy for the use of its personnel that is acceptable to a majority of the friendly Southeast Asian countries. To focus solely on one or two of these nations could very well be detrimental to U.S. presence in the region as a whole. Malaysia and Indonesia, for example, reacted with open hostility to Singapore's 1989 offer to provide the U.S. with permanent military facilities as replacements for the bases in the Republic of the Philippines.[41] While both Malaysia and Indonesia are considered friendly, and eagerly participate in various bilateral programs, when it comes to discussing U.S. military involvement in the region each has unique political and social propensities that cannot be ignored.

A general assessment of Indochina'sattitude regarding the employment of American forces reveals at least three fundamental considerations. Taken together, these factors make it highly doubtful that the larger countries of Thailand, Malaysia, or Indonesia would easily agree to a plan that called for the permanent basing of anything but the smallest number of American forces. First and most prevalent, no one state desires another to gain the disproportionate military advantage that a large scale U.S. presence would afford.

Second, the same spirit of self-determination and nationalism that speaks for withdrawing troops from the states that currently quarter them isjust as strong in the ASEAN nations.[42] Americans cannot afford to be provincial in this matter; history has shown that a spark of nationalistic fervor can flame an uncontrollable fire, transforming otherwise reasonable citizens into anti-American mobs. A classic case in point occurred in Thailand in 1973, when widespread civil disobedience erupted in Bangkok in part because of the incumbent government being perceived as a "lackey" to the American forces

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[40]Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, British Yearbook of International Law, LVI 252 (1985).

[41]Richburg, *supra* note 13. Singapore made the offer on August 4, 1989. *Singapore's Leader Says U.S. Vital To Region*, Washington Times, Aug. 21, 1989, at 2, col. 1.

[42]Clark, *supra* note 6, at 14.

then stationed in the country.[43] During the remainder of that decade, bloody riots by competing factions brought the nation to the brink of anarchy.[44]

Planners must understand that Southeast Asia has had a long and sometimes troubled chronology in dealing with Western powers. While the West has undeniably brought substantial benefits to the region, too often many have viewed these contacts as merely outside exploitation. To be successful, the U.S. will have to treat Indochina as a partner, rather than as a client; commitments must be binding and fulfilling, not merely cold business transactions.[45] Indeed, a model that even hints at colonialism cannot be reconciled against the strong expressions of independence and autonomy that now permeate these nations. The desire to be treated as equal sovereigns and the basing of large amounts of foreign troops, no matter how benevolent, are no longer consistent. Therefore, absent a serious escalation in either the LIC environment or direct external threats to their sovereignty, host governments will find it very difficult to support the deployment of significant numbers of U.S. troops. They know that to do so could very well threaten their own legitimacy.

The third consideration is a regional one, reflected in the recently expressed ASEAN goal of establishing a "Zone of Peace, Freedom and Neutrality" in Southeast Asia.[46] Based loosely on the repudiation of the use of force expressed in article 2(4) of the United Nations Charter,[47] this unified expression of neutrality would imply that any proposal to establish fixed American facilities would be met with immediate resistance. In fact, in mid-1989 the Interparliamentary Organization of ASEAN once again rejected a proposal to create even an ASEAN collective defense pact.[48] As is often the case in collective organizations, however, what nations proclaim in unison is not necessarily an accurate indication of what they say in private. Considering ASEAN's goal of neutrality, it is telling that there has never been a direct call for American withdrawals from any part of Asia, not even from the Philippines where many Filipinos are increasingly demanding that the U.S. depart.[49]

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[43]Lobe, 14 Monograph Series in World Affairs, bk. 2, *United States National Security Policy and Aid to the Thailand Police* (1977).
[44]*Id.*
[45]*Id.* at 112.
[46]Richburg, *supra* note 13.
[47]U.N. Charter art. 2, par. 4.
[48]*ASEAN*, *supra* note 21.
[49]*See supra* note 15 and accompanying text.

The nations of Indochina are pragmatic; they recognize that they owe their prosperity and perhaps even a measure of their stability to the general security umbrella of American protection. ASEAN may pay the necessary lip service to aspirations of non-alignment, but the separate member-states are wholly cognizant that once that umbrella begins to fold, they will be left in an uncomfortable power vacuum.

It is not surprising that individual expressions of this anxiety are already rumbling throughout Southeast Asia. In fact, it was this very concern that prompted Singapore to make its unilateral proposal to the U.S. for permanent military facilities.[50] While the offer was not palatable to some of his neighbors, Prime Minister Lee Kuan Yew certainly encapsulated the general consensus of the region—even if the U.S. draws down its forces in the Pacific Rim, it should nonetheless continue to guarantee the balance of power in Southeast Asia.[51] Another Singapore official observed that, at a bare minimum, "[a] physical presence counts, even a symbolic one."[52]

In short, the majority of the nations in Indochina want the benefits that a permanent U.S. basing would bring, but not the base itself. If Singapore'soffer was criticized because it smacked of colonialism, and was otherwise insensitive to the rest of the region, at least it realistically recognized that the pledge of American protection can be fulfilled only through the use of American soldiers. As a starting point in formulating a strategy, then, American planners can anticipate that a limited physical presence of some sort would be viewed as necessary and acceptable, once American withdrawals occurred in the Asian Basin. If the presence is couched in terms of being non-permanent, or if permanent, only minimal, planners should envision enthusiastic concurrence throughout friendly Indochina.

2. America's Perspective

From the perspective of the sending state, Congress, as well as the American people, should view the strategy as suitable and necessary. As to suitability, the question is primarily one of funding. Eagerly anticipating the so called "peacedividend" associated with overseas withdrawals, the U.S. will be reluctant to funnel the massive amounts

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[50] *See supra* note 41 and accompanying text.

[51] *Southeast Asia Debates U.S. Security Umbrella,* Washington Post, Aug. 21, 1989, at A18.

[52] *Id.*

of monies that are required to create new facilities. Demands for an alternative solution will gravitate toward a plan that is far less expensive.

As to necessity, there are those who will never be convinced of the wisdom of involving U.S. forces in Indochina. The great fear is termed "entanglement"; but really it is only a reflection of America's inability to plan in terms of years, not months, in dealing with developing states. The roots of this phenomenon are deep, resting in the traditional view of the military as an instrument for use in conventional warfare only.[53] Thus, Americans are extremely apprehensive concerning the use of armies to combat LIC or about getting involved in "dirty little wars." Because of this fear, validated in the mind of the public by the war in Vietnam, calls for the establishment of a large permanent garrison in Indochina or for the use of a substantial force structure would probably face an impossible battle in gaining congressional backing. Attempts to invoke President Kennedy's philosophy that armies could be used to help "build countries" would persuade none but the already persuaded.[54]

From a funding view, as well as that of a conceptional analysis, a necessary policy, i.e., a saleable policy, will have to rely on a limited troop structure. There is little doubt that the size of the American force in a Southeast Asian strategy will have to be minimal, regardless of whether it is garrisoned or not. This is largely a political battle between Congress and the President, but certainly the smaller the size of the force employed, the easier approval will be achieved.

Finally, in order to facilitate congressional acceptance and to ensure simplified implementation, the new policy will have to be constructed around existing approaches for projecting American military support that do not necessarily require the stationing of U.S. troops. Considering the inherent bureaucratic aversion to change, coupled in this case with the necessary interplay of the Congress and State Department, any proposal that is naive enough to seek to "break new ground" is doomed to failure. Are there such existing approaches?

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[53] Walsh, *A Different Lesson From the War in Afghanistan,* Military Review, Dec. 1989, at 83-84.

[54] *See* De Pauw and Luz, *The Role Of the Total Army in Military Civic Action and Humanitarian Assistance,* Strategic Studies Institute, U.S. Army War College (1989).

V. CURRENT INITIATIVES USED TO PROJECT AMERICAN SUPPORT

A mutual consensus concerning an optimal strategy that accommodates and reconciles the desires of both the U.S. and Indochina would call for some form of an American presence on the ground. However, that presence would undoubtedly be a restricted one. Consequently, the overall policy will have to find ways to compensate for size, because to be successful, the strategy must still be capable of providing at least some measure of external security while operating within the complexities of a LIC environment.

An examination of the current programs that are used to project American strategic commitments makes it apparent that an acceptable Indochina model could be drawn from tested ideas, with some modification. Besides the actual stationing of military personnel in a friendly or allied country, the United States has three available methods to send the message of American support. Categorized as Foreign Internal Defense (FID), these are security assistance, combined training military exercises, and the use of special forces in peacetime operations.[55] In general, FID activities are executed through the particular geographic unified commanders, who are, of course, familiar with the unique problems of the countries in their area of responsibility.

A. SECURITY ASSISTANCE

1. Description and Purpose of Security Assistance

Security assistance activities are carried out predominately under the auspices of the Foreign Assistance Act (FAA),[56] the Arms Export Control Act (AECA),[57] and pertinent annual appropriation acts. The FAA was passed in 1961 as a means of providing various types of economic and military assistance to countries considered key American allies or friends. The functional aspect of security assistance is easily defined. It is divided into four principal categories of aid: food; development; military; and direct cash payments under an economic support fund (ESF). To the greatest extent possible, these initiatives are administered with only the use of a limited number of U.S. personnel situated within the host nation.

[55] For a discussion of the statutory prohibitions relating to FID, see International Law Division, The Judge Advocate General's School, U.S. Army, The Operational Law Handbook, chap. 3, sec. III C (1989) [hereinafter *OPLAW Handbook*].

[56] 22 U.S.C. § 2301 (1988).

[57] 22 U.S.C. § 2751 (1988).

The specific purpose of security assistance was summed up by the former Secretary of Defense, Frank C. Carlucci, in his annual report to the Congress on the 1990/91 biennial budget: "Security assistance exists to facilitate the pursuit of our national security objectives."[58] A closer synthesis of the various activities reveals the following broad goals: assist our friends and allies to defend against aggression and instability; promote regional stability; strengthen the economies of key states; and maintain friendly military/political relations.[59] The significance of security assistance is therefore twofold: operating to ward off external threats and assisting developing countries to cope with internal troubles.

a. Security Assistance as a LIC Weapon

Carlucci noted that security assistance "provides the principal policy instrument for assisting nations engaged in low-intensity conflict."[60] At least in theory, the U.S. has recognized that to effectively neutralize the social and economic problems associated with LIC environments, specific programs concentrating on specific plights must be utilized. The cumulative impact of such social and economic assistance should play an integral part in the long term elimination of the factors that foment domestic instability. Aid directed at agricultural and rural development, population planning, construction activities, and balance-of-payment deficits has long been seen as a viable tool in blunting many of the underlying causes of LIC.

Other programs are aimed not at the causes, but directly at countering those violent or otherwise criminal acts associated with the lower spectrum of the LIC scale.[61] Seeking to alter the policies of the indigenous government, activities such as kidnapping, sabotage, and assassination should be classified as criminal, if not terrorist acts.[62] While the perpetrators will invariably claim that they are "soldiers" (i.e. insurgents) and entitled to protection under international law,

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[58]Carlucci, *Security Assistance and International Armaments Cooperation*, Annual Report of the Secretary of Defense to the Congress on the FY 1990/FY 1991 Biennial Budget and FY 1990-1994 Defense Programs 67 (1989).

[59]*Id.*

[60]*Id.* at 63.

[61]*See generally*, Center for Land Warfare, U.S. Army War College, Theater Planning and Operations for Low Intensity Conflict Environments (September 1986).

[62]Army Reg. 525-13, The Army Terrorism Counteraction Program, 4 Jan. 1988, at 16, defines terrorism as "[t]he calculated use of violence or the threat of violence to attain goals, political, religious, or ideological in nature. This is done through intimidation, coercion, or instilling fear. Terrorism involves a criminal act that is often symbolic in nature and intended to influence an audience beyond the immediate victims."

they have no status under either the Geneva or Hague Conventions and should be treated, in every respect, as domestic criminals.[63] Additionally, there is no prohibition under international law against a third state assisting the host government in dealing with those who foment internal disorder, as long as this group has not attained some degree of international status.[64] One legislative program designed to assist law enforcement capabilities in a developing country is the Antiterrorism Assistance[65] statute.

b. Security Assistance Used to Discourage External Aggression

The military component to security assistance is geared predominantly toward helping provide a defense shield against outside aggression. It consists of four major programs. The first is the Military Assistance Program (MAP),[66] a grant program providing a developing country with the ability to obtain defense articles and services from the United States at no cost. Operating on financial grants and credits, MAP is an institutional recognition that many countries are unable to adequately provide for their own defense. MAP funds may also be used by the host nation to purchase items offered through other assistance programs, giving the states the appropriate flexibility to determine what items or services are most immediately required.

Currently overtaking the function of the MAP program, the second component is the Foreign Military Financing Program (FMFP).[67] Although designed initially to extend credits to third world nations and not to operate on grants, FMPF has essentially evolved into a grant initiative.[68]

The Foreign Military Sales (FMS)[69] program is the third approach. FMS is administered under the provisions of the AECA and allows qualified countries to buy American military defense articles and ser-

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[63]McCullough, *International and Criminal Law Issues in the Achille Lauro Incident: A Functional Analysis*, 36 Naval L. Rev. 53, 55 (1986). *But see* United States v. Yunis, 681 F. Supp. 909 (D.D.C. 1988).

[64]R. Erickson, Legitimate Use of Military Force Against State-Sponsored International Terrorism 69 (1989); Schachter, *The Extraterritorial Use of Force Against Terrorism Bases*, 11 Houston J. Int'l L. 309, 310 (1989).

[65]22 U.S.C. § 2349aa (1988). Under the Antiterrorism Assistance statute, the U.S. provides training and equipment to assist third states in dealing with hostage situations, implementing security procedures, and handling explosives.

[66]22 U.S.C. § 2311-2318 (1988).

[67]22 U.S.C. § 2761-2764 (1988).

[68]Samelson, *Military Assistance Legislation For Fiscal Year 1990*, DISAM Journal, Winter 1989-90, at 5-6.

[69]22 U.S.C. § 2761-2762 (1988).

vices. Because FMS is a sale procedure and not based on grants, it also provides an economic benefit to the U.S.

The final program is the International Military Educational and Training (IMET)[70] program. IMET is another grant initiative that provides for the training of foreign military personnel, usually in the United States. The primary purpose of IMET rests in the promotion of close working ties with the host country over an extended period of time. It opens up channels of communication, helps establish friendly relations, maintains American influence, and promotes respect for democratic institutions and human rights.[71]

The military dimension of security assistance does, of course, rely in part on the use of American soldiers, but only in the limited capacity of providing services in the form of training and technical assistance. Tasked to create various training or technical assistance teams, such as Mobile Training Teams (MTT),[72] the component commands of the regional unified commands will provide small teams of trainers who usually conduct the required training or technical assistance within the host nation. As further evidence of their service-oriented role, even in countries where there are no status of forces agreements (SOFA's),[73] these soldiers are routinely afforded the same privileges and immunities as those provided to the administrative and technical staff of the American embassy in that country.[74]

2. *Criticisms and Effectiveness of Security Assistance*

In describing the benefits of security assistance, Ambassador H. Allen Holmes, the Assistant Secretary for Politico-Military Affairs in the State Department, argues that it is not a philanthropic endeavor, but rather a mechanism to save money: "To equal the military effect of friends and allies who are on the scene, we would have to spend much more on U.S. force structure, mobility, and logistics."[75]

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[70] 22 U.S.C. § 2347 (1988).

[71] Carlucci, *supra* note 58, at 64.

[72] Joint Chiefs of Staff, Doctrine for Joint Special Operations (Initial Draft) at 11-20 (June 1989) [hereinafter *JCS PUB 3-05*].

[73] *See generally* Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces, June 19, 1951, art. VII, 4 U.S.T. 1792; T.I.A.S. 2846; 199 U.N.T.S. 67 (1951).

[74] Members of the administrative and technical staff are usually afforded complete immunity from criminal jurisdiction and immunity from civil jurisdiction in those cases involving acts undertaken in their official capacity. ***See*** Vienna Convention on Diplomatic Relations, 22 U.S.T. 3227; T.I.A.S. 7502; 500 U.N.T.S. 95.

[75] Holmes, *FY 1990 Security Assistance* ***Request,*** Department of State Bulletin, June 1989, at 53.

Ambassador Holmes takes the position that security assistance, properly administered, can be an effective substitute for the stationing of large numbers of U.S. forces abroad. "[I]t is more effective—and less costly in the long term—than using U.S. military personnel for the same purposes."[76] In practice, however, the effectiveness of security assistance in achieving any of its goals is a subject that is open to heated debate; it is not the panacea that many portray it to be. Directed primarily at Congress, criticisms are legion, including inordinate congressional micro-management, a shrinking budget, and a lack of continuity.

One of the most often cited complaints is that of congressional earmarking of funds. Even though security assistance was established to be administered by the State Department, by earmarking specific dollar amounts for specific countries Congress has essentially taken the program out of the hands of the executive branch. From the earmarking of over half of the budget in the mid-1980's, dollar figures for fiscal year 1989 indicate that "49 percent of development aid, 92 percent of military aid, and 98 percent of the ESF [was] earmarked for particular countries."[77] The end result is that about 90% of all security assistance funds are directed to only a handful of countries, with Israel and Egypt accounting for about half of the total expenditures. Apparently, one might conclude, Congress does not perceive the third world, including Indochina, to be of great strategic significance.

Furthermore, not content to simply earmark funds, Congress engages in the practice of dividing this earmarked aid into functional accounts. By creating these functional accounts, Congress regulates exactly how the money that it has already earmarked is spent in a recipient nation. Legislation may, for example, specify for country X that a particular dollar amount be spent only on agricultural development. This practice effectively stifles even the smallest degree of flexibility for security assistance administrators.

Other criticisms begin with the basic formulation process of security assistance and move on to the massive amounts of bureaucratic impediments, e.g., reporting and notification requirements. An overview of the implementation process reveals that, in the normal course of affairs, security assistance proposals are promulgated at the executive branch after input from sources as varied as component

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[76] *Id.*

[77] Stanfield, *Built without a Blueprint,* National Journal, April 8, 1989, at 848.

military commands and departmental agencies in the State Department. Congress then receives and considers these proposals and sometimes proposes its own, but is mainly content to exercise control of security assistance through its budgetary authority. As the requests make their way through this bureaucratic maze, it can take up to three years for the initial proposal to actually take shape in the host country. While the President does have limited power to authorize certain types of assistance on an immediate basis, this is an "emergency" authority and cannot be used routinely.[78] In most cases, getting appropriate assistance to a country in need is often too little, too late. Finally, when the aid does arrive, operators are faced with a never-ending barrage of reporting requirements spawned by congressional oversight.

Valid concerns also focus on legislative restrictions; each recipient country must be deemed to be "eligible" to receive aid. If Congress determines that a country is in violation of any number of legislative restrictions, it may immediately terminate or curtail assistance. These restrictions essentially fall into country-oriented and issue-oriented categories. Examples of country-oriented restrictions include the prohibition on providing security assistance to communist countries[79] or other states that Congress may specifically deem to be hostile to the U.S., such as Libya.[80]

Issue-oriented legislation addresses such subjects as states in arrearage to the U.S.,[81] nuclear transfers,[82] states that provide sanctuary to terrorists,[83] and human rights concerns.[84] While most of the restrictions contain clearly worded triggering mechanisms, some passages are typically ambiguous. In dealing with human rights, for example, 22 U.S.C. § 2304 requires that aid be cut off if a nation ''engagesin a consistent pattern of gross violations of internationally recognized human rights.''[85] Obviously, such a subjective determination can be made only by Congress. Other legislative passages require administrators to define such terms as ''internalrepression" in conjunction, for instance, with prohibitions on providing assistance to host nation police forces.[86]

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[78]22 U.S.C. § 2318, 2364 (1988).
[79]22 U.S.C. § 2370(f) (1988).
[80]Foreign Operations, Export Financing and Related Programs Appropriations Act, 1990, Pub. L. No. 101-167, Title III, § 512, 548 [hereinafter *FOAA 90*].
[81]*FOAA* 90 § 518.
[82]22 U.S.C. § 2429 (1988).
[83]22 U.S.C. § 2371(a)(1) (1988).
[84]22 U.S.C. § 2304 (a)(2) (1988).
[85]22 U.S.C. § 2304(a)(3) (1988).
[86]22 U.S.C. § 2420 (1988).

With respect to providing military services, the most sensitive restriction requiring the greatest attentiveness from military trainers is Section 21(c) (1) of the AECA: "Personnel performing defense services sold under [the AECA] may not perform any duties of a combatant nature, including any duties related to training and advising that may engage United States personnel in combat activities outside the United States in connection with the performance of those defense services."[87] In short, trainers must scrupulously avoid even the appearance of being involved in combatant activities or risk curtailment of assistance.

The issue that makes all other concerns academic, however, is the problem of the "decreasing budget," particularly in view of increased reporting requirements and congressional earmarking of funds. "Since 1985, security assistance has been cut in the aggregate by 33%."[88] The current U.S. allocation has been hovering at around $15 billion per year, with only about one third of the monies going toward military assistance programs.[89] Indeed, in terms of a proportion of national wealth devoted to security assistance, the United States ranks next to the last of the industrialized nations.[90] Although probably as much a question of earmarking of funds, Japan provides more economic assistance to Indochina than does the United States.[91] This trend has caused alarm, reflected again by Secretary Carlucci's remarks to Congress:

> [Security assistance] is a low-cost investment in both our defense and foreign policies. By failing to invest, we risk incurring higher costs in the long-term. Failure to help our allies deter and combat aggression calls into question the reliability of the United States as a security partner, while reducing our allies' effectiveness in sharing the burden of collective security. Without adequate assistance, there is great risk that we will lose regional influence around the world, and that regional conflicts could expand, necessitating the direct involvement of U.S. forces.[92]

Finally, programs that are funded in developing countries do not have the required year-to-year predictability necessary to make them

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[87] 22 U.S.C. § 2761(c) (1988).
[88] Holmes, *supra* note 75.
[89] *Id. See also* Samelson, *supra* note 68, at 2.
[90] Stanfield, **supra** note 77, at 850.
[91] *Kimmitt*, *supra* note 16. ***See also*** Sneider, *supra* note **32,** at 10-11.
[92] Carlucci, *supra* note 58.

effective. In recent years, entire programs have been severed due to inadequate funding.[93] Of course, this is also a reflection of the lack of clear cut objectives and priorities. Without question, the FAA has evolved into a foreign assistance program used to address multiple and often ambiguous objectives. One critic has noted that after almost three decades "of legislative accretion . . . , [t]he law now lists 33 objectives; AID [Agency for International Development] documents expand these into 75 priorities."[94] No policy can ever hope to establish meaningful direction with such baggage. Trends vacillate between various political concerns, to include building up the indigenous infrastructure, providing for basic human needs, encouraging the development of free market economies, and providing for self-defense needs.[95]

3. *Current Uses of Security Assistance in Indochina*

Considering the criticisms associated with security assistance, what impact has the program had on Indochina? The share of security assistance monies for Indochina has been negligible. Fiscal year 1989 amounts provided to the three largest nations in Southeast Asia reveal just how stagnant security assistance has become. Indonesia's military assistance was only about $10 million in FMS credits and $1.9 million in IMET, while Malaysia's total assistance amounted to about a million dollars in IMET money.[96] During this same period, inadequate American military assistance forced Thailand to turn to Communist China as an alternate source for purchasing military equipment.[97] Even so, for fiscal year 1990 overall military aid to Thailand has been further cut by 86%, from around a total of $22 million to about $3 million.[98]

The *de minimus* funding provided to Indochina has also seriously constrained efforts at establishing any real sense of continuity. Indeed, if security assistance is viewed as an excellent LIC neutralizer, by and large it has been ignored.[99] The only bright spot rests in the IMET initiatives in the region. Over the years, planners have wisely chosen to consolidate their efforts into advocating and fostering the one program that offers the most return on the dollar.

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[93] *Id.*

[94] Stanfield, *supra* note 77, at 848.

[95] *Id.*

[96] Jacobs, *US Aid Focus on Asia and the Pacific*, Jane's Defense Weekly, Sept. 30, 1989, at 657, col. 1.

[97] Holmes, *supra* note 75, at 54.

[98] N. Y. Times, Jan. 31, 1990, at A7, col. 1.

[99] Congress has provided economic aid to refugees in Thailand. U.S. Dep't of State, Bureau of Public Affairs, *Thailand*, March 1988, at 8.

The vast potential benefits of security assistance have not been appreciated in Southeast Asia. Satisfied that its military presence throughout the Pacific could accommodate strategic goals,[100] the United States has yet to establish a cohesive agenda for the use of security assistance in this region.

4. Security Assistance in the Indochina Model

a. Security Assistance Components

Ideally, security assistance could satisfactorily meet many of the requirements for an Indochina model: it requires a minimum number of U.S. personnel; it assists the host nation's military structure in achieving self-sufficiency; its non-military programs are effective in combating LIC causes; and it generally demonstrates a degree of American commitment. At present, however, the crippling problems associated with security assistance negate much of its potential use in an Indochina model.

Once the reductions in force do occur, however, the U.S. cannot hope to maintain its force projection and influence without effectively employing the full arsenal of security assistance programs. Therefore, any proposed model that seeks to incorporate security assistance must overcome the treble obstacles of bureaucratic encumbrances, inadequate funding, and ill-defined priorities.

b. Making it Viable—The Regional Account Concept

Attempts to answer the more difficult problems that have so fragmented security assistance are currently being made. Perhaps realizing that the last major reform of security assistance legislation was in 1973, members of Congress do periodically propose haphazard amendments. In an effort to redirect money toward Third World countries in Latin America, Africa, and Indochina, for example, Senator Robert Dole proposed in January 1990 that an across-the-board cut in aid be made to the top five recipients "in order to help less-favored countries."[101] Even if adopted, however, this is merely an incidental effort to limit congressional control of the purse.

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[100] *See* Rep. Jim Kolbe's comments in Richburg, ***Soviet Pullout Could Spark Debate in U S***, Washington ***Post,*** Jan. **20,** 1990, at A16, col. 1.

[101] Dewar and Kamen, *Cut in Aid to Israel* ***Proposed,*** Washington ***Post,*** Jan. 17, 1990, at **A1,** col. 1.

One legislative measure has been enacted in an attempt to eliminate or minimize congressional earmarking and functional accounts. Aimed at putting the program back into the hands of the Administration, a "regional account" concept was developed in 1987 for the sub-Sahara portion of Africa. Under the plan, Congress agreed simply to appropriate $500 million for an African Development Fund. The fund was administered by the State Department and directly eliminated most earmarked and functional set-asides.[102] If this regional account concept were used in an Indochina strategy, Congress could exercise a regional oversight, while allowing the Administration the flexibility of using these funds for those programs and countries it deems most appropriate.

Regardless of the proposal for reform advocated, Congress must be persuaded to make security assistance viable. The critical challenge of proposing legislation to incorporate an effective security assistance package into an Indochina model will require great tenacity and clarity of purpose. As a logical starting point, the precedent established by the African regional account concept should be strenuously argued. In the accompanying area of funding, other arguments could draw on the savings associated with troop withdrawals from both Europe and the Pacific. Perhaps a *quid pro quo* could be proffered—drawdowns in military forces in the region could be exchanged for an increase in the security assistance budget.

To date, the President has not vigorously proposed reforms, nor has Congress seriously focused on an overhaul of the legislation. Those who view American foreign policy formulation as "crisis-driven," however, would argue that the stimulus for initiating such change has not yet occurred. Absent a recognition that Indochina is worth protecting, calls for security assistance to take on the role of protector will not be appreciated.

B. COMBINED TRAINING EXERCISES

The second method used to project American military support for a developing country is combined training exercises. Combined training exercises essentially are military "war games" conducted within the territory of the host nation. Directed or coordinated by the Joint Chiefs of Staff (JCS) or a single service secretary, these exercises demonstrate that the United States is prepared to assert its manpower in the defense of the host nation, should the need arise. As a vehicle to discourage external aggression, combined training exercises are extremely effective.

[102] *Stanfield*, *supra* note 77, at 848

1. As an Asset to Combat LIC Issues

There are other advantages to the use of these exercises as well. A U.S. Army War College text points out an important collateral benefit:

> In addition to demonstrating tangible US support for the host country and providing invaluable readiness training to US forces, combined training exercises may also serve as an excellent mechanism by which the United States may assist third world countries in addressing a number of the social and economic conditions endemic to the LIC threat.[103]

Increasingly, component commands have incorporated into military exercises various programs geared toward addressing LIC issues. In this context, the military has conducted such collateral activities as humanitarian and civic assistance (HCA), construction projects, and military training of foreign forces. These collateral activities must be undertaken in accordance with U.S. statutory law, however.[104] Proper budgetary authority has not always been used; exercise operation and maintenance (O&M) monies have been expended to finance these initiatives.[105] After investigating combined training exercises in Honduras, the Comptroller General summed up the prohibition from two perspectives. First, aside from certain "incidental" considerations, O&M funds may be used only for the operation and maintenance of the American Armed Forces. Second, exercise O&M appropriations may not be used "on activities within the scope of other funding sources.[106]

The propriety and effectiveness of using these exercises to combat LIC issues continues to be a source of contention between DOD and Congress. While it is inherently the intention of Congress to closely regulate all collateral activities associated with such maneuvers, the legislative branch has exhibited some flexibility, enacting specific funding authorities for DOD to carry out HCA and construction project~?~~

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[103]Center for Land Warfare, US. Army War College, *supra* note 61, at 19.
[104]*OPLAW Handbook, supra* note 55. *See also* 31 U.S.C. § 1532 (1982) (prohibiting the transfer from one appropriation to another except as specifically authorized by law).
[105]*Id.*
[106]Letter from Comptroller General to Honorable Bill Alexander (30 Jan. 1986) (discussing update of 63 Comp. Gen. 422 (1984)) [hereinafter *Comp. Gen. Letter]*.
[107]*OPLAW Handbook, supra* note 55.

2. *Combined Training in Indochina*

The largest Southeast Asian exercise conducted in Indochina is the JCS directed Cobra Gold exercise. For nine consecutive years, Cobra Gold maneuvers have been conducted throughout the Kingdom of Thailand, enjoying consistent and dependable support from the Thai government. This exercise has included such American units as the 25th Infantry Division, the 1st Special Forces Group (Abn), and the 8th Tactical Fighter Wing, as well as Naval and Marine elements. Forty days in length, the exercise involves approximately 1,500 American soldiers and airmen and 2,500 Thai participants.

Compared to those exercises undertaken in Central America,[108] Cobra Gold has not been used as a significant vehicle by which to address internal problems in Thailand; the key mission has been to directly express American support for the Kingdom in the event of external aggression. In this regard, the U.S. Pacific Command has been extremely effective. Hostile governments have paid close attention to each and every Cobra Gold exercise. A typical reaction coming out of a Bangkok newspaper had this to say about Vietnam's reaction to Cobra Gold 1987: "The exercise was condemned by Vietnam whose Hanoi radio described them last week as 'the continuation of hostile acts of Bangkok ultra-rightist authorities against Laos, Vietnam, and Kampuchea.'"[109]

Although Cobra Gold has not had a significant impact on neutralizing the social and economic issues endemic to LIC, there is no question that it has been an outstanding force multiplier when viewed as a deterrent to external aggression. Considering the relatively small number of soldiers engaged, the exercises have certainly sent the appropriate signal to unfriendly states in the region, as well as to any disruptive internal factions.

3. *Use in the Indochina Model*

Combined training exercises will be a necessary component in the post-drawback era. These exercises demonstrate American support, while manifesting none of the evils related to permanent garrisons. In contrast, American troops are not viewed as "occupation" forces, but rather as partners and equals. Heartened by the realization that

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[108] *Id.*

[109] Ratchasima, *Fitting Climax to Cobra Gold '87*, The Nation, Aug. 21, 1987, at 1, col. 1.

they must bear responsibility for their own defenses, host nation participants respond with tremendous zeal to the combined training. Accordingly, indigenous governments have very little trouble finding widespread local support for the use of American forces in this capacity. The thorny issue of territorial integrity is negated by the combined nature and the limited duration of these exercises.

Combined training exercises can be effective, but only if they are properly funded, coordinated, and implemented on a year-to-year basis. When used in an Indochina strategy, planners will have to determine the frequency and regional allocation of the exercises, and other Southeast Asian countries, in addition to Thailand, must be offered the opportunity to participate. Since the principal argument for using combined training is to deter external aggression, the question of using these exercises as a vehicle to combat social and economic problems should also be clearly resolved.

C. SPECIAL OPERATIONS FORCES

*1. **Congressional** Support for SOF*

The final method by which the United States may assist developing countries is the use of its special operations forces (SOF). The genesis of modern SOF is most closely identified with President Kennedy.[110] Although the entire force structure virtually disappeared with the end of the Vietnam era, revitalization of SOF occurred in the 1980's.[111] Anticipating that most future conflicts would entail LIC situations, several key members of Congress placed top priority on special operations forces as the preferred weapon of choice. Those efforts resulted in widespread bipartisan support for SOF, culminating in the creation of a separate unified command, the United States Special Operations Command (USSOCOM).[112]

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[110] *See* A. Banks, From OSS to Green Berets, The Birth of Special Forces (1986).

[111] Thomas, *A Warrior Elite For the Dirty Jobs,* Time, Jan. 13, 1986, at 16-19.

[112] Congressional commitment to SOF is reflected in several significant milestones dating from 1986. The first is the 1987 creation of USSOCOM, a unified independent command. Stressing interoperability, USSOCOM maintains operational control over all SOF assets of all services. The FY89 Defense Authorization Bill further mandates that the commander-in-chief of USSOCOM (USCINSOC) prepare and execute his own budget by 1992. The second is the establishment of a Low Intensity Conflict Board under the National Security Council. This, coupled with the third initiative, the creation of an Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict (ASDSOLIC), ensures coordination of all federal agencies involved in LIC. *See generally* Rylander, *The Congressional Approach to SOF Reorganization,* Special Warfare, Spring 1989, at 10-17.

Congress has been significantly involved in structuring the types of forces essential to effectively operate in a LIC environment. Indeed, Congress has taken the unprecedented step of establishing, through legislation, the specific mission activities of the SOF community: direct action; strategic reconnaissance; unconventional warfare; foreign internal defense; counterterrorism; civil affairs; psychological operations; humanitarian assistance; theater search and rescue; and other activities.[113]

2. *Peacetime Role of Special Forces (SF)*

The public mystique of the green beret as the ultimate jungle fighter capable of singlehandedly defeating entire enemy battalions clearly belies the real importance of these specialized and highly skilled soldiers.[114] While they certainly have significant wartime missions, SF, a component of SOF, are most effective when executing their dual peacetime roles of prevention and deterrence.[115] Paradoxically, when executing their peacetime role, it is in part because of—not in spite of—this aura that they enjoy public support and successes far in excess of what their limited numbers would imply. Currently, the Army has four active-duty brigade-sized Special Forces groups, each group operationally directed toward a particular segment of the world.

a. Prevention

The preventive SF role covers a full range of activities, to include training, teaching, and performing HCA in third world countries. Their principal purpose is to prevent the escalation of LIC. This is done by training indigenous people to defend themselves and, to a lesser degree, engaging in limited HCA missions in the more remote parts of the country. This civic action includes providing medical and veterinary aid, conducting various public services, and other activities aimed at improving living conditions.

The primary mission in the prevention role, however, has always been training. It was during the Vietnam era that SF earned the coveted reputation of being premier trainers of indigenous forces in

[113] National Defense Authorization Act for Fiscal Year 1987. Pub. Law No. 99-661, 100 Stat. 3816 (1986).

[114] *See gewully* H. Halberstadt, Green Berets: Unconventional Warriors (1988)

[115] *See generally* Dep't of Army, Field Manual 100-25, Doctrine for Army Special Operations Forces (Revised Coordinating Draft), Headquarters, para. 2-17 (November 1989) [hereinafter *FM 100-25*].

military skills. Thousands of tribesmen and local Vietnamese were successfully organized into effective self-defense forces. Then, as now, the secret to their achievements was hard training, common sense, and empathy. These professionals were required not only to be experts in their technical skills, but also they had to be proficient in the host language, totally familiar with the culture, and able to literally live in the same, often-times primitive, environments.[116] To accomplish this, these men underwent extensive, intensive, and expensive training.

Carrying on this tradition, SF continue to teach host nation forces fundamental military skills, as well as more advanced tactics in both jungle and urban warfare. Accordingly, the mission to train and help organize indigenous local forces remains the cornerstone of modern SOF.[117] The efforts crystalize as the host nation is better prepared to deal with overt manifestations of LIC through strengthened military capabilities.

When used in their preventive capacity, SF are inherently successful, not only in providing needed military skills, but also in establishing an excellent rapport with the local population. This, quite naturally, helps defeat LIC at its roots. One SF medic conducting Foreign Internal Defense missions in Honduras described the typical attitude of the locals: ''[I]t is also a morale boost for them [Hondurans]; if we're out in the field with them, sweat with them, eat their food and drink their beer, then, by God, they appreciate what we're doing and what we're going through.''[118]

If funded and employed as a security assistance asset, the training activities are directly aimed at assisting the host nation through long-term, in-depth courses of instruction. Employed during combined training exercises, the SF may very well conduct similar activities, but their primary purpose is to train themselves, with the accruing benefits to the host country being categorized as secondary. The dispute, of course, is whether the use of exercise O&M funds violates the prohibition of using those monies for the training of host nation personnel.[119]

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[116] *See* Low Intensity Warfare (M. Klare & P. Kornbluh eds. 1988).
[117] FM 100-25, *supra* note 115.
[118] H. Halberstadt, *supra* note 114, at 50.
[119] *Comp. Gen. Letter, supra* note 106, at para. II C & D.

In 1986 the Comptroller General recognized that such benefits afforded the host nation do not violate the Economy Act,[120] so long as the "training of indigenous forces is considered a by-product, with the primary objective for the activity being the training of the Special Forces to fill their role as instructors of friendly indigenous forces."[121] Turning on a question of primary purpose and scope, this is currently known as the "Special Forces exception."[122]

b. Deterrence

The other critical peacetime role of SF is that of deterrence, a role that is particulary important in a crisis situation. In this role, the SF are used to "wave the flag"—to be nothing less than concrete evidence that America is strongly committed to the host nation. A good illustration of this function occurred in 1963. Forces from the 10th SF group were sent to Saudi Arabia at the request of that government as a demonstration of American support. At the time, the Saudis were supporting guerrilla forces seeking to overthrow what is now North Yemen, while Egypt was supporting the anti-royalist government. In keeping with the deterrent function, the SF were directed to perform numerous well-publicized mass parachute jumps with their Saudi counterparts in the cities of Jiddah and Riyadh.[123]

Show of force functions are relatively well suited to the SF, due again in part to their universal reputation as being America's elite fighters. In 1987 the *Soviet Military Review* described them as being "professional killers . . . with . . . a brutal hatred of the Communist countries."[124] Such "puffing" aside, these soldiers never fail to make an impression; no matter the story line, headlines always start with the same two words: "Green Berets."

3. Current Uses of Special Forces in Indochina

Since the 1984 reactivation of the 1st Special Forces Group (Airborne),[125] SF has been carving out a significant peacetime role in several Southeast Asian countries. Focused primarily at Thailand, although active in Malaysia and Indonesia, the 1st SFG(A) has in-

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[120] 31 U.S.C. § 1341(a) (1982).
[121] *Comp. Gen. Letter, supra* note 106, at para. II. C.
[122] *Id.*
[123] FM 100-25, para. 2-17 and 2-18.
[124] *Privileged Killers,* Soviet Military Review, January 1987, at 4.
[125] The 1st Special Forces Group (Airborne) is located at Fort Lewis, Washington, and consists of three battalions. The 1st Battalion is forward deployed to Okinawa, Japan.

creased its presence in the Kingdom from periodic small team deployments to the dedication of an entire battalion. While these numbers are still extremely modest, the soldiers are well-received by the Thai authorities as well as by the local population.

The SF currently engage in recurring exercises and security assistance missions in Thailand. It is not uncommon for a trainer to spend fifty days in the Kingdom, return to his home post at Fort Lewis, Washington, for a month, and then return to Thailand for another forty day mission.

The 1st Group not only undertakes security assistance missions in Thailand, but also regularly engages in various combined exercises. In some instances, the training activities have been conducted in such a way as to place emphasis on the deterrence function. In Cobra Gold 1987, for example, the Green Berets conducted operations in Thailand, even as Vietnamese troops were engaged in major assaults against Cambodian resistance forces along the border. The special forces operational base (SFOB)[126] was set up at a Thai military base in Lop Buri, and subsequent operations were openly conducted in the Kingdom in conjunction with Thai forces. During Cobra Gold 1989, the decision was made to establish the SFOB nearer to the Burmese border.

VI. AN INDOCHINA MODEL

A. SPECIAL FORCES AS THE HEART

1. General Characteristics of a Strategy

A matching of the basic criteria for the Indochina model against the peacetime missions of SF makes it apparent that the precedent set by the SF, particularly in Thailand, is the key to formulating an Indochina formula, from both the perspective of the sending and receiving states:

—Constantly functioning throughout the territories of the host nation, the requirement to maintain a **high** visibility American presence is satisfied.

—Such a use of American personnel does not violate the "rules of the game" and would not prompt escalation from hostile forces.

[126] A special forces operational base (SFOB) is a command, control, and support base. FM 100-25, para. 7-8.

—With the U.S. forces operating on a rotating basis, the issue of establishing a permanent base is amiably resolved. While the Indochina model would probably call for a fixed stationing area for logistical support, the solution is again offered by the current SF exercises; the base could be set up at an existing Thai military facility.

—The soldiers deployed are elite professionals, trained to operate within LIC environments. Participation in security assistance programs to combat the causes of LIC is endemic to the special forces. Host governments invariably view the skills imparted by the SF as invaluable.

—Because the green berets know the language, culture, and environment, the soldiers foster an atmosphere of unity with the indigenous people. Nationalistic animosities are kept to a minimum.

—Both Indochina and America have become accustomed to the peacetime roles of SF; the model will not be instituting new concepts, only building on activities already successfully being undertaken. This fact should assist in relieving American anxiety concerning deploying soldiers to Indochina.

—An equitable distribution of SF to all the friendly nations would alleviate local concerns over balance of power shifts.

All of the above factors militate towards constructing the Indochina model around an expanded use of special forces. For showing the flag, being welcomed by our friends, dealing effectively with LIC issues, and protecting American interests, they are without equal. The critical issues will be of funding and size.

2. *Funding and Size*

To avoid a disjointed model, the use of SF should be expressly recognized and funded either as a special security assistance initiative or as a legitimate use of a separate appropriation. The current "SF exception" cannot be expanded. In the 1980's, Congress showed that it understood the value of special forces. With forceful leadership, it can be persuaded, in the 1990's, that the SF role must be expanded to protect our interests in Indochina. From the standpoint of cost, the use of special forces is a bargain.

Initially, at least the equivalent of a full brigade should be specifically assigned to each of the friendly states in Indochina. This

would ensure a force commitment capable of making an appropriate impact and the maintenance of a manageable rotation cycle. Decisions on how to best utilize the green berets assigned to the country should be made in conjunction with the unified command, the U.S. country team,[127] and host nation authorities.

B. SECURITY ASSISTANCE AND COMBINED TRAINING EXERCISES

The full range of security assistance programs must be used to attack the social and economic maladies that contribute to LIC and to provide meaningful assistance to military preparedness. Because congressional restrictions on security assistance will require the greatest reforms, planners should not expend their efforts on proposing major legislative corrections, but should advocate a separate funding source for security assistance under a regional account concept. Since this would not entail a structural overhaul, consensus would only require marrying the appropriated monies to the proposed expanded use of the special forces or, in the alternative, providing the funds directly to the unified command for allocation. Regardless of the approach used, it is essential that the Indochina model contain a tangible and predictable security assistance package that administrators can efficiently tailor in an autonomous manner.

Likewise, the inclusion of periodic combined training exercises would add the necessary muscle to the model, dispelling any residual notions that America had ceased to care for the region. Again, however, concrete agreement must be achieved concerning the conduct of HCA and training activities in the context of combined training exercises. Statutory requirements cannot be circumvented.

C. LEGAL ISSUES FOR THE ON-GROUND MILITARY ATTORNEY

Military attorneys from all of the services must not only be prepared to address myriad questions concerning the legal issues connected with proposals for an Indochina strategy, but also they must stand ready to fulfill crucial implementation roles once a coherent model is adopted. Developing the capability to intelligently respond to such issues is best achieved by taking a proactive view: anticipating

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[127]The Country Team is the "executive committee of an embassy, headed by the chief of mission, and consists of the principal representatives of the government departments and agencies present (for example, the Departments of State, Defense, Treasury, Commerce, and the USIA, USAID, DEA, and CIA)." FM 100-25, at 8.

probable requirements; identifying the associated legal implications; and discussing the impact.[128]

The on-ground attorney must be highly motivated, legally proficient, and able to be equally at ease with host nation officials as he is with his own people. In combating LIC issues in a developing country, the Assistant Secretary of Defense for Low-Intensity Conflict correctly points out the need to pick the highly motivated professional: "[T]hey have to be good. They have to be knowledgeable. They have to be persuasive. They have to have a high degree of professional competence. The history of low-intensity conflict reveals again and again the important—indeed overriding—role that one man can play . . . ."[129] While additional combined training exercises and some form of enhanced security assistance will no doubt be a part of the model, the function of the on-ground forces will pose the most significant operational law (OPLAW) issues, requiring servicing attorneys to become well-versed in this area of the law.[130]

1. Status of the American Soldier

Because the central focus of the proposed model is the use of special forces personnel in the host nation, the premier legal consideration is identifying the jurisdictional status of the forces while in-country. Currently, there are no SOFA's in effect in Indochina; U.S. troops are subject to the full local civil and criminal jurisdiction of the host nation unless, as discussed, they have been accorded some form of jurisdictional immunity.[131] American negotiators should seek similar status arrangements for the SF soldiers operating in the pro-

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[128]In December 1988 the Secretary of the Army directed the establishment of the Center for Law and Military Operations (CLAMO). Located at The Judge Advocate General's School of the Army in Charlottesville, Virginia, this center examines both current and potential legal issues attendant to military operations. Drawing on military, civilian, and allied legal expertise, CLAMO not only better prepares attorneys to deal with operational legal issues as they exist, but also, as a concurrent function, attempts to anticipate future developments in military operations—ensuring identification, discussion, and implementation of those legal doctrines that will accompany transitions in the field. Memorandum to the Judge Advocate General from Secretary Marsh (Dec. 21, 1988), *reprinted in* The Army Lawyer, April 1989, at 3.

[129]Whitehouse, *Special Operations and Low Intensity Conflict*, DISAM Journal, Spring 1989, at 70.

[130]The working definition of Operational Law, as used at the Judge Advocate General's School, is "[t]hat body of law, both domestic and international, impacting specifically upon legal issues associated with the planning for and deployment of U.S. forces in both peacetime and combat environments." The Judge Advocate General's School, International Law Deskbook, ADI-5, The Graduate Course Operational Law Deskbook, at i (1989).

[131]*See supra* note 74.

posed model. While the U.S. should also attempt to bargain for the best status possible for the troops who participate in the periodic combined training exercises, the host country will probably be reluctant to grant more than a NATO-type arrangement of shared jurisdiction.

2. *Know the Host Nation*

The on-ground legal advisor must be completely familiar with the culture, customs, and laws of the host nation. Even though all of the states in issue have incorporated elements of European jurisprudence into their legal structure, many aspects of the *malum prohibitum* statutes are based on cultural heritage. Indonesia, for example, has numerous criminal sanctions based on Islamic traditions; other nations incorporate Buddhist and Taoist criminal concepts. In Thailand, one can be imprisoned for up to fifteen years for defaming or insulting the King, the Queen, or any heir-apparent.[132] Obviously, the servicing attorney must be fully cognizant of the full range of the civil and criminal codes.

The judge advocate must establish a close liaison with the host authorities at all levels. Opportunities for enhanced cooperation must be actively pursued to ensure quick resolution of the inevitable civil and criminal violations that will occur. Personal contacts always pay excellent dividends, particularly in regard to the disposition of minor offenses.

3. *Know the Mission*

Finally, the military attorney must thoroughly understand the mission of the forces he represents, accompanying the troops into the host nation. Only when this is juxtaposed, with a knowledge of the appropriate OPLAW considerations, running the gamut from claims to rules of engagement, will the judge advocate properly discharge his function.[133]

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[132] The Thai Penal Code, book II, title I, chapter I, section 112, *as amended* by article 1 of the Order (No. 41) of the National Administrative Reform Council in B.E. 2519.

[133] *See* Walsh, *Role of the Judge Advocate in Special Operations*, The Army Lawyer, Aug. 1989, at 4-10.

VII. CONCLUSION

From Okinawa to Korea, the writing is on the wall: major cuts will be instituted; withdrawals of American forces will take place. The appearance of a *defacto* U.S. retreat from its responsibilities in the region can be overcome only by formulating a post withdrawal policy that will evidence its unquestioned commitment to Indochina. Without such a strategy, the cumulative effect of an erosion of confidence on the part of its friends, LIC escalations, and acts of external military aggression could well be devastating to American interests in the region. There is a growing urgency for Thailand and her sister countries to be offered concrete American support.

Fortunately, the blueprint of an Indochina model is substantially in place, and it does not call for the establishment of alternate bases, elaborate new weapons systems, or massive foreign aid packages. With an increased deployment of its special forces assests and an expanded use of combined training exercises, PACOM, in conjunction with USSOCOM, can adequately tailor an agenda to simultaneously combat LIC, while deterring external threats. The real issue will be providing the unified command with the flexibility and funding to make the model viable. This challenge will be met only if Congress is made aware that the model can function effectively within the already existing DOD infrastructure and that modifications in current security assistance priorities must be made.

AN OVERVIEW OF THE MILITARY ASPECTS OF SECURITY ASSISTANCE

by Major Carl J. Woods*

I. INTRODUCTION

In it's broadest terms, "security assistance" encompasses a range of developmental, educational, and military foreign aid programs. These programs, subsidized to various degrees by the Federal Government, are intended to strengthen allies and other friendly nations internally by promoting stable democratic government and by providing the capability to deter external aggression. Security assistance programs are established by Congress and administered by the executive branch, although Congress maintains a significant degree of control over the programs through an elaborate array of constraints upon executive action in this area.

The purpose of this article is to identify and discuss these congressional constraints as they apply to *military* security assistance. The scope of this inquiry will encompass certain areas that are not purely military in orientation, but which may reasonably be expected to have a substantial military impact. These will include initiatives to combat narcotics and international terrorism. On the other hand, there are also certain aspects of congressional control of military security assistance that will not be discussed in depth, if at all. The possible unconstitutionality of the legislative veto provisions appearing in some of the security assistance acts in light of *Immigration and Naturalization Service V. Chadha*[1] will not be examined; neither, in any detail, will be the multitude of reporting requirements levied

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[1] 462 U.S. 919 (1982).

upon the President throughout security assistance legislation.[2] Examination of the limitations placed by Congress on security assistance will reveal that, although they are properly motivated and in many instances make sense individually, collectively these constraints significantly undercut the potential strength of military security assistance as a powerful, cost-effective foreign policy tool.

II. HISTORICAL BACKGROUND

Certainly one could easily trace American military security assistance, in fact if not in name, back almost to the beginnings of the nation. To identify the origins of modern military security assistance and to understand the development of the complex system of security assistance legislation that currently governs United States activities in this area, however, a more productive historical starting point is the end of the Second World War.

Soon after the war in Europe ended in May 1945, it became apparent that the hopes for the non-confrontational era of peace that the major wartime powers so elaborately planned at the Yalta and Potsdam Conferences[3] were unfounded. Soviet aggression in Eastern Europe, coupled with their increasingly unconcealed hostility toward the West, greatly increased American concern for the continued freedom of those nations that had not already fallen under Soviet domination. This concern came to a head in 1947, when a very active Communist guerrilla movement in Greece and heavy Soviet diplomatic pressure on Turkey for various concessions convinced President Truman that the peace and security of Southeastern Europe was seriously threatened.* In response, the President announced what became known as the "Truman Doctrine," declaring:

> I believe that it must be the policy of the United States to support free peoples who are resisting attempted subjugation by armed minorities or by outside pressure. I believe that we must assist free peoples to work out their own destinies in their own way. I believe that our help should be primarily through economic and financial aid which is essential to economic stability and orderly political processes.[5]

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[2]Currently, there are over four hundred different reporting requirements imposed upon the President and other members of the executive branch within foreign assistance legislation. ***See*** Baker, *The **Foreign** Policy **Agenda and** the FY 1990 **Budget Request,*** DISAM J. Int'l Sec. Asst. Mgmt., Spring 1989, at 34.

[3]***See generally*** J. Pratt, A History of United States Foreign Policy 686-719 (1955); 6 W.S. Churchill, The Second World War 346-668 (1953).

[4]J. Pratt, ***supra*** note 2, at 719-20.

[5]Defense Institute of Security Assistance Management, The Management of Security Assistance 1-16 **(3d** ed. 1982).

Congress appropriated the funds necessary to implement the Truman Doctrine as it applied to Greece and Turkey; over the next three years, the two nations received over $600 million in economic and military aid through programs administered by "on the scene" American military advisors.[6] Military assistance at this point consisted primarily of no-cost arms transfers from surplus World War II stockpiles. This grant-type aid was the direct precursor of the Military Assistance Program (MAP), which, though much changed in the last two years, continues to play a role in military security assistance.[7]

A much more ambitious follow-on program was established in mid-1947, when then Secretary of State George Marshall announced that massive American aid would be made available to European nations with the aim of rebuilding economies destroyed by the recent war.[8] Although this European Recovery Program, popularly known as the Marshall Plan, did not involve military aid, it implicitly recognized that military security assistance could be most effective if given to countries that had a reasonably strong economic base. It also set the stage for establishment of the North Atlantic Treaty Organization (NATO), a Western military alliance that continues to figure prominently in American security assistance programs today.

As the "Cold War" sharpened in the late 1940's and the Soviet Union sought ways to counter the new "American imperialism" embodied in the Marshall Plan, European leaders became convinced that a Soviet military invasion of Western Europe was a distinct threat to world peace. To counter the common threat and to ensure a continued United States commitment to Western European independence, NATO was formed in 1949.[9]

Creating a mutual defense pact was one thing; seeing that it was equipped and manned at levels sufficient to deter armed attack was something else. Almost immediately, American military aid began flowing across the Atlantic. Over the course of the next sixteen years, until the massive military buildup in Vietnam, NATO members received over half of all American security assistance provided under the Military Assistance Program and the Foreign Military Sales Program.[10] Maintenance of a strong NATO Alliance has, of course, re-

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[6] *Id.*
[7] *Id.* at 1-17.
[8] J. Pratt, *supra* note 2, at 720.
[9] H. Kissinger, American Foreign Policy 67 (expanded ed. 1974).
[10] A. Pierre, Arms Transfer and American Foreign Policy 35 (1979).

mained the cornerstone of our foreign policy; American security assistance legislation continues to reflect this. As will be developed below in greater detail, Congress has continued to provide NATO nations with a substantial number of benefits unavailable to other countries receiving military security assistance. Two relative latecomers to the Alliance, Greece and Turkey, have, on the whole, done particularly well as recipients of American military aid.

This is not to say that only the countries in Western Europe were receiving large amounts of military aid from the United States during the early post-World War II period. After the signing of a hemispheric collective security agreement known as the Inter-American Treaty of Reciprocal Assistance, or "Rio Pact," in September 1947," South and Central America were for almost two decades completely reliant on the United States for arms and equipment.[12] In Asia, the Nationalist Chinese received military aid in an effort to bolster Chiang Kai-shek's war against the Communists under Mao Tse-tung;[13] South Korea was given defensive arms after the peninsula was partitioned in 1948;[14] and American military equipment was figuring prominently in French pacification operations in Indochina.[15] Meanwhile, a diverse assortment of nations such as Pakistan, Ethiopia, Libya, and the Philippines received arms in exchange for base rights.[16]

After the Korean War ended and Eisenhower took office as President, the policy of providing military assistance as part of a grand design to "contain" the Soviet Union evolved into a broader scheme. Under the rubric of "collective security," the United States supplied arms, equipment, and other aid to countries thought to be threatened by "Communist aggression," no matter where it might be found.[17] International communism was seen by members of the Eisenhower Administration as a pervasive and immediate threat to the entire free world;[18] the answer to the threat was perceived to be providing military assistance to almost any nation not in the Communist camp. The Truman concept of "arms to allies" became "arms to friends" in the 1950's.[19]

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[11]World Peace Foundation, IX Documents on American Foreign Relations 534-40 (R. Dennett & R. Turner eds. 1949).

[12]A. Lowenthal, *The United States and Latin America: Ending the Hegemonic Presumption*, in *Two* Hundred Years of American Foreign Policy 194 (W. Bundy ed. 1977). Castro's Cuba provided the major Latin American exception to this rule.

[13]J. Pratt, *supra* note 2, at 736 n.12.

[14]B. Alexander, Korea 3-24 (1986).

[15]R. Spector, United States Army in Vietnam 97-102 (1983).

[16]A. Pierre, The Global Politics of Arms Sales 20-21 (1982) [hereinafter Arms Sales].

[17]E. Furniss, Jr., Some Perspectives on American Military Assistance 13 (1957).

[18]J. Dulles, War or Peace 174-77 (1950).

[19]P. Farley, S. Kaplin, & W. Lewis, Arms Across the Sea 21 (1978) [hereinafter P. Farley].

It was also during the Eisenhower years that the Middle East began to be viewed as strategically critical to American national interests. In 1957 the Eisenhower Doctrine was announced and was approved by Congress. It specified four principles to govern American Middle Eastern policy, among which were the willingness to use armed force to assist any nation or group of nations requesting assistance against armed aggression from any country controlled by international communism, as well as the undertaking of military assistance programs with any nation or group of nations requesting them.[20] This marked the beginning of Israel's receipt of substantial military security assistance directly from the United States.[21]

The first half of the 1960's continued to see the bulk of American security assistance flowing to Europe, where events like the Berlin Crisis of 1961 and the Cuban Missile Crisis continued to confirm the reality of the Soviet threat. Increasingly, however, President Kennedy and his Administration began to focus on Southeast Asia as the area most susceptible to a Communist attack that, if not repelled, would undermine American credibility and start a series of Communist revolutions in other, more strategically important areas.[22]

In the late 1950's, South Vietnam and Laos had already become the principal Southeast Asian recipients of American security assistance. By 1959 a Military Assistance Advisory Group (MAAG) of approximately 750 men was providing a wide range of training and advice to the newly restructured South Vietnamese Army.[23] At this same time well over eighty percent of South Vietnam's defense budget was financed by some form of American aid.[24] Four years later, South Vietnam was receiving $400 million a year in security assistance, and over 12,000 military advisors were stationed there.[25] This trend continued and accelerated throughout most of the remainder of the decade, as American involvement in the Vietnam War escalated. By the time Saigon fell to the North Vietnamese in 1975, the United States had provided over $20 billion in security assistance to the South Vietnamese government.[26]

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[20] W. Eytan, The First Ten Years 154-55 (1958).

[21] *Id.* Surprisingly, Israel had received almost exclusively economic aid from the United States prior to 1957. Although Israel possessed a substantial amount of American-made equipment, it had received it somewhat clandestinely from West Germany. Arms Sales, *supra* note 16, at 110.

[22] F. Fukuyama, Military Aspects Of The U.S.-Soviet Competition In The Third World 4-5 (1985).

[23] R. Spector, *supra* note 15, at 291.

[24] *Id.* at 306.

[25] S. Karnow, Vietnam: A History 22 (1983).

[26] P. Farley, *supra* note 19, at 21-22.

In 1969 President Nixon announced a new security assistance policy, the Nixon Doctrine, under which the United States would continue to supply military and economic aid to friends and allies, but would require the recipient nation to provide the manpower necessary for its defense.[27] The Nixon Doctrine dovetailed nicely with a trend that began in the mid-1960's outside of Vietnam. As the stocks of surplus military equipment from World War II and the Korean War began to grow smaller, security assistance gradually changed from grant military aid under the Military Assistance Program to sales of arms under foreign military sales programs.[28]

In the meantime, Congress was becoming increasingly concerned with what it viewed as an unrestrained arms transfer policy. In 1968 Congress passed the Foreign Military Sales Act,[29] requiring that emphasis be placed on foreign policy considerations in arms sales policies.[30] Arguably President Nixon complied, while at the same time endeavoring to adhere to the principles of the Nixon Doctrine. The most striking example was the relationship developing between the United States and Iran. Iran was viewed as the potential pro-Western anti-Communist regional superpower that would ensure stability in the Persian Gulf, and in 1972 Nixon gave the Shah *carte blanche* to purchase virtually any American military equipment that he desired.[31] Other arms transfers during the Nixon Administration included relatively modest deliveries to Latin America and an enormous resupply effort to Israel during and after the 1973 war.[32]

Pressure continued to mount for increased congressional oversight of arms transfers to foreign countries during the remainder of the Nixon and Ford Administrations. Decisions to sell Iran F-14 fighters and state-of-the-art Spruance-class destroyers, as well as President Ford's commitment to provide sophisticated equipment to Israel that had been previously banned from sale, served to confirm suspicions that uncontrolled arms sales were being used to further short term political objectives rather than contributing in any meaningful way to American security.[33] The congressional response came in the 1974

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[27]L. Sorley, Arms Transfers under Nixon 25 (1983).

[28]R. Labrie. J. Hutchins. & E. Peura, U.S. Arms Sales Policy 8 (1982) [hereinafter R. Labrie].

[29]Pub. L. No. 90-629, 82 Stat. 1320 (1968) (current version renamed Arms Export Control Act of 1976, *as amended* at 22 U.S.C. § 2751 (1988)) [hereinafter AECA].

[30]R. Labrie, *supra* note 28, at 9.

[31]L. Sorley, *supra* note 27, at 114.

[32]*Id.* at 89-98. The total emergency arms package for Israel in 1973 was valued at $2.2 billion.

[33]Arms Sales, *supra* note 16, at 48.

passage of the Nelson Amendment, which gave Congress the ability to block any arms sale valued in excess of $25 million.[34] This, along with the passage of the far more comprehensive International Security Assistance and Arms Export Control Act of 1976,[35] gave Congress a significant degree of control over American arms sales to foreign countries for the first time.[36] The congressional mandate was to move from merely selling arms to controlling the sale of arms.

Both Presidents Ford and Carter viewed the above-described congressional initiatives as too restrictive and as infringing upon the President's constitutional power to conduct foreign affairs.[37] Nevertheless, President Carter built his security assistance policy on the concept that arms sales by the United States did indeed need substantial control. He decreed that under his Administration, arms transfers would be an "exceptional foreign policy implement, to be used only in instances where it [could] be clearly demonstrated that the transfer contribute[d] to our national security interests."[38] Restrictions would be imposed, but would not apply to NATO, Japan, Australia, or New Zealand; Israel, though not exempt, would receive special consideration.[39] These restrictions included provisions to stop private American arms manufacturers from actively seeking foreign purchasers or developing advanced weapons systems solely for export, to prohibit the United States from first introduction of advanced weapons systems into regions when such introduction would significantly change the balance of combat power there, and to prohibit co-production of major weapons systems or allow such systems to be sold abroad before operational deployment with U.S. forces.[40] He also shifted the burden of persuasion from those opposing a particular arms sale to those who favored it.[41] Thus, President Carter committed the United States to a policy of unilateral restraint in arms transfers. He also indicated that security assistance programs would be formulated in light of the human rights records of potential recipients and that he would seek multilateral action to reduce the "worldwide traffic in arms."[42]

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[34] *Id.* at 50.
[35] AECA, *supra* note 29.
[36] R. Labrie, *supra* note 28, at 9-10. Congress had, of course, always had control over *grant* military aid, by virtue of its power to block appropriations for grants it opposed.
[37] Defense Institute of Security Assistance Management, *supra* note 5, at 1-27.
[38] Presidential Directive on Arms Transfer Policy, 19 May 1977, *reprinted in* C. Catrina, Arms Transfers and Dependence 378 app. III (1988).
[39] Arms Sales, *supra* note 16, at 52.
[40] *Id.* at 52-53.
[41] C. Catrina, *supra* note 38, at 378.
[42] *Id.* at 379.

The Carter policy was, in most respects, a failure. The concept of arms transfers as ''an exceptional foreign policy implement" was itself made the subject of many exceptions by the Carter Administration.[43] The Camp David accords, for instance, committed the United States to a long-term security assistance program providing billions of dollars in arms to both Egypt and Israel.[44] Moreover, other arms-exporting countries did not exhibit much interest in curtailing their activities.[45] In the long run, unilateral restraint on the part of the United States probably did little more than to allow other arms producing countries to expand their markets to fill the void left by reduced American export levels.

A fundamental change in security assistance direction occurred in 1981, when President Reagan issued a new Presidential Directive on Arms Transfer Policy, which effectively scrapped President Carter's.[46] President Reagan viewed military security assistance as "an essential element of [the United States] global defense posture and an indispensable component of its foreign policy.''[47] His approach emphasized a flexible, case-by-case evaluation of arms transfer requests in light of their ability to contribute to deterrence and defense; did away with the previous restrictions on private arms manufacturer sales solicitations; and specifically repudiated unilateral restraint.[48] Nowhere in Reagan's Presidential Directive are the words "human rights" mentioned, but it is clear that concern for human rights remained an important, if not central, aspect of security assistance planning and implementation.[49]

The new Reagan policy was very quickly put into effect. Within three months, approximately $15 billion in military security assistance was offered to foreign governments.[50] Although security assistance was provided to many nations around the globe, the most controversial utilization of security assistance assets was in Central America. To counter arms deliveries from Nicaragua to guerrillas in

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[43]R. Labrie, *supra* note 28, at 11 n.18.

[44]Arms Sales, *supra* note 16, at 157-158.

[45]C. Catrina, *supra* note 38, at 81.

[46]Presidential Directive on Arms Transfer Policy, 8 July 1981, *reprinted in* C. Catrina. Arms Transfers and Dependence 380-81 app. III (1988).

[47]*Id.*

[48]*Id.*

[49]Defense Institute of Security Assistance Management, *supra* note 5, at 1-35.

[50]Arms Sales, *supra* note 16, at 65. Advanced fighter aircraft were offered to Israel, Pakistan, South Korea, and Venezuela; Cobra tank-killer helicopters were sold to Jordan; Saudi Arabia received AWACS early warning aircraft and Sidewinder missiles: and Morocco was promised aircraft and armor.

El Salvador, military aid begun by President Carter was increased, and fifty military advisors were sent to train the Salvadoran Army in the use of American equipment.[51] In spite of congressional resistance, considerable military aid was also provided to Honduras, the nation interposed between El Salvador and Nicaragua.[52] Concern over Nicaragua's military buildup and support for Marxist guerrilla movements in the region lead to a decision to equip and to supply the Nicaraguan "Contra" rebels seeking to overthrow the Marxist regime in that nation.[53] Throughout the remainder of the Reagan Presidency, aid to the Contras was bitterly contested in Congress; all but humanitarian aid was finally terminated in 1988.[54]

Under President Bush, security assistance policy does not seem to have deviated greatly from that established by President Reagan. The only significant change in emphasis has been Bush's decision to increase military aid to those South American countries fighting the large drug cartels.[55]

111. THE PRESENT GOALS OF SECURITY ASSISTANCE

If military security assistance as it exists today is to be evaluated in terms of its effectiveness as a foreign policy tool, it is necessary to identify and, if possible, to prioritize the specific goals of the overall security assistance program. As is apparent from earlier portions of this article, there are three entities concerned with goal formulation for military security assistance: the President and his Administration, the Congress, and the Armed Forces. Substantial unanimity among these groups regarding goals would certainly contribute to optimizing program effectiveness. Unfortunately, a single, common set of goals has not emerged. All would agree in the most general terms that security assistance is an instrument of national security policy used to promote the national interests of the United States. There is agreement on several other points, but divergence remains considerable.

The goals announced by the Bush Administration are conceptually clear and relatively straightforward. There are five primary securi-

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[51] *Id.* at 247.
[52] J. Cirincione, Central America and the Western Alliance 19, 45 (1985).
[53] S. Etheredge, Can Governments Learn? 181 (1985).
[54] Department of Defense Appropriations Act, 1989, Pub. L. No. 100-463, § 8097, 9005-9007, 102 Stat. 2270 (1988).
[55] *Hitting the Drug Lords*, Newsweek, September 4, 1989, at 18-23.

ty assistance objectives: promotion of regional stability; maintenance of the cohesion and strength of U.S. alliances and cooperative agreements essential to maintaining access to important military facilities around the world; enhancement of the ability of United States security partners to deter and to defend against aggression and instability; strengthening the economies of countries struggling to cope with high import costs and heavy debt when commodity prices are down; and defense of democratic values and institutions.[56]

Security assistance aims of the military do not differ radically from those of the Administration, but they explicitly emphasize enhancement of coalition defense by helping allies shoulder a greater share of the common defense burden.[57] The military also adds an additional goal of building military-to-military relations with a wide variety of countries across the globe.

Congressional goals for security assistance are more complex and difficult to decipher. They are contained in policy sections of the two primary security assistance statutes, the Foreign Assistance Act (FAA) and the Arms Export Control Act (AECA), which was mentioned above under its old title, the Foreign Military Sales Act.[58] Read together, these statutes indicate that Congress desires to use security assistance to: promote peace; promote the foreign policy, security, and general welfare of the United States; improve the ability of friendly countries and international organizations to deter, or if necessary, defeat Communist or Communist-supported aggression; facilitate arrangements for individual and collective security; assist friendly countries to maintain internal security; and to "create an environment of security and stability in developing friendly countries essential to their more rapid social, economic, and political process."[59]

On the other hand, these same statutes clearly state that congressional goals include: achieving world-wide regulation and reduction of armaments; encouragement of regional arms control and disarmament agreements; reduction of the international trade in "implements of war"; lessening the burdens of armaments; and exer-

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[56]Department of Defense, Congressional Presentation Document for Security Assistance Programs, Fiscal Year 1990 (1989) [hereinafter FY 90 CPD].

[57]Brown, *Military Assistance Requirements for FY 1990*, DISAM J. Int'l Sec. Asst. Mgmt, Spring 1989, at 47.

[58]The Foreign Assistance Act of 1961, as *amended*, 22 U.S.C. § 2301 (1988) [hereinafter FAA]; AECA, *supra* note 29.

[59]FAA, 22 U.S.C. § 2301 (1988).

cising restraint in conventional arms transfers, particularly to the developing world.[60]

Clearly, most of the above-described goals can be reconciled, albeit with some degree of strain. Some of the goals mentioned in the immediately preceding paragraph, however, are realistically inconsistent with the theme of strengthening collective security. Moreover, they are not reasonably attainable and seem to be holdovers from the discredited Carter policy of unilateral restraint. Although one cannot help but support these aims as ideals, in the context of the serious pursuit of American national security for the foreseeable future they serve as nothing more than empty catch-phrases for domestic political consumption.

In terms of the priorities of security assistance goals, neither the Administration or the Armed Forces have established any official order of precedence. What guidance there is in this area has been provided by Congress, and it reflects sound practical judgment. Security assistance furnished under the FAA is to be given in the first instance to satisfy the "needs of those countries in danger of becoming victims of active Communist or Communist-supported aggression or those countries in which internal security is threatened by Communist-inspired or Communist-supported internal subversion.''[61] Although not specifically stated, the policy provisions of the FAA leave little doubt that NATO members will normally be accorded the next highest priority.[62]

IV. THE ELEMENTS OF MILITARY SECURITY ASSISTANCE

Security assistance goals are attained through a number of component programs that deal with specific types of aid. The military component of security assistance is established under the FAA and AECA, and each will be discussed in some detail below.

Traditionally, military security assistance has been made up of four distinct programs. These are the Military Assistance Program (MAP),[63] the International Military Education and Training Program (IMET),[64]

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[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.* § **2311-2318,** 2321d, 2321h-2321j.
[64] *Id.* § 2347-2347d.

the Foreign Military Sales Program (FMS),[65] and the Foreign Military Financing Program (FMFP).[66] In addition to those four, two other military assistance programs, each with a narrow focus, have been established in the relatively recent past. These relate to Peacekeeping Operations[67] and Antiterrorism Assistance.[68]

The Military Assistance Program was for many years the centerpiece of security assistance. MAP is a program by which military equipment and related services, other than training, are furnished to eligible governments by outright grant. Various nations received billions of dollars in aid during the first twenty-five years of the program (1950-1975),[69] but its importance has rapidly declined. In 1980 those portions of the FAA pertaining to MAP were amended to allow MAP funds to be merged into the FMS trust fund for use by recipient countries to pay for military equipment purchases under FMS.[70] Since then MAP's practical importance has been minimal, and it has been overshadowed by other security assistance programs. For Fiscal Year 1990, the Administration requested funding under MAP solely to cover the administrative costs of military assistance.[71]

The International Military Education and Training Program is a grant aid program that allows the United States to provide training to selected foreign military personnel or civilians working in defense-related positions. IMET has never attracted a great deal of security assistance funds, but it has been described as our "most cost-effective foreign assistance program.''[72] Training is conducted primarily in the United States and performs two primary functions. First, IMET offers a range of military training alongside American personnel that provides foreign military students with specialized knowledge and skills that will ultimately improve their armed forces and contribute to their nation's security.[73] It also serves as *a* way to acquaint members of foreign military establishments with American military professionals and expose them to our societal values, such as support for democracy and respect for human rights.[74] It is hoped that their

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[65]AECA, 22 U.S.C. § 2761-2762 (1988).
[66]*Id.* § 2761-2764, 2771.
[67]FAA, 22 U.S.C. § 2348-2348c (1988).
[68]*Id.* § 2349aa-2349aa5.
[69]P. F'arley, *supra* note 19, at 28. During the specified time period, the United States had delivered approximately 25,000 tanks, 10,000 combat aircraft. and over 100 cruisers, destroyers, and submarines to other countries.
[70]Defense Institute of Security Assistance Management, *supra* note 5, at 2-12.
[71]Brown, *supra* note *57*, at 49.
[72]*Id.* at 53.
[73]FY 90 CPD, supra note 56.
[74]*Id.*

experiences will then be shared with their contemporaries upon their return home. Because foreign countries will logically send personnel to the United States that show potential for promotion to senior governmental positions, IMET allows the United States to develop lines of communication with foreign military personnel world-wide that may become increasingly important with the passage of time.[75]

Cash sales of military equipment and services to allies and other friendly countries are made pursuant to the Foreign Military Sales Program. FMS is a government-to-government program, under which the United States purchases equipment from manufacturers or draws it from existing Department of Defense stocks and then resells it directly to other nations.[76] FMS is a popular program with many foreign countries. Sales of major weapon systems are incorporated into complete defense packages, based upon detailed military studies of the defense requirements of purchasing nations.[77] An additional attraction is that under FMS, foreign governments are provided with the same legal protection as the Department of Defense in contractual agreements with American manufacturers.[78]

Military purchases for credit extended to foreign countries by the United States are governed by the provisions of the Foreign Military Sales Financing Program. FMSFP is a broad program that allows foreign governments to make purchases either by ''direct credit''[79] or ''guaranteed loans" at reduced interest rates.[80] Purchases under FMSFP can be made either from the United States Government or, with governmental approval, from commercial sources directly.[81] Unlike other programs, FMSFP allows the purchase of training as well as equipment and services.[82] As originally envisioned, FMSFP was established to help foreign countries overcome the difficulties associated with moving from grant aid to cash purchases.[83] The program has evolved, however, into something quite different. Foreign debt burdens have increased so sigruficantly over the last decade that it has become a fairly common practice for Congress, at the behest of the executive branch, to forgive all or a substantial portion of the

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[75]Defense Institute of Security Assistance Management, *supra* note 5, at 2-13.
[76]C. Catrina, supra, note 38, at 84.
[77]R. Labrie, *supra*, note 28, at 28.
[78]*Id.*
[79]AECA, 22 U.S.C. § 2762 (1988).
[80]*Id.* § 2764.
[81]C. Catrina, *supra* note 38, at 84-85.
[82]Defense Institute of Security Assistance Management, *supra* note 5, at 2-14.
[83]*Id.*

debt created by credit purchases. Indeed, in Fiscal Year 1990, FMSFP has become little more than an outright grant program.[84]

The two additional programs identified at the beginning of this part deal with highly specialized areas of security assistance. Funding for Peacekeeping Operations under the FAA represents a relatively small outlay that is used to pay costs associated with American participation in peacekeeping operations conducted primarily under the auspices of the United Nations.[85] Antiterrorism Assistance is meant to help foreign law enforcement personnel to improve their ability to deter or resolve terrorist incidents. Authorized assistance includes training services and provision of equipment related to bomb detection and disposal, management of hostage situations, and physical security.[86]

V. CONSTRAINTS ON MILITARY SECURITY ASSISTANCE

Having discussed security assistance goals and the programs used to attain those goals, we now turn to an examination of the plethora of restrictions that have been placed on the use of military security assistance. These constraints constitute an effective congressional means of restraint upon executive discretion in tht conduct of American foreign policy. Again, this is not to say that most of these statutory provisions are individually undesirable, or indeed that they do not have laudatory aims. Taken together, however, they are difficult to categorize, are spread across several statutes, and severely inhibit the President's ability to achieve any of the nation's security assistance goals.

Before considering the actual constraints on security assistance, it is important to stress that the President has been granted certain very narrow exceptions to the limitations placed upon his actions in this area. Under the "Special Authorities" sections of the FAA,[87] the President is authorized to furnish emergency assistance without regard to any of the provisions of the laws pertaining to security assistance, if he determines that to do so is important to the security interests of the United States.[88] There are, however, limits imposed

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[84]Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, Pub. L. No. 101-167, Title III (1989) [hereinafter FOAA 90].
[85]Defense Institute of Security Assistance Management, *supra* note 5, at 2-14.
[86]FAA, 22 U.S.C. § 2349aa (1988).
[87]*Id.* § 2318, 2364.
[88]*Id.* § 2364(a)(1).

upon the amount of emergency aid the President can furnish in any fiscal year.[89] In regard to funds earmarked by Congress for specific programs, the President may use such funds for different programs if compliance is made impossible by operation of law or if a prospective recipient has given base rights or access to the United States and has significantly reduced its military or economic cooperation with the United States in the last year.[90]

A. PROGRAM ELIGIBILITY

Initially, constraints on security assistance take the form of conditions on program eligibility. Under the FAA, section 505[91] indicates that no defense articles, training, or services may be given by grant unless the recipient country agrees to not permit use by anyone not an agent of that country, to not transfer or permit to be transferred the assistance supplied, or to use or permit its use for purposes other than those for which it was furnished.[92] Further, the recipient country must agree to maintain security over equipment to the same degree that the United States would, furnish information regarding its use, and return whatever is supplied when it is no longer needed, unless the President approves another disposition.[93] No defense articles are to be transferred by grant at a cost in excess of $3 million without a series of presidential determinations that culminate with the finding that the increased ability of the recipient country to defend itself is important to United States security.[94] Additionally, the President is under a mandate to terminate grant aid as soon as possible to countries that are later able to purchase desired equipment without undue burden to their economies.95

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[89]*Id.* § 2364(a)(4)(A) indicates that no more than $750 million in sales may be made under the AECA; no more than $250 million of the funds made available for use under the FAA or AECA may be used; and that no more than $100 million of foreign currency accruing under any law may be used. Additionally, 22 U.S.C. § 2364(a)(4)(c) (1988) indicates that not more than $50 million of the $250 million limitation described above may be allocated to any one country in any fiscal year, unless that country is the victim of active Communist or Communist-supported aggression, and that no more than $500 million of the aggregate limitation of $1 billion on AECA sales and funds under the FAA or AECA may be allocated to any one country in any fiscal year. The President also has emergency authority under 22 U.S.C. § 2318(a) (1988) to draw down from Department of Defense assets, but only to a maximum of $75 million per year. If this emergency draw down authority is exercised, the assets are required to be in the hands of the recipient country within 120 days of congressional notification. FOAA 90, § 551(a) (1989).

[90]FOAA 90, § 559 (1989).

[91]FAA, 22 U.S.C. § 2314 (1988).

[92]*Id.* § 2314(a)(1)(A)-2314(a)(1)(C).

[93]*Id.* § 2314(a)(2)-2314(a)(4).

[94]*Id.* § 2314(b)(1)-2314(b)(4).

[95]*Id.* § 2314(c).

Once eligibility for grant aid is established, assistance can be terminated for any substantial violation by the grantee nation of the terms and conditions of the grant.[96] The termination will remain in effect until the President determines that the violations have ceased and has received assurances that they will not reoccur.[97]

No grant aid is to be approved unless the recipient country agrees that, in the event of a later sale of any of the furnished material, the net proceeds will be paid to the United States.[98] Finally, no assistance is to be given to any country whose laws, policies, or practices would prevent a U.S. person "from participating in the furnishing of defense articles or . . . services . . . on the basis of race, religion, national origin, or sex.''[99]

Most of the eligibility requirements under the AECA are exactly the same as those found in the FAA, other than that they apply primarily to sales or leases rather than to grants.[100] A number of restrictions are added, however. No assistance will be provided to any country that engages in a consistent pattern of acts of intimidation or harassment directed against individuals in the United States.[101] The prohibition against non-authorized transfer by the recipient country is broadened to include products resulting from jointly managed research, development or manufacture of defense articles.[102] Further, the President is prohibited from approving a third-party transfer of security assistance articles under either the AECA or FAA if major defense equipment or high value articles, services, or training is involved, unless a detailed description of the proposed transfer is submitted to Congress.[103] The AECA also provides for a third-party transfer "cooling-off" period. Except for emergency situations requiring immediate transfer, any consent to transfer by the President is not effective until thirty days after the transfer submission is sent to Congress (fifteen days for transfer to NATO members, Japan, Australia, or New Zealand).[104] These restrictions also apply to transfers involving commercially exported defense articles, but an exception is granted for transfers made for maintenance, repair, cross-

[96] *Id.* § 2314(d)(1).
[97] *Id.* § 2314(d)(3).
[98] *Id.* § 2314(f).
[99] *Id.* § 2314(g)(1).
[100] AECA, 22 U.S.C. § 2753, 275.5 (1988).
[101] *Id.* § 2756.
[102] *Id.* § 2753(a)(2).
[103] *Id.* § 2353(d)(1). "Major defense equipment" is defined as that which has a value of $14 million or more; high value articles, training, or services are those having a value of $50 million or more, as measured by original acquisition cost.
[104] *Id.* §§ 2753(d)(2)(A)-2753(d)(2)(B).

servicing, or lead-nation procurement among NATO members.[105] International terrorism also figures into AECA eligibility. Sales are prohibited to any government that aids or abets, by granting sanctuary from prosecution, any individual or group that has committed an act of international terrorism.[106] The prohibition lasts for one year and is extended an additional year for each additional terrorist act.[107]

Termination of eligibility under the AECA does not differ widely from that under the FAA, although diversion of assistance is specifically addressed. When an economically less developed country is found to be diverting development assistance to military expenditures or is diverting its own resources to unnecessary military expenditures to a degree which materially interferes with its development, that country becomes immediately ineligible for further sales and loan guarantees.[108] As with the FAA, eligibility remains terminated until the President receives assurances that aid diversion will no longer take place.[109]

As a final general consideration in the initial, discretionary decision to furnish military assistance, the President is required to coordinate with the Director of the U.S. Arms Control and Disarmament Agency.[110] The President must "take into account" the Director's opinion as to whether the proposed assistance will contribute to an arms race, increase the possibility of outbreak or escalation of conflict, or prejudice the development of bilateral or multilateral arms control arrangements!"

B. OUTRIGHT AND CONDITIONAL PROHIBITIONS

Security assistance legislation contains many outright or conditional prohibitions on furnishing aid. These prohibitions can be generally applicable or can be country-specific. As a rule, they do not follow any particular pattern.

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[105] *Id.* §§ 2753(d)(3)-2753(d)(4).

[106] *Id.* § 2753(f)(1). An additional provision of the AECA, 22 U.S.C. § 2791(a) (1988), explicitly prohibits export of items on the U.S. Munitions List to any country that has repeatedly provided support for acts of international terrorism. Under 22 U.S.C. § 2791(b) (1988), however, the President may waive this restriction in the case of a particular export if he determines that waiver is important to U.S. national interests and reports that determination to Congress. The waiver is good for ninety days unless extended by Congress.

[107] AECA, 22 U.S.C. § 2753(f)(1) (1988).

[108] *Id.* § 2775(a).

[109] *Id.*

[110] FAA, 22 U.S.C. § 2321d (1988).

[111] *Id.*

State-sponsored terrorism again figures prominently in several provisions. No aid may be supplied under the FAA or AECA to any country that supports international terrorism,[112] and bilateral assistance may not be provided to terrorist countries.[113] The United States is also obligated to oppose any international loan or other use of funds to assist terrorist countries[114] and is prohibited from importing any goods or services from countries supporting terrorism.[115] The President is also required to suspend all assistance under the FAA or AECA to any country in which an airport is located that does not maintain and effectively administer security, when that country has been determined to contain a high terrorist threat.[116]

As might be expected from the previous historical discussion, human rights has remained a subject of congressional concern. There is a prohibition against furnishing security assistance to any country whose government "engages in a consistent pattern of gross violations of human rights.''[117] Further, the President is directed to:

> Formulate and conduct international security assistance programs of the United States in a manner which will promote and advance human rights and avoid identification of the United States, through such programs, with governments which deny to their people internationally recognized human rights and fundamental freedoms, in violation of international law or in contravention of the policy of the United States . . . .[118]

In an apparent need to further emphasize the importance it attaches to this topic, Congress has directed that no funds are to be used to provide assistance to any country for the purpose of aiding a government's efforts to repress legitimate rights in violation of the Universal Declaration of Human Rights.[119]

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[112] *Id.* § 2371(a)(1).

[113] FOAA 90, § 564 (1989). Section 529 of FOAA 90 (1989) addresses a related issue. that of dealing with the Palestine Liberation Organization (PLO). Employees or agents of the United States are forbidden from recognizing or negotiating with the PLO until it recognizes Israel's right to exist, accepts Security Council Resolutions 242 and 338, and renounces the use of terrorism.

[114] *Id.* § 563(a).

[115] International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83. § 505, 99 Stat. 190 (1985) [hereinafter ISDCA 85].

[116] ISDCA 85, § 552 (1985).

[117] FAA, 22 U.S.C. § 2304(a)(2) (1988). Although this ban seems clear on its face, Congress specifically forbade the President from providing security assistance to law enforcement forces or domestic intelligence arms of such countries, and Congress prohibited the issuance of export licenses for delivery of crime control or detection devices and equipment.

[118] *Id.* § 2304(a)(3).

[119] FOAA 90, § 511 (1989).

Several outright prohibitions address problems arising from what are essentially unfair business practices on the part of foreign countries. No aid will be provided to any country that remains indebted to any U.S. citizen or person for goods or services when the creditor's legal remedies have been exhausted, when the foreign government does not deny or contest the debt, or when the debt arises under an unconditional guaranty of payment given by such government or its predecessor.[120] Any country receiving financed security assistance from the United States that remains in default on payments of principal or interest for a period in excess of one calendar year will likewise receive no further aid.[121] When a country receiving assistance from the United States nationalizes or expropriates (directly or indirectly) property of a U.S. citizen or a business entity with fifty percent U.S. ownership, or has taken steps to repudiate or nullify existing contract or agreements with such citizens or companies, further military security assistance must be suspended.[122] This suspension will not be triggered, however, if the country in question takes timely and appropriate steps to discharge its obligations and otherwise to provide necessary relief to those affected by its actions.[123] If a country does nationalize or expropriate property, no monetary assistance is to be given to that country when it will be used to compensate the owners of that property.[124] If assistance funds are so used, the President must terminate aid until reimbursement is made.[125] This prohibition does not apply to monetary aid made available specifically to compensate foreign nationals in accordance with a furtherance of our national interests.[126]

Other general security assistance prohibitions include a directive to not furnish military aid to any country whose duly elected head of government is deposed by military coup or decree[127] (aid can be resumed if a democratically-elected government takes office after the prohibition takes effect). Further, there is a limit of $100 million on military assistance "for construction of any productive enterprise" to any given country (absent emergency) unless the program is in-

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[120]FAA, 22 U.S.C. § 2370(c) (1988).

[121]FOAA 90, § 518 (1989). Note that § 620(q) of the FAA, 22 U.S.C. § 2370(q), provides that no assistance will be furnished to any country in default during a period exceeding six months. (Neither provision applies to funds made available to Columbia, Bolivia, or Peru for anti-narcotics-related activities.)

[122]FAA, 22 U.S.C. § 2370(e) (1988).

[123]*Id.*

[124]*Id.* § 2370(g).

[125]*Id.*

[126]*Id.*

[127]FOAA 90, § 513 (1989).

cluded in the presentation made to Congress during its consideration of appropriations for foreign assistance.[128] Assistance is not to be given to any country that has severed diplomatic relations with the United States or *vice versa,* unless those relations have been resumed,[129] or to major drug-producing or drug-transit countries.[130] In addition, no defense articles may be sold to any nation acquiring intermediate-range ballistic missiles made by the People's Republic of China, unless the United States verifies that the acquiring nation has no nuclear, biological, or chemical warheads for the missiles.[131] The Central Intelligence Agency may not fund operations in foreign countries, except those intended solely for obtaining necessary intelligence.[132] Payment of any assessments, arrearage, or dues of any member of the United Nations is prohibited,[133] and security assistance funds may not be used to pay pensions, annuities, retirement pay, or adjusted service compensation for any person serving in the armed forces of any recipient country.[134]

Aid under the FAA or AECA is also forbidden to be furnished to any nation that delivers to or receives from any other country nuclear enrichment equipment, materials, or technology.[135] The countries involved can avoid this restriction if they agree in advance of delivery to place such equipment, materials, or technology under multilateral auspices and management *and* the recipient country enters into an agreement to place all equipment, technology, materials, nuclear fuel, and facilities under the safeguards system of the International Atomic Energy Agency.[136] The President can furnish assistance that would otherwise be prohibited if he certifies to Congress that the recipient country will not acquire or develop nuclear weapons or will not assist other nations to do so.[137] Assistance is also to be denied to any country that transfers or receives nuclear reprocessing equip-

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[128]FAA, 22 U.S.C. § 2370(k) (1988).

[129]*Id.* § 2370(t).

[130]International Narcotics Control Act of 1986, 22 U.S.C. § 2291-1(b) (1988). This prohibition is expanded under the FAA. 22 U.S.C. § 2291f (1988) directs the President to ensure that security assistance is not provided to individuals or entities who have been convicted of an American or foreign drug offense, or who have been involved in drug trafficking. 22 U.S.C. § 2291(i)(2) (1988) defines "major illicit drug producing country" as a country that produces at least five metric tons of opium or opium derivative, or five hundred metric tons of coca or marijuana. during a fiscal year.

[131]National Defense Authorization Act, Fiscal Year 1989, as *amended,* Pub. L No. 100-456, 102 Stat. 1918, § 1307(a)-1307(b) (1989) [hereinafter NDAA 89].

[132]FAA, 22 U.S.C. § 2422 (1988).

[133]FOAA 90, § 505 (1989).

[134]*Id.* § 503.

[135]FAA, 22 U.S.C. § 2429 (1988), FOAA 90, § 510 (1989).

[136]FAA, 22 U.S.C. §§ 2429(a)(1)-2429(a)(2) (1988).

[137]*Id.* § 2429(b)(1)(A).

ment or technology, unless it is to be used in international programs evaluating alternatives to pure plutonium reprocessing in which the United States participates;[138] or to a non-nuclear weapon nation that illegally exports or attempts to export material, equipment, or technology from the United States that would contribute significantly to that country's ability to manufacture a nuclear explosive device.[139] Additionally, military aid is to be refused to any country that transfers a nuclear explosive device to a nation that did not previously possess such a weapon, and to any non-nuclear weapon state that procures or detonates a nuclear explosive device.[140]

A number of security assistance restrictions are directed toward a specific type of country, groups of countries that are considered hostile or otherwise present a threat to the United States, and countries that the United States generally seeks to restrain from engaging in hostilities. There is, of course, a broad prohibition against providing aid to Communist countries.[141] Additionally, assistance to Sudan, Burundi, Liberia, Uganda, Jamaica, and Somalia is forbidden, unless furnished through the regular notification procedures of the congressional committees on appropriations.[142] There can also be no funding for direct or indirect assistance or reparations to Angola, Cambodia, Cuba, Iraq, Libya, the Socialist Republic of Vietnam, South Yemen, Iran, or Syria.[143] Funding for any military or paramilitary combat operations by foreign forces in Laos, Cambodia, Vietnam or Thailand is not allowed unless "such operations are conducted by the forces of that government receiving such funds within the borders of that country" or otherwise specifically authorized by law.[144] None of the funds provided for ''International Organizations and Programs" will be used to pay the United States' normal proportionate share of such programs if they are to benefit the Palestine Liberation Organization, the Southwest African Peoples Organiza-

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[138]*Id.* § 2429a(a)(1)(A).
[139]*Id.* § 2429a(a)(1)(B).
[140]*Id.* §§ 2429a(b)(1)(A)-2429a(b)(1)(B).
[141]*Id.* § 2370(f)(1). For purposes of this prohibition, "Communist country" includes: Czechoslovakia, Democratic People's Republic of Korea, Estonia, German Democratic Republic, Hungary, Latvia, Lithuania, Mongolian People's Republic, People's Republic of Albania, Bulgaria, People's Republic of China, Poland, Republic of Cuba, Yugoslavia, Rumania, Socialist Republic of Vietnam, Tibet, and the Union of Soviet Socialist Republics. The list is not meant to be all-inclusive. Recent events in Eastern Europe may cause a radical change in the number of nations covered by this section. It is, of course, doubtful that U.S. military aid will be sought by the Eastern Block anytime soon.
[142]FOAA 90, § 542 (1989).
[143]*Id.* §§ 512, 548.
[144]Foreign Assistance Act of 1973, Pub. L. No. 93-189, § 31, 87 Stat. 714 (1973).

tion, Libya, or Iran.[145] Further, Congress has suggested that the President exercise restraint in selling or financing the sale of defense equipment or services to nations in Sub-Saharan Africa.[146]

Bans on aid to individual nations are also to be found in security assistance legislation.[147] In two cases, the countries involved already figure prominently in other provisions. There is an absolute prohibition of assistance to the present government of Cuba,[148] and the President is authorized to ban any imports from or exports to Libya.[149] There is also an unqualified ban on use of any funds to supply military assistance to Mozambique.[150]

There are a large number of statutory provisions placing more limited constraints on security assistance available to specific nations, international organizations, and the Nicaraguan Democratic Resistance. These provisions constitute responses to many international political problems and well illustrate congressional efforts to influence the actions of other nations as well as to maintain a substantial degree of control over American foreign policy.

No security assistance is to be supplied to either Greece or Turkey unless it is intended solely for defensive purposes (including fulfillment of NATO obligations) and does not adversely effect the balance of military strength existing between those countries.[151] Further, such assistance cannot be transferred to Cyprus or used in support of the severance or division of that island.[152]

Haiti is not to receive any military aid unless its government embarks upon what Congress describes as "a creditable transition to democracy."[153] This creditable transition must include restoration of the 1987 Constitution, appointment of and support for a genuinely

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[145]FOAA 90, § 526(a) (1989).

[146]AECA, 22 U.S.C. § 2773 (1988).

[147]There is no specific statutory prohibition against providing assistance to Nicaragua. President Reagan imposed a ban on imports from or exports to Nicaragua, including forbidding Nicaraguan air carriers from servicing points within the United States and Nicaraguan ships from entering American ports, when he issued Executive Order 12513, 50 Fed. Reg. 18629 (1985). This Executive Order declared a national emergency to deal with "an unusual and extraordinary threat to the national security and foreign policy of the United States." presented by the Government of Nicaragua. The national emergency has been extended each year by Presidential Notice.

[148]FAA, 22 U.S.C. § 2370(a)(1) (1988).

[149]ISDCA 85, § 504 (1985).

[150]FOAA 90, § 566 (1989).

[151]FAA, 22 U.S.C. § 2373(b)(4) (1988).

[152]*Id.* § 2373(e)(1), FOAA 90, § 570 (1989).

[153]FOAA 90, § 560(a) (1989).

independent electoral commission to expeditiously conduct free, fair, and open elections, and making provision for adequate electoral security.[154]

No assistance will be allowed to go to Ethiopia if it is to be used to defray costs associated with that country's forced resettlement or villagization programs,[155] and Afghanistan will receive no aid until its government apologizes officially for the death of Ambassador Adolph Dubs and agrees to provide adequate protection for all U.S. Government personnel in that country.[156] In regard to Afghanistan, the United States has also indicated that it will not pay directly or as its normal proportionate share for funding of programs under the heading of "International Organizations and Programs" that are to provide assistance inside the country, if that assistance would be passed through the Soviet-controlled government.[157]

Other miscellaneous statutory sections place conditions on supplying security assistance based on issue-specific criteria. Pakistan, for example, can receive no aid unless the President submits a yearly certification to Congress that Pakistan has no nuclear weapons and that United States aid will significantly reduce the risk that they will.[158] Of the security assistance funding currently approved for El Salvador, $5 million cannot be expended until the investigations and trials (if appropriate) pertaining to the murders of two American and one Salvadoran land reform specialists as well as the massacre of ten peasants near the Salvadoran town of San Francisco are complete.[159]

Providing aid to certain forces of rebellion in Latin America and Southeast Asia has been selected for special legislative attention. No security assistance (other than humanitarian assistance) is to be provided to persons or groups engaging in insurgency or rebellion against the Government of Nicaragua, absent specific congressional authorization.[160] In addition, no funds are to be provided for purposes of planning, directing, executing, or otherwise supporting the mining of the ports or territorial waters of Nicaragua.[161] Further, United States Government personnel may not provide any training

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[154] *Id.* §§ 560(a)(1)-560(a)(3).
[155] *Id.* § 541.
[156] FAA, 22 U.S.C. §§ 2374(a)(1)-2374(a)(2) (1988).
[157] FOAA 90, § 577 (1989).
[158] FAA, 22 U.S.C. § 2375(e) (1988).
[159] FOAA 90, § 538 (1989).
[160] ISDCA 85, § 722 (1985); Department of Defense Appropriations Act, 1990, Pub. L. No. 101-165, § 9054, (1989) [hereinafter DODAA 90].
[161] Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2907, 98 Stat. 494 (1984).

or other services or otherwise participate directly or indirectly in the provision of any assistance to the Nicaraguan Democratic Resistance within those portions of Honduras and Costa Rica that are within twenty miles of the Nicaraguan border? In Asia, dollar limits have been placed on the amount of aid that can be provided to non-Communist Cambodian resistance forces, which, to the extent possible, is to be administered directly by the United States Government.[163]

Although they do not technically constitute restraints on security assistance, several sections of the FAA direct the President to *consider* termination or non-initiation of aid under certain circumstances. In determining whether to furnish aid to Liberia, for instance, the President is to "take into account" whether that nation has demonstrated its commitment to economic reform by keeping expenditures within budgetary limits and has taken "significant steps to increase respect for internationally recognized human rights."[164] This is also the case in regard to any country that permits or fails to take adequate measures to prevent damage or destruction to American property by mob action within that country or which, when such an event has already occurred, fails to take appropriate measures to prevent a reoccurrence and to provide adequate compensation for the damage or destruction.[165] Consideration should also be given to denying assistance to any country that has failed to enter into an agreement with the President to institute the investment guarantee program described in the FAA,[166] which protects against risks of inconvertibility, expropriation, or confiscation.[167] Finally, consideration is to be given to refusing aid to any country that seizes or imposes any penalty or sanction against any United States fishing vessel based upon its fishing activities in international waters.[168] This last provision does not apply to any case which is governed by an international agreement to which the United States is a party.[169]

C. PROCUREMENT AND BUDGET

In addition to the legislative prohibitions dealing with specific coun-

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[162]Continuing Appropriations Act, 1987, as amended, Pub. L. No. 99-591, § 216(a), 100 Stat. 3341 (1987).
[163]FOAA 90, § 572 (1989). No more than $7 million in aid may be given.
[164]FOAA 90, § 549(a) (1989).
[165]FAA, 22 U.S.C. § 2370(j) (1988).
[166]*Id.* § 2194(a)(1).
[167]*Id.* § 2370(l).
[168]*Id.* § 2370(o).
[169]*Id.*

tries or types of countries, security assistance is also subject to various procurement and budget constraints. These range from statutorily required contract clauses to earmarking of funds for use only by the countries designated by Congress. By far the greatest impact of these constraints on the military aspect of security assistance is in the area of earmarking.

Congress has given the President considerable guidance in all of the areas related to procurement for security assistance. Payment in any sales arrangement involving a foreign purchaser must be made in U.S. dollars.[170] In the case of sales from Department of Defense (DOD) stocks, payment is normally required in advance, although the payment period can be extended for up to 120 days in emergency situations with congressional approval.[171] Sales from DOD stocks that could have a sigmficant adverse effect on U.S. combat readiness must be kept to an absolute minimum, and no delivery of items sold from DOD stocks may be made until the sale is justified to Congress in terms of U.S. national security.[172] The United States Government is authorized to enter into contracts for cash sales to foreign countries on the basis of a "dependable undertaking" from the purchasing nation that it will make timely contract payments, ultimately pay the full amount of the contract, and will pay any damages resulting from breach.[173] The same emergency payment extension applicable to DOD stock sales is available for cash sales.[174]

Credit sales are also authorized, of course, but payment is normally required within twelve years, and no less than five percent interest

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[170]AECA, 22 U.S.C. §§ 2761(a)(1), 2762(b), 2763(b) (1988).

[171]*Id.* §§ 2761(b), 2761(d).

[172]*Id.* §§ 2761(i)(1)-2761(i)(2). 10 U.S.C. §§ 975(a)(1)- 975(c)(1) (1988) also prohibits non-emergency sale of DOD stocks that are designated to bring U.S. Armed Forces from a peacetime level of readiness to a combat level of readiness, unless the items are to be replaced, substituted, eliminated, or sold to provide funds for procurement of higher priority stocks. The prohibition does not apply to sales to **NATO** members.

[173]AECA, 22 U.S.C. § 2762(a) (1988). The rules governing cash sales are also applicable to the sale of design and construction services to foreign military establishments under *id.* § 2769. In either case, *id.* § 2779(c) indicates that no contribution, gift, commission or fee may be included, in whole or part, in the amount paid under a cash sales contract, unless the amount thereof is reasonable, allocable to the contract, and not made to a person who has solicited, promoted, or otherwise secured the sale. or has held himself out as being able to do so, through improper influence.

[174]*Id.* § 2762(b).

must be charged on the outstanding debt each year.[175] Economically less developed nations desiring to purchase defense articles on credit have two additional constraints with which to contend. They cannot finance their purchases through the Export-Import Bank of the United States,[176] and AECA funds cannot be used to guarantee or extend credit in connection with the sale of sophisticated weapons systems to any underdeveloped country.[177]

No weapons or other defense-related items can leave the United States without an authorizing export license. Decisions on issuing export licenses must be coordinated with the Director, U.S. Arms Control and Disarmament Agency.[178] A license to export an item on the U.S. Munitions List will not be issued to anyone convicted or under indictment for any one of a series of federal offenses[179] or who is otherwise ineligible to receive an export license from any agency of the U.S. Government, except as may be determined on a case-by-case basis by the President after consultation with the Secretary of the Treasury.[180] Export licenses for items on the U.S. Munitions List will not be issued to a foreign person, other than to a foreign government.[181] Once arms manufactured in the United States and furnish-

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[175] *Id.* §§ 2763(b)-2763(c). Additionally, AECA, 22 U.S.C. § 2777(a) (1988) requires that any cash payments or advances received under 22 U.S.C. §§ 2761, 2762, 2763, or 2769 be used solely for payments to suppliers and refunds to purchasers; they cannot be used for financing credits and guarantees. Amounts received as repayments of 22 U.S.C. § 2763 credits, amounts received from disposition of instruments evidencing indebtedness, and other collections of fees and interest must be transferred to the miscellaneous receipts of the Treasury.

[176] AECA, 22 U.S.C. § 2772 (1988).

[177] *Id.* § 2754. Examples of "sophisticated weapons systems" include missile systems and military jet aircraft. Greece, Turkey, Israel, the Republic of China, the Philippines, the Republic of Korea, and, surprisingly, Iran are exempt from this restriction.

[178] *Id.* § 2778(a)(2). The President must go through the same decision process as was previously discussed in relation to furnishing military assistance to a foreign country, i.e., he must take into consideration the Director's opinion as to whether export of an item will contribute to an arms race, increase the possibility of outbreak or escalation of conflict, or prejudice development of arms control agreements.

[179] *Id.* §§ 2778(g)(1), 2778(g)(4). The federal offenses, commission of which will bar issuance of an export license, include: 22 U.S.C. § 2778 (1988); § 11 of the Export Administration Act of 1979 (50 U.S.C. A. App. 2410 (West 1984 & Supp. 1989)); 18 U.S.C. §§ 793, 794 or 798 (1988); § 16 of the Trading with the Enemy Act (50 U.S.C.A. App. 16 (West 1984 & Supp. 1989)); § 206 of the International Emergency Economic Powers Act (31 U.S.C.A. § 492a (West 1984 & Supp. 1989)); Section 30A of the Securities Exchange Act of 1934 (15 U.S.C. § 78dd1 (1988)); § 104 of the Foreign Corrupt Practices Act (15 U.S.C. § 78dd2 (1988)); 18 U.S.C. chapter 105 (1988); § 4(b) of the Internal Security Act of 1950 (50 U.S.C. § 783(b) (1982)); §§ 57, 92, 101, 104, 222, 224, 225, or 226 of the Atomic Energy Act of 1954 (42 U.S.C.A. §§ 2077, 2122, 2131, 2134, 2272, 2274, 2275, and 2276 (West 1984 & Supp. 1989)); § 603(b) or (c) of the Comprehensive Anti-Apartheid Act of 1986 (22 U.S.C. § 5113(b), (c) (1988).

[180] AECA, 22 U.S.C. § 2778(g)(4)(B) (1988).

[181] *Id.* § 2778(g)(5).

ed to foreign governments under security assistance legislation are actually exported, they may not be returned for sale in the United States, other than to the U.S. Armed Forces, to allies of the United States, or to state or local law enforcement agencies.[182]

There are several specialized security assistance procurement programs authorized under the AECA. One is the Special Defense Acquisition Fund, which is used to purchase defense articles in anticipation of their transfer pursuant to security assistance legislation.[183] This fund may not exceed the figure set out in 10 U.S.C. § 114,[184] and amounts in the fund that are available for obligation in any fiscal year must be specified in advance in appropriations acts.[185] Another program allows the President to enter into cooperative projects with friendly foreign countries for furthering the objectives of standardization, rationalization, and interoperability among the armed forces of the nations involved.[186] No military aid or other financing received from the United States can by used by another participant to pay its share of the cooperative project's costs, and all other participants must agree to pay their equitable share in the amounts and at the times required under the agreement.[187] The President is allowed to reduce or waive certain charges for other participants in a cooperative project, but funds received from other sales cannot be used to cover the subsidy.[188] There is also a project that, on cash terms, authorizes the sale of defense articles to U.S. companies at replacement cost for incorporation into end items that will be sold commercially to friendly foreign countries or international organizations, as well as defense services in support of the sale of such articles.[189] However, any defense services sold can be performed only in the United States.[190] The defense articles can be sold only when the end item

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[182] *Id.* § 2778(b)(1)(A). Id. § 2778(b)(1)(B) indicates that this prohibition does not apply to an importation of firearms approved by the Secretary of the Treasury under 18 U.S.C. § 925(e) (1988) or if a foreign government certifies to the United States that such foreign government owns the weapons in question.

[183] AECA, 22 U.S.C. § 2795(a)(1) (1988).

[184] *Id.* § 2795(c)(1). Currently, the fund may not exceed $1.07 billion.

[185] *Id.* § 2795(c)(2). Title III of FOAA 90 (1989) states that no more than $280,000,000 may be so obligated.

[186] AECA, 22 U.S.C. §§ 2767(a)(1)-2767(b)(2) (1988). "Cooperative project" is defined as a jointly managed arrangement that provides for cost-sharing of research on and development, testing, evaluation or joint production of defense articles; for concurrent production in the U.S. and another participant's country of a jointly developed defense article; or for procurement by the United States of a defense article or service from another participant to the agreement.

[187] *Id.* § 2767(c).

[188] *Id.* §§ 2767(e)(1)-2767(e)(2).

[189] *Id.* § 2770(a).

[190] *Id.*

to which the articles apply is to be procured for the armed forces of a friendly country or international organization, the articles would be supplied to a prime contractor as government-furnished materials if the end item was to be procured for the American military, and the articles and/or services are not available to the prime contractor through a non-government source or at the times needed to meet the delivery schedule.[191]

Any security assistance procurement through means of a contract to which the United States is a party requires a contractual provision authorizing the termination of the contract for the convenience of the United States.[192] Generally, such procurement is required to be made within the United States. Funds will be made available for purchases outside the United States only if the President determines that a particular foreign procurement will not adversely effect the American economy or industrial mobilization base.[193] Much the same determination must be made prior to approval of any agreement with a foreign country that requires transfer of U.S. defense technology in connection with contractual offsets.[194] If a bulk commodity is to be purchased "off shore," the procurement price must be lower than the prevailing United States market price, after adjustment for the cost of transport, quality, and terms of payment.[195] Congress has also stipulated that no more than fifteen percent of any appropriation item made available through the primary security assistance appropriation act can be obligated during the last month of availability.[196] If the Government Accounting Office or any appropriate congressional committee submits a written request for information to the head of any agency that is carrying out a function under the FAA, and no response is forthcoming within thirty-five days, FAA funds relating to the project or activity that is the subject of the inquiry are, in essence, frozen.[197] They will remain that way until the requested information is provided or until the President certifies that he will not allow the information to be furnished and indicates his reasons for doing so.[198]

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[191] *Id.* §§ 2770(b)(1)-2770(b)(3).

[192] FOAA 90, § **504** (1989).

[193] FAA, 22 U.S.C. § 2354(a) (1988). AECA, 22 U.S.C. § 2791(c) (1988) contains the same limitation.

[194] 10 U.S.C. § 2505(b)(1) (1988). In the case of technology transfers, the President may not approve agreements that will result in a substantial loss to a U.S. firm, as opposed to the entire economy. 10 U.S.C. § 2505(b)(2) (1988) indicates, however, that the President may approve technology transfers pursuant to an agreement that will result in a strengthening of US. national security, in spite of resultant business losses.

[195] FAA, 22 U.S.C. § 2354(b) (1988).

[196] FOAA 90, § 502 (1989).

[197] FAA, 22 U.S.C. § 2393A (1988).

[198] *Id.* §§ 2393a(1)-2393a(2).

DOD itself also has budget-related security assistance restrictions placed upon it. No DOD funds are to be used for planning or execution of programs using amounts credited to DOD appropriations or funds pursuant to section 37(a) of the AECA representing payment for the actual value of defense articles purchased from DOD stocks that were not intended to be replaced.[199] DOD is also prohibited from using its funds to approve any request for waiver of costs otherwise required to be recovered under section 21(e)(1) of the AECA, unless the congressional committees on appropriations are notified in advance.[200] Before any military equipment or data related to the manufacture of such equipment can be transferred to a foreign country at DOD expense, the undertaking requires approval in writing by the Secretary of the military service concerned.[201]

The budgetary issue with the greatest impact on security assistance, however, is that of earmarking of funds. Congress has made it standard practice to designate funding levels for a relatively small number of specific countries, regions, or programs. In 1990, in excess of ninety-four percent of the money appropriated for military security assistance was earmarked, leaving less than six percent to cover the costs of all non-earmarked programs.[202] This gives the President very little flexibility to deal with new or rapidly changing situations in the security assistance sphere that do not rise to the level of bona fide emergencies.

Of the $4,703,404,194 appropriated for military assistance loans and grants in Fiscal Year 1990, a minimum of $4,180,000,000, or roughly eighty-nine percent, was earmarked for five countries: Israel, Egypt, Turkey, Greece, and Pakistan.[203] Other large scale recipients were El Salvador ($85 million), Morocco ($43 million), and the countries in sub-Saharan Africa ($30 million).[204] An additional $3 million was made available to Zaire, and Guatemala was to receive $9 million

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[199] Department of Defense Appropriations Act, 1989, Pub. L. No. 100-163, § 8021, 102 Stat. 2270 (1988) [hereinafter DODAA 89].

[200] AECA, 22 U.S.C. § 2761(e)(1)(c) (1988). Under this provision, purchasers are required to pay "a proportionate amount of any nonrecurring costs of research, development, and production of major defense equipment." An exception is granted for equipment paid for totally from funds transferred under section 503(a)(3) of the FAA or from funds made available on a grant basis under the AECA.

[201] DODAA 89, § 8034 (1988).

[202] FOAA 90, Title III (1989).

[203] *Id.* Israel received $1.8 billion, Egypt $1.3 billion, Turkey $500 million, Greece $350 million, and Pakistan $230 million. All of these figures were expressed as minimum dollar amounts that each nation was to receive.

[204] *Id.*

in "non-lethal assistance."[205] Although no dollar figures were mentioned, any military aid to Haiti was also to be limited to non-lethal items, such as "transportation and communications equipment and uniforms."[206] Finally, $39 million was designated for program administration.[207] All told, after subtracting the earmarks, only $266,404,194 remained uncommitted.

International narcotics control has taken on increased importance over the last few years; the level of congressional interest in the area is reflected in part by the substantial number of earmarks and other limitations placed on funds to fight the overseas drug problem. Of the funds appropriated for military security assistance, $35 million was targeted for narcotics control in Bolivia, Ecuador, Jamaica, and Columbia.[208] Another $1 million was made available to provide defensive arms for aircraft used in narcotics control, eradication, or interdiction.[209] If any of these countries were not to take adequate steps to stop illegal drug production or trafficking, security assistance funding would be halted to the offending country for a three-month period, and the funds for that period would be redistributed among the remaining recipients.[210] Congress appropriated $115 million to carry out the narcotics control provisions of the FAA, provided that increased emphasis was placed on eradication and interdiction of drugs and that the United States would foster initiatives for cooperative international narcotics enforcement efforts.[211] Mexico was provided with a total of $15 million for the drug fight, with no other significant conditions placed upon the use of the funds.[212] Congress also designated $6.5 million of FAA money to provide education and training in the operation and maintenance of narcotics control equipment in Bolivia, Peru, Columbia, and Ecuador, as well as to cover the costs of deploying DOD mobile training teams to countries desiring instruction in conducting tactical narcotics interdiction operations.[213] These countries were also to receive an additional

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[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] FOAA 90, § 569(a)(2) (1989).
[209] *Id.* § 569(a)(5).
[210] *Id.* § 569(b),(d)(1)(A),(B). *Compare id. with* 22 U.S.C.§§ 2291(h)(1)-2291(h)(2) (1988). which prohibits obligation or expenditure of fifty percent of any assistance allocated to major drug producing or drug transit countries, as well as imposes a requirement to oppose any loan or other use of funds from international banking institutions for these countries, unless the President certifies that they have cooperated with American anti-drug efforts or have otherwise taken adequate steps to combat those within their nations contributing to the international narcotics trade.
[211] FOAA 90, Title II (1989).
[212] INCA 90, § 7(a)(1) (1989).
[213] FOAA 90, § 569(a)(6)(A) (1989), INCA 89, § 3(c)(1) (1989).

$12.5 million to purchase defense articles for use in narcotics control, eradication, and interdiction.[214] No FAA funds made available for international narcotics control may be used to acquire real property for foreign military, paramilitary, or law enforcement forces,[215] and equipment made available to foreign nations for anti-narcotics efforts may only be used for that purpose.[216] Furthermore, recipient countries are required to "bear an appropriate share of costs" relating to any narcotics control program implemented on their territory.[217]

D. OPERATIONS AND TRAINING

Another category of restraints deals with what may loosely be called "operations and training." These constraints are concerned with the activities of American personnel in the security assistance setting and the type of support that can be provided in training and operational environments. In this area, "training" includes both that which is provided by agents of the United States and that in which U.S. personnel jointly participate with foreign military establishments. The line between "operations" and "training" is largely indistinct.

Congressional concern over the possibility of American troops actively participating in actions that are the responsibility of the nation receiving assistance are made quite plain in these provisions. Section **650** of the FAA states emphatically that the fact that the United States furnishes foreign countries with assistance is not to be interpreted as establishing new defense commitments or modifying existing ones.[218] It is commonly agreed that effective administration of security assistance programs overseas requires ''onsite" management by representatives of the United States; Congress approved performance of this function by members of the military.[219] Congress has also ordained, however, that any advisory and training assistance conducted by military members serving in these billets is to be kept to an absolute minimum.[220] In what probably constitutes an effort

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[214]INCA 89, § 3(d) (1989).
[215]FAA, 22 U.S.C. § 2291g (1988).
[216]*Id.* 22 U.S.C. § 2291h.
[217]FAA, 22 U.S.C.A. § 2292(d) (West 1984 & Supp. 1990).
[218]*Id.* § 2409.
[219]*Id.* 22 U.S.C. §§ 2321i(a)(1)-2321i(a)(7). The individuals assigned to this duty are charged with the performance of a series of functions, including equipment and services case management, training management, program monitoring, evaluation and planning of the host government's military capabilities and requirements, and liaison functions exclusive of advisory and training assistance.
[220]*Id.* § 2321i(b).

to ensure this, the number of Armed Forces personnel assigned to such duties in any particular country has been limited to six.[221] When properly justified by the President, this limitation can be waived; currently, seventeen countries are authorized larger contingents.[222] These personnel are also admonished not to encourage or to otherwise promote the foreign purchase of American-made military equipment, absent direction to do so by higher authority.[223]

Training and support of foreign law enforcement personnel as part of security assistance has generally been forbidden, as has any support for programs of internal intelligence or surveillance on behalf of any foreign government within the United States or abroad.[224] The potential for abuse in this area is obvious. There are, however, three exceptions to the general prohibition. Costa Rica is given a blanket exemption,[225] and subject to certain conditions El Salvador may also receive training assistance for security forces separate and apart from the military.[226] Limited assistance may also be given to countries needing anti-narcotics or anti-terrorist training and support.[227] As one might expect, even limited assistance in these areas is subject to other restrictions.

American personnel are forbidden from making any direct arrests as part of a narcotics control effort conducted by foreign police within their own country,[228] although they can assist foreign officers in doing so if the chief of mission approves.[229] This limitation does not prohibit Americans from taking whatever actions are necessary under exigent circumstances to protect life or safety,[230] and it does

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[221] *Id.* § 2321i(c)(1).

[222] *Id.* The countries with expanded security assistance management teams include Pakistan, Tunisia, El Salvador, Honduras, Columbia, Indonesia, Morocco, Saudi Arabia, Greece, Portugal, Spain and Turkey.

[223] *Id.* § 2321i(f).

[224] *Id.* § 2420(a).

[225] *Id.* § 2420(c). Although Costa Rica is not mentioned by name, the exemption is granted to "a country which has a longstanding democratic tradition, does not have standing armed forces, and does not engage in a consistent pattern of gross violations of internationally recognized human rights." The number of countries that can be so described and might still be in need of such training is finite.

[226] FOAA 90, §§ 599G(a)-599G(a)(2)(B) (1989). Police training for Salvadorans must be provided by American civilian law enforcement personnel, and must include instruction in "such areas as human rights, civil law, investigative and civilian law enforcement techniques, and urban law enforcement training." No assistance can be used to purchase lethal equipment other than small arms and ammunition for training purposes.

[227] FAA, 22 U.S.C. §§ 2291(a)(4), 2349aa (1988).

[228] *Id.* § 2291(c)(1).

[229] *Id.* § 2291(c)(2).

[230] *Id.* § 2291(c)(3).

not apply (with the agreement of the country involved) to maritime law enforcement actions in the territorial sea of a foreign country.[231] American personnel are also prohibited from interrogating or being present during the interrogation of any United States person arrested in a foreign country on a drug-related charge without that person's written consent.[232] None of these limitations apply to actions by U.S. military personnel taken pursuant to an applicable status of forces agreement.[233]

In the realm of anti-terrorism, any assistance provided by the United States must be paid for by the recipient country in advance, and credits and proceeds of guaranteed loans made available pursuant to the AECA may not be used for payment.[234] No anti-terrorism training is to take place outside of the United States, and U.S. anti-terrorism advisors cannot work outside of the United States for more than thirty consecutive days.[235] Department of State employees can engage in this training only to the extent that they instruct foreign nationals in the methods of ensuring the physical protection of internationally protected persons and related facilities.[236] Equipment and supplies that may be made available for anti-terrorism training are also limited. Such equipment, to include small arms, ammunition, and intelligence collection devices, must be directly related to the training being provided, and the recipient country cannot otherwise be prohibited from receiving security assistance.[237] Anti-terrorism equipment cannot include shock batons or similar instrument ~Equipment and supply costs cannot exceed twenty-five percent of the funds made available in any fiscal year for this training,[239] and such funds may not be used for personnel compensation or benefits.[240]

Security assistance training of a more general sort has also been constrained in a number of ways. There has been no prohibition against the Armed Forces participating in military exercises with developing countries, but there can be no payment of the incremental expenses incurred by these countries as a result of participation

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[231] *Id.* § 2291(c)(4).
[232] *Id.* § 2291(c)(5).
[233] *Id.* § 2291(c)(6).
[234] *Id.* § 2349aa2(b).
[235] *Id.* §§ 2349aa2(d)(1)-2349aa2(d)(2).
[236] *Id.* § 2349aa2(d)(3).
[237] *Id.* §§ 2349aa2(c)(4)(A), 2349aa2(c)(5).
[238] *Id.* § 2349aa2(d)(4)(C).
[239] *Id.* § 2349aa2(d)(4)(B).
[240] *Id.* § 2349aa2(f).

by the United States.[241] This rule applies to all cases except those in which the Secretary of Defense finds that a particular exercise is undertaken primarily to enhance U.S. security interests, that developing country participation is necessary to achieve the exercise's fundamental objectives, and that those objectives cannot be achieved unless the incremental expenses of non-U.S. participants are paid.[242] Training can also be provided to military personnel of friendly foreign countries and international organizations as part of an exchange training program, if the non-U.S. participants agree to provide comparable training to American personnel within one year.[243] In regard to the more formal academic International Military Education and Training Program, no grant assistance will be given to any country whose annual per capita gross national product is greater than **$2,349,** unless that country funds the transportation costs and living expenses of its students.[244]

In addition to the constraints placed upon the training-oriented programs identified above, there are also limitations placed on three programs that have a more benevolent direction. American troops are allowed to engage in peacekeeping operations, but only to the extent they are justified in the yearly Congressional Presentation Document.[245] The U S. Armed Forces are also permitted to conduct humanitarian and civic assistance projects[246] if certain conditions are met. These activities must be conducted in conjunction with authorized military operations, must promote the security interests of both the United States and the recipient nation, and must improve specific operational readiness skills of participating Armed Forces members.[247] Further, this form of assistance cannot duplicate that provided by any other agency or department of the United States, and it must serve the basic economic and social needs of the people of the country concerned.[248] It cannot be provided to any individual

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[241] 10 U.S.C. § 2010(a) (1988). "Incremental expenses" include rations, fuel, training ammunition, and transportation.

[242] *Id.* §§ 2010(a)(1)-2010(a)(2).

[243] AECA, 22 U.S.C. §§ 2770a(a)-2770a(b) (1988). If the agreed upon foreign sponsored reciprocal training is not provided within a year, the non-U.S. participants must reimburse the United States for the full costs of the initial training.

[244] FOAA 90, Title III (1989). For Fiscal Year 1990, $47.4 million was earmarked for IMET.

[245] FOAA 89, Title V (1988). Under FOAA 90, Title III (1989), $33,377,000 was allocated for Fiscal Year 1990 peacekeeping operations.

[246] 10 U.S.C. §§ 401(e)(1)-401(e)(4) (1988) define "humanitarian and civic assistance" as medical, dental, and veterinary care provided in rural areas, construction of basic roads, well drilling, construction of basic sanitation facilities, and rudimentary construction and repair of public facilities.

[247] 10 U.S.C. §§ 401(a)(1)(A)-401(a)(1)(B) (1988).

[248] *Id.* § 401(a)(2).

or group engaged in military or paramilitary activity.[249] Before any humanitarian or civic assistance project is initiated, it must be approved by the Secretary of State and can only be paid for out of funds specifically appropriated for such purposes.[250] Additionally, the military is authorized to transport non-governmental humanitarian supplies to foreign countries under some circumstances. Transport is allowed on a "space available" basis only and cannot be used if providing this service would be inconsistent with American foreign policy, if the supplies are unsuitable for humanitarian purposes or in an unusable condition, or if there is no legitimate need for them.[251] Transport will also be denied if the Secretary of Defense determines that the supplies in question will not be used for humanitarian purposes or if no adequate arrangements have been made for supply distribution.[252] Supplies so transported are not to be distributed to any individual or group engaged in military or paramilitary activities.[253]

E. EQUIPMENT TRANSFER AND DELIVERY

Restrictions on transfer and delivery of military equipment under security assistance programs form the last group of congressionally-imposed constraints. Like those previously reviewed, these provisions are markedly diverse; they include restrictions that are applicable to any equipment subject to transfer as well as those that relate to particular items sent to particular nations. They also contain a few rather novel statutory sections, such as those dealing with defense stockpiles.

The basic rule regarding equipment transfer is that defense-related items will be furnished to foreign nations solely for internal security, legitimate self-defense, participation in collective security agreements, or for collective actions under the auspices of the United Nations for the purpose of maintaining or restoring international peace and security.[254] Military equipment may also be provided to assist foreign military forces in developing friendly countries or U.S. forces in such countries to conduct civic assistance operations, so long as the foreign military units are not raised or maintained just for civic assistance purposes and these activities do not significant-

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[249] *Id.* § 401(a)(3).
[250] *Id.* §§ 401(b)-401(c)(1).
[251] *Id.* §§ 402(b)(1)(A)-402(b)(1)(C).
[252] *Id.* §§ 402(b)(1)(D)-402(b)(1)(E).
[253] *Id.* § 402(c)(2).
[254] FAA, 22 U.S.C. § 2302 (1988).

ly degrade the military's ability to perform its primary defense mission.[255] A related rule prohibits furnishing a foreign country with newly-procured items when excess defense articles are available for transfer.[256]

Under the Military Assistance Program, equipment may be given to friendly nations or international organizations by means of either grant or loan, but loans must be fully justified; lack of appropriated funds does not constitute a bona fide reason for using a loan rather than a grant.[257] Loans may be made for a maximum of five years, there must be a reasonable expectation that the articles so loaned will be returned, and the country receiving the items must agree to pay the United States for any damage or destruction.[258] The agency making the loan is to be reimbursed from Military Assistance funds.[259]

It is a fairly common practice to stockpile military articles for the future use of specified foreign countries. There can be no release from the DOD inventory of any defense-related equipment designated for a foreign country, however, unless the transfer is authorized under the FAA, AECA, or any "subsequent corresponding legislation," and the value of equipment is charged against funds authorized under the appropriate legislation.[260] In the case of items to be marked as war reserve stocks for allies or other foreign countries in stockpiles located abroad, their value cannot exceed the limits imposed by security assistance authorization legislation, unless they constitute additions to NATO stockpiles.[261] Further, Congress has forbidden establishment of any new stockpiles outside of the United States or military bases dominated by the U.S., unless they are located in the Republic of Korea, in Thailand, or within the territory of a NATO member or major non-NATO ally.[262]

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[255] *Id.*

[256] *Id.* § 2303.

[257] *Id.* § 2311(b)(1). *Id.* § 2796 requires similar justification within the AECA for use of defense article leases instead of sales. Section 571 of FOAA 90 (1989) allows Israel, Egypt, NATO members, and major non-NATO allies to lease many defense items from commercial suppliers in the United States if the President finds a compelling foreign policy or national security reason to use a lease rather than a government-to-government sale. FOAA 90, § 573(g)(3) (1989) indicates that the term "major non-NATO ally" includes Australia, Egypt, Israel, Japan, and New Zealand.

[258] FAA, 22 U.S.C. §§ 2311(b)(2)-2311(b)(3), 2311(b)(5) (1988). Loaned items are also subject to recall by the United States.

[259] *Id.* § 2311(b)(5).

[260] *Id.* § 2321h(a).

[261] *Id.* § 2321h(b)(1),(2). Under FOAA 90, § 587(a) (1989), $165 million was the FY 1990 limit imposed on additions to stockpiles on foreign territory.

[262] FAA, 22 U.S.C. § 2321h(c) (1988), FOAA 90, § 587(a) (1989).

In order to assist the modernization efforts of NATO members on the Alliance's southern flank, major non-NATO allies on NATO's southern and southeastern flanks, and those of ''majordrug producing countries," Congress has authorized the transfer of excess defense-related equipment to those nations at no cost.[263] There are, of course, limitations on this authority. Any such transfer must not have an adverse impact on U.S. military readiness, and no funds available for defense equipment procurement by DOD may be spent in connection with the transfer.[264] The congressional committees on appropriations must be notified in advance of the transfer, given an assessment of the impact of the transfers on American military readiness, and informed of the original acquisition costs of the equipment to be conveyed.[265] In the case of transfers of defense articles to major illicit drug producing countries, the equipment is only to be used for anti-narcotics activities,[266] and no one country can receive more than $10 million worth of equipment in any fiscal year.[267]

Much-varied restrictions on transfer of individual types of equipment round out this group of constraints. No motor vehicles are to be used for security assistance purposes under the FAA unless they are manufactured in the United States,[268] and neither the FAA nor the AECA can be used to make available helicopters or other aircraft for military use to any country in Central America, unless the appropriate congressional committees are notified in writing at least fifteen days in advance of the transfer.[269] F-15 fighter aircraft may be sold to Saudi Arabia, but they must be early models with no ground attack capability, and the Saudis can have no more than sixty of them in their possession at any one time.[270] With the exception of Bahrain, no country in the Persian Gulf region is allowed to receive

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[263]FAA, 22 U.S.C. § 2321j(a) (1988). Those countries included in the "southern flank of NATO" are identified in 22 U.S.C. § 2321j(e) (1988) as Greece, Italy, Portugal, Spain, and Turkey.

[264]FAA, 22 U.S.C. §§ 2321j(b)(1)-2321j(b)(3) (1988).

[265]*Id.* § 2321j(c); FOAA 90, §§ 552, 573(b)-573(c) (1989).

[266]FOAA 90, § 573(f)(2) (1989).

[267]*Id.* § 573(f)(4).

[268]FAA, 22 U.S.C. § 2396(i) (1988).

[269]FOAA 90, § 532(a) (1989).

[270]NDAA 89, §§ 1306(a)(1)-1306(a)(2) (1989).

Stinger antiaircraft missiles.[271] Lastly, there is to be no transfer, by any means, of anti-tank shells containing depleted uranium to countries other than NATO members, major non-NATO allies, or Pakistan.[272]

VI. CONSTRAINTS AS APPLIED

It may be useful at this point to very briefly examine how application of this complex system of constraints might affect the President's ability to provide military security assistance to nations that are identified as being worthy of American support. The countries chosen to illustrate congressional constraint application are El Salvador and Columbia, because they represent nations facing significantly different types of threats. Additionally, military aid to either of these countries cannot be said to have the whole-hearted support of the United States Congress. By no means, however, are these examples to be taken as exhaustive treatments of the problems facing a President desiring to implement military security assistance.

In the case of El Salvador, assume the following facts. It is a small, impoverished country with an elected government that has been endeavoring to eliminate an active Marxist insurgency for many years. The fighting has been vicious and has been accompanied by activity of both right and left wing death squads that have ruthlessly murdered civilians during the course of the conflict.

Congress has been reluctant to supply aid to El Salvador for some time, primarily because of the persistent death squad activity that it feels has been condoned, if not actually sponsored by, the Salvadoran Government. In the wake of the recent killings of several Roman Catholic priests by members of the Salvadoran military, Congress debates once again the advisability of providing military aid to the embattled government, in spite of the fact that a specific congressional goal of security assistance is to aid countries that are

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[271] FOAA 90, § 580 (1989). Pursuant to *id.* § 581(a), Bahrain can obtain Stingers only if the following conditions are satisfied:

> (1) such missiles are needed by the recipient country to counter an immediate air threat or to contribute to the protection of United States personnel, facilities or operations;
> (2) no other appropriate system is available from the United States;
> (3) the recipient agrees in writing to such safeguards as required by the United States Government; and (4) the recipient country has agreed to a United States buy-back of all the remaining missiles and components which have not been destroyed or fired . . . .

[272] *Id.* § 558.

threatened by Communist or Communist-supported aggression. Already in place are the means to effectively prevent the President from furnishing meaningful aid to El Salvador.

For example, if Congress would have chosen to attribute those killings to the Salvadoran Government, as opposed to the murderers in their individual capacities, it could have invoked provisions prohibiting aid to El Salvador as a country exhibiting a consistent pattern of gross violations of human rights, harking back to the years of prior death squad murders. If Congress were to do so, all aid would be mandatorily terminated. Even if the Administration could overcome this hurdle (which is likely to be a formidable one), the delivery of additional aid to El Salvador would have to be coordinated with the Director **of** the Arms Control and Disarmament Agency, who could opine that supplying further military equipment to El Salvador would lead to an escalation of the ongoing conflict. This would provide Congress with an additional reason to block any further provision of military security assistance to that country. It is commonly agreed that some of the most useful and critical pieces of equipment needed by a government fighting an insurgency are helicopters; yet before any could be delivered to El Salvador, even to replace those shot down by Communist-manufactured surface-to-air missiles, the President must give fifteen days notice to Congress. During this two week period, Congress could again attempt to thwart the furnishing of essential U.S. aid. Leaving aside these potential impediments, the President must cope with the fact that he must pay for additional assistance to El Salvador out of the roughly six percent of security assistance funding that has not been earmarked, but must be used to satisfy numerous conflicting security assistance needs throughout the globe. Even if the President desired to loan military equipment to the Salvadoran Government, he would have to fully justify his actions to Congress.

Columbia, on the other hand, is fighting extremely powerful drug cartels that have supplied billions of dollars worth of illegal narcotics to the United States. Although Columbia's efforts have received widespread support in the United States, any military aid it receives from this country is dependent upon Congress being convinced that the Columbian Government is taking adequate, prompt steps to destroy the drug manufacturers and suppliers located in that nation. If Congress, for whatever reason, is not so convinced, aid can be terminated, because Columbia is without question a major drug producing country.

Although funds were allocated to Columbia, Peru, Bolivia, and Ecuador to purchase defense articles for narcotics control and to provide education and training in the use and care of narcotics control equipment, the monies allocated for these purposes total a mere $19 million. Because Congress has declared that this aid must be shared between the four named countries, it is reasonable to assume that Columbia will receive little more than twenty-five percent of the total, or approximately **$4.75** million. The same allocation problem applies to the **$35** million appropriated for anti-drug military security assistance, which Columbia must by statute share with three other nations. In any event, in view of the high price of large military end items and the war chest available to the drug cartels, Columbia's proportionate share of these funds will not go very far in bringing the drug war in that country to a successful conclusion. Moreover, Columbia's anti-narcotics campaign financing difficulties are further exacerbated by the rather cryptic requirement that it bear "an appropriate share" of the costs of the narcotics control program. This condition on aid could impose a significant burden on a relatively poor developing nation. The end result of these constraints is to severely inhibit the President's ability to provide Columbia with the degree of assistance that would be commensurate with the fact that it is currently bearing the greatest burden in the Latin American anti-drug conflict.

VII. TRENDS

As we enter into a new decade and examine security assistance in light of the past, the long-term trends are not particularly difficult to identify. Based on the experiences of the last ten years, five major patterns of practice can reasonably be expected to continue unabated in regard to constraints on security assistance. These concern the pursuit of unconcerted goals, funding reductions, the overwhelming use of funding earmarks, continued reliance on yearly appropriations, and yearly amendment of major security assistance legislation.

As indicated in Part III of this article, the security assistance goals set by Congress and the President are certainly not fully compatible. Executive goals have not changed radically since the end of the Carter Administration; congressional goals have not been modified in any meaningful way since before that time. There is currently no sign that either branch is particularly concerned with reconciling their security assistance objectives; perhaps this results from a somewhat flexible pursuit of these goals in practice. Nevertheless,

their formal divergence constitutes a source of confusion and tension regarding foreign policy direction that will be present for some time to come.

In a time of massive national debt and growing pressure to balance the federal budget, security assistance presents an attractive target for funding reductions. Funding for military sales financing has dropped over twenty-six percent in the last seven years.[273] Given the current budgetary climate and the tortuous movement so far toward debt reduction, further cuts in security assistance appropriations can be expected. Because the number and breadth of security assistance programs and subsidiary projects have not and probably will not decrease, those involved will be confronted with the classic requirement to do as much, or more, with less.

The congressional proclivity to earmark security assistance funds has been a most troubling trend for several years and promises to remain popular for the foreseeable future. Although the amount of overall funding earmarks has varied over the last decade, it has never been less than forty-five percent, and from FY 1986 to FY 1989 it surged from fifty-nine to ninety-four percent.[274] Obviously, there can no longer be any dramatic increases in earmarking with only six percent of security assistance free of earmarks, but small incremental increases should surprise no one. The devastating effect of this trend on those nations in need of assistance but not fortunate enough to benefit from congressional earmarks when combined with the continued funding cuts mentioned above is enormous. Since FY 1984, increased earmarks and reduced funding have resulted in a ninety percent decrease in funding available to non-earmarked countries.[275]

The annual appropriation process and yearly amendment of major security assistance legislation go hand in hand. There does not appear to be any prospect that the time involved in the cycle will be extended, in spite of the destabilizing effect that single-year funding has on security assistance programs. It is very difficult to do any long-range security assistance planning with foreign partners without consistent funding over the long term, since the very existence of most projects cannot be guaranteed from one year to the next. Even funding reductions can have a major impact on multi-

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[273]Brown, *supra* **note 57, at 48.**

[274]Carlucci, ***Security Assistance*** *and International Armaments Cooperation,* **DISAM J. Int'l Sec. Asst.** Mgmt., **Summer 1989, at 17.**

[275]Brown, *supra* **note 57, at 48.**

year projects; lower funding levels almost always result in significant modification of undertakings, the full completion of which were relied upon at their inception by the foreign governments involved. The weaknesses in this system of finance from a security assistance perspective are extremely serious, and there has been some minor movement, as noted previously, to make certain appropriations available for use over more than one year. Overall, however, security assistance funding remains an extremely powerful method of controlling foreign policy from year to year that Congress is not apt to relinquish.

VIII. RECOMMENDATIONS

Simply put, the best method of enhancing the effective use of security assistance as a foreign policy tool is to "limit the limitations." There are a number of ways to accomplish this, some of which are merely the converse of trends identified in Part VII, above. Congress and the President should negotiate an agreed upon set of prioritized goals for security assistance, and genuine efforts should be made to stabilize funding for security assistance programs. Fundamentally, however, limiting constraints on security assistance will require far-reaching legislative reform.

A sound security assistance policy would in all likelihood benefit most if the current controlling legislation were eliminated and fresh legislation were enacted. Because the chances of this are quite unlikely, a more realistic approach would be to combine the FAA and AECA into a single statutory scheme. This process would, at a minimum, eliminate the necessity for many identical provisions in both Acts and would group the major aspects of security assistance together for ease of reference. It would also force the drafters to reassess the viability of current programs, including constraints on them. For instance, because the Military Assistance Program has in essence been co-opted by changes to the Foreign Military Sales Program, serious consideration should be given to terminating MAP altogether. Necessary MAP provisions could be incorporated into other modified sections of the new act.

Finally, flexibility must be restored to security assistance. The only way to accomplish this is to eliminate or substantially reduce congressional earmarking. An attractive alternative to the present practice is the regional funding concept proposed by Senator Kassenbaum.[276] This would allow the President to be more responsive to

[276] R. Stanfield, *Built without a Blueprint,* National Journal, April 8, 1989, at 848.

changing needs in relatively large geographical areas, while still substantially satisfying the congressional need for fiscal accountability.

IX. CONCLUSION

Military security assistance has been, and remains, an extremely important part of United States foreign policy. The enormous number and variety of constraints on security assistance, however, severely limit its present usefulness and may, if current trends continue, eventually turn it into little more than a rote subsidy program for a small handful of countries that are not necessarily the most in need of our aid. Unless significant changes are soon made to security assistance legislation that will enhance a flexible, meaningful response to the serious defense needs of friendly foreign countries, the United States may be forced to make the unhappy choice between providing no assistance at all to our friends and allies or having to supply them with more than just equipment and related services.

COMA WATCH 1989

by Lieutenant Colonel W. Gary Jewell*
and Major Harry L. Williams**

I. INTRODUCTION

Congress created the United States Court of Military Appeals (COMA) in the Uniform Code of Military Justice, enacted on May 5, 1950.[1] COMA was hailed as a new guarantor of justice, a safeguard against command influence, and an institutional innovation that would help restore confidence in military justice.[2] Indeed, since COMA's creation it has been a powerful force in the development of military justice and our practice.[3] This article will consider briefly some statistics, the judges' perspectives, the COMA Report, and the very recent legislation. The article will then focus on the direction provided by the court's work during the 1989 term.[4] This analysis should provide an appreciation not only of what COMA has done during this period, but also it may help to chart COMA's future course in its preeminent role in the military justice system.

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[1] Uniform Code of Military Justice art. 67, 10 U.S.C. § 867 (1950) [hereinafter UCMJ].

[2] *Hearing on S. 857 and H.R. 4080 Before a Subcomm. of the Senate Comm. on the Armed Services*, 81st Congress, 1st Sess. (1949).

[3] Moyer, *Procedural Rights of the Military Accused: Advantages over a Civilian Defendant*, 22 Maine L. Rev. 105 (1970).

[4] Specifically, we will review COMA decisions from 26 M.J. 415 to 29 M.J. 337 (26 September 1988 - 31 December 1989).

II. STATISTICAL DATA/JUDICIAL OUTLOOK

We will begin our look at COMA by examining some statistical data and the backgrounds and individual perspectives of the judges.

A. STATISTICS

In 1987 COMA recognized that steps had to be taken to reduce its backlog and case processing time. Thus, in September 1987 the court issued more than **30** opinions and denied some 400 petitions for review. A year later, in September 1988, COMA repeated its performance, deciding another 40 cases. Indeed, the court decided cases so fast that the only thing that COMA issued for some was the decretal paragraph—case affirmed or reversed—with the actual opinion to follow. Why? Again, COMA was concerned that cases were not being handled expeditiously. Finally, hopefully to resolve the problem forever, COMA went to the term system to ensure speedy disposition of its cases. As a result, there was a significant decline in processing time, despite over 2500 petitions for review being filed during the term. In addition, while over 50 cases were decided in September 1989, all were full opinions.

B. CHIEF JUDGE EVERETT

Chief Judge Robinson O. Everett received a B.A. *(magna cum laude)* and a J.D. *(magnacum laude)* from Harvard University and a LL.M. from Duke University. He served two years on active duty with the Air Force Judge Advocate General's Corps during the Korean War. After the war, he became a commissioner for COMA. In 1956 Chief Judge Everett joined the Duke Law School faculty on a part-time basis and since then has continuously served on that faculty, becoming a tenured member in 1967. In February 1980 Chief Judge Everett was appointed to COMA, and he assumed this office on April 16, 1980.

It **is** now easy to forget the turmoil that Chief Judge Everett faced when he assumed the leadership of the court. He arrived at a time when COMA's decisions were often viewed as being out of touch with the realities of military life and the needs of military commanders. The Chief Judge has restored confidence in the court by a practical, yet scholarly approach to military justice.[5]

[5]The court is also engaged in "Project Outreach." This is COMA's effort to educate the general public about the military justice system. COMA heard arguments on cases at various universities—Virginia, South Carolina, and the United States Military Academy. In addition the court heard arguments on C-SPAN, as well as submitting to interviews. Overall, COMA's efforts fostered a favorable impression of the court and military justice.

That approach is reflected in Chief Judge Everett's 54 lead opinions, 17 concurring opinions, and 9 dissents during this term. In fact, his opinions sometimes appear to be short sections of *Perkins on Criminal Law*,[6] as he traces the development of the law and then applies that analysis to military practice. It is an approach that he uses effectively to explain and perhaps to teach his rationale for his decisions.[7]

It is evident that, despite potential United States Supreme Court review of COMA decisions,[8] Chief Judge Everett still sees COMA as being the primary civilian guarantor of justice in the military —and rightfully so, because in the five years of potential Supreme Court review only two petitions for certiorari have been granted.[10] Clearly he believes that a military accused should not have to venture outside the military justice system to obtain justice![11] Chief Judge Everett also apparently favors expanding COMA's jurisdiction to include a wide range of military-related cases, such as summary courts-martial and article 15's.[12]

C. JUDGE WALTER T. COX, 111

Judge Walter T. Cox, 111, earned a B.S. from Clemson University and a J.D. *(cum laude)* from the University of South Carolina School of Law. After serving eight years on active duty with the Army Judge Advocate General's Corps, Judge Cox returned to private practice in South Carolina in 1972. In 1978 he was elected as Resident Judge of the 10th Judicial Circuit of South Carolina. In June 1984 Judge Cox was appointed to COMA, and he assumed this office on September 6, 1984.

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[6] R. Perkins, Criminal Law (3d ed. 1982).

[7] *See, e.g.*, United States v. Mance, 26 M.J. 244 (C.M.A. 1988) (Everett, C.J., explains the concept of knowledge as it relates to the possession of drugs); and United States v. Thomas, 25 M.J. 396 (C.M.A. 1987) (Everett, C.J., provides a detailed treatment of the offense of forgery in the military).

[8] On August 1, 1984, the decisions of the United States Court of Military Appeals became subject to review of the Supreme Court of the United States by writ of certiorari. Military Justice Act of 1983, Pub. L. No. 98-208, 97 Stat. 1393 (1983).

[9] *See, e.g.*, U.S.N.M.C.M.R. v. Carlucci, 26 M.J. 328 (C.M.A. 1988). For a detailed discussion of this case, see Note, *DOD Inspector General Investigates Navy-Marine Court of Military Review*, The Army Lawyer, Sept. 1988, at 49.

[10] The first, filed by the Army Defense Appellate Division in United States v. Goodson, 18 M.J. 243 (C.M.A. 1984), involving a right to counsel issue under Edwards v. Arizona, 451 U.S. 477 (1981), was remanded for further consideration. The second was filed by the Coast Guard in Solorio v. United States, 107 S. Ct. 2924 (1987), where the Supreme Court reestablished military status as the sole test of court-martial jurisdiction.

[11] Unger v. Zemniak, 27 M.J. 349 (C.M.A. 1989).

[12] *See, e.g.*, Jones v. Commander, 18 M.J. 198, 200 (C.M.A. 1984); and Dobzynski v. Green, 16 M.J. 84, 86 (C.M.A. 1983) (Everett, C.J., dissenting).

Coming to the court in one of the most trying times in its history due to the absence of Judge Fletcher,[13] Judge Cox continues to lead in opinion writing, authoring 52 of the court's lead opinions, 24 concurring opinions, and 16 dissents. In fact, Judge Cox could be called the "great concurrer" because his concurring opinions often indicate in no uncertain terms where he believes the law should go or *not* go.[14]

Judge Cox's background as a trial judge also continues to come to the fore. This is particularly evident in his support and expressed confidence in the role and responsibilities of military judges.[15]

D. JUDGE EUGENE R. SULLIVAN

Judge Eugene R. Sullivan graduated in 1964 from the United States Military Academy at West Point. He was commissioned as an Armor officer and subsequently served in Vietnam. After leaving the Army, Judge Sullivan obtained his law degree from Georgetown University. Judge Sullivan then held successive positions with the White House as a Special Counsel, the Justice Department as a trial lawyer, and the Air Force as Deputy General Counsel and General Counsel. In February 1986 Judge Sullivan was appointed to COMA, and he assumed his office on May 27, 1986.

During this term Judge Sullivan authored 54 lead opinions, 17 concurring opinions, and 5 dissents. While Judge Sullivan's judicial philosophy is conservative in nature, and although he is generally a strict constructionist, he supports broad jurisdictional power for the court. He authored five opinions on the issue of court-martial jurisdiction during this term alone. He is also a harsh opponent of unlawful command influence, authoring both *United States* v. *Cruz*[16] and *United States v. Levite*,[17] two recent decisions in this area.

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[13]Judge Albert B. Fletcher, an associate member of the court, and former Chief Judge from 1975-1980, was convicted of soliciting a homosexual act on February 28, 1985. His absence, due to the criminal charges and an earlier illness, caused the court to operate as a two-judge court for almost two years. *See* USCMA Annual Report, Fiscal Year 1986, 24 M.J. CXIII, CXIV.

[14]*See, e.g.*, United States v. Byrd, 24 M.J. 286 (C.M.A. 1987); and United States v. Hill, 25 M.J. 411 (C.M.A. 1988) (Judge Cox expresses a growing dissatisfaction, not with the holding of the cases, but with the other members of the court using guilty plea cases, with their limited factual records, to announce new law).

[15]*See, e.g.*, United States v. Burnett, 27 M.J. 99 (C.M.A. 1988) (Cox, J., dissenting).

[16]25 M.J. 326 (C.M.A. 1987).

[17]25 M.J. 334 (C.M.A. 1987).

111. THE COMA REPORT

In October 1987 COMA reestablished a court committee to study and make recommendations concerning the court's role, status, and future in the military justice system. On January 27, 1989, the court committee issued its report.[18]

The court committee found that COMA was accomplishing its mission—"careful, objective, and judicious review of court-martial convictions by a strong court of civilian judges."[19] The report praised the court for "much excellent judicial work."[20] Nevertheless, the court committee made 16 recommendations for improvement.[21] Three of those recommendations merit special note.

First, the court committee recommended that COMA take immediate steps to reduce appellate delay. If there was a central theme to this report, it was the length of time necessary to complete the processing of cases. The committee members were critical of some of the court's practices, and their criticisms were clearly manifested in their report.[22] Second, the committee recommended that COMA be expanded to five judges. Third, the committee recommended COMA limit its practice of specifying issues not raised by appellate counsel to those cases where plain error has occurred.

These recommendations, while not affecting the court's special place in the military justice system, portend a whole new look at COMA. The committee also decided it was appropriate to delay consideration of article III status for COMA. The committee summarized arguments both for and against such a change, but deferred this matter until after their current recommendations were implemented and their effect evaluated.[23]

IV. THE LEGISLATION

The most exciting event of the year was the new COMA legislation.[24] This legislation dramatically changed COMA and military justice.

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[18]United States Court of Military Appeals Committee Report, Jan. 27, 1989.
[19]*Id.* at 24.
[20]*Id.* at 25.
[21]*Id.* at 25-26.
[22]This recommendation of the committee was also the subject of a very one-sided attack on the court by Molly Moore in the Washington Post. *See* Washington Post, Feb. 13, 1989, at A21 col. 5.
[23]*Id.* at 24.
[24]S. 1352, §§ 552 and 806a, 101st Cong., 1st *Sess.*

A. INCREASE THE COURT TO FIVE MEMBERS

First, the legislation increases the court to five members.[25] The legislation report notes:

> One of the primary functions of the highest appellate tribunal within a jurisdiction is to ensure clarity of decisions and predictability of doctrine. Persons affected by the law must have a reliable basis for planning their conduct, and the lower courts must be able to apply the law of a jurisdiction without an undue number of reversals, remands, and other proceedings that delay finality in the judicial process.[26]

The report went on to conclude that the ability of COMA "to provide for consistency in doctrine has been compromised substantially by considerable turnover on the court.''[27]

In the long run, a five-judge court undoubtedly will provide more consistency in doctrine. In the near term, however, even assuming the three current judges remain on the court, two new judges would likely have the opposite effect.

B. REVISE TEMPORARY REPLACEMENT AND REMOVAL PROVISIONS

Next, the legislation seeks to avoid long periods of absence by COMA judges, such as the absence occasioned by Judge Fletcher's difficulties. It seeks to do so by relaxing the provision that allows article III judges to sit and by modernizing the removal statute.

The legislation allows any federal district or appellate court judge to sit during a COMA judge's period of disability.[28] Currently, only judges of the District of Columbia Circuit may sit in the event of a disability.[29] The report on the legislation notes this does not provide a sufficiently large pool for service in the event of a disability.[30] This provision, while easing the filling of vacancies during disabilities, also would likely cause more inconsistency in doctrine.

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[25] *Id.* at § 552(a).
[26] S. Rep. No. 81, 101st Cong., 1st *Sess.* 171 (1989).
[27] *Id.* at 172.
[28] S. 1352 § 552(c).
[29] UCMJ art. 67(a)(3).
[30] S. Rep. No. 81, *supra* note 26, at 172.

The new removal provisions are those currently used with respect to other article I judges. Specifically, they provide that upon notice and hearing, the President may remove a judge for: 1) neglect of duty; 2) misconduct; or 3) mental or physical disability.[31]

C. ESTABLISH PROCEDURE FOR TJAG CERTIFICATION OF CASES

Further, the legislation provides a procedure for the Judge Advocate Generals to certify cases to the courts of military review when the sentences are not subject to automatic review.[32] The report on the legislation notes that this provision would allow appellate courts to review cases not subject to automatic review, without resort to the All-Writs-Act on an ad hoc basis.[33]

D. ESTABLISH PROCEDURE FOR INVESTIGATION OF ALLEGATIONS PERTAINING TO FITNESS OF MILITARY JUDGES

Last, the legislation requires the President to prescribe standards and procedures for the investigation and disposition of allegations that might affect the fitness of military trial and appellate judges.[34] The report on the legislation refers to COMA's decision in *United States Navy-Marine Corps Court of Military Review v. Carlucci*[35] as resulting in substantial uncertainty as to the authority for investigation and disposition of charges related to the fitness of military judges.[36] The legislation expects the President to fashion appropriate rules in the Manual for Courts-Martial and, to the extent possible, that they emulate those that govern judges in the civilian sector.[37]

V. THE CASES

With this background we will now examine the cases. To facilitate review, we have categorized the cases into those involving pretrial issues, trial issues, post-trial issues, and powers of the courts. We have

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[31] S. 1352 § 552(b).
[32] S. 1352 § 552(g).
[33] S. Rep. No. 81, *supra* note 26, at 173.
[34] S. 1352 § 806a.
[35] 26 M.J. 328 (C.M.A. 1988).
[36] S. Rep. No. 81, *supra* note 26, at 173.
[37] *Id.*

included all the cases for future reference, but will only discuss selected cases that are either the leading cases in an area or that reflect the court's approach on an issue.

A. PRETRIAL ISSUES

1. Jurisdiction

The jurisdiction question is much simpler with the Supreme Court's holding, in *Solorio v. United States*,[38] that "the jurisdiction of a court-martial depends solely on the accused's status as member of the Armed Forces and not on the service connection of the offense charged."[39] Nevertheless, the issue of jurisdiction was the subject of several opinions.

In *United States* v. *Avila*[40] the court dealt the service-connection test for jurisdiction its final blow. In *Avila*, a case dealing with off-post sexual abuse of minor children, the court held that the *Solorio* decision was completely retroactive. Moreover, the court noted that under the Supreme Court's decision in *Griffith v. Kentucky*,[41] it appeared they had "no option but to apply" the holding in *Solorio* retroactively.[42]

The court dealt with military status of the accused again in *Pearson v. Bloss*[43] and *United States v. Cline*.[44] Judge Sullivan, writing for the court in *Pearson*, found it constitutional to make subject to the UCMJ retired members of the regular component of the armed forces who are entitled to pay.[45] Then, in *Cline*, another Judge Sullivan opinion, the court found a member of the Air Force Reserve became subject to military jurisdiction at one minute past midnight on the date he was to report for active duty.[46]

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[38] 107 S. Ct. 2924 (1987).

[39] *Id.* at 2925. Prior to the *Solorio* decision the rule in trial by court-martial was that a crime had to be "service-connected" before a court-martial could exercise jurisdiction. O'Callahan v. **Parker**, 395 U.S. 258 (1969).

[40] 27 M.J. 62 (C.M.A. 1988).

[41] 479 U.S. 314 (1987).

[42] *Avila*, 27 M.J. at 65.

[43] 28 M.J. 376 (C.M.A. 1989).

[44] 29 M.J. 83 (C.M.A. 1989).

[45] *Pearson*, 28 M.J. at 379.

[46] *Cline*, 29 M.J. at 86. *See also* United States v. King, 27 M.J. 327 (C.M.A. 1989)(giving a service member a discharge certificate for the purpose of reenlistment did not deprive the military of jurisdiction).

In *United States* v. *Yates*[47] Judge Sullivan said that because of the presumption of regularity, the mere fact that the director of reserve component support was senior in date of rank to the deputy post commander and was present for duty did not establish the illegality of the latter's assumption of command. Judge Sullivan emphasized, as he had in *United States* v. *Jette*,[48] that the concern was for the realities of command, rather than for the intricacies of service regulation ~However, it is still necessary to follow service regulations, as a different result would surely have been had with an objection at trial.[50]

2. Restraint

On the issue of pretrial restraint, the court decided two cases. Interestingly, both cases dealt with pretrial confinement in civilian jails, and both cases are warnings to military authorities to pay attention to the rules when dealing with pretrial confinement.

First, in *United States* v. *James*[51] the court decided Specialist Jesse James's pretrial confinement in a civilian jail was subject to the same scrutiny as confinement in a detention facility operated by the military.[52] Then, in *United States* v. *Ballesteros*[53] COMA found the accused should have received a magistrate hearing within seven days of the date that he was detained by civilian authorities as a military deserter, where his detention was with notice and approval of military authorities. Thus, the accused was entitled to administrative credit for his pretrial confinement from the date that a magistrate hearing should have been held.[54]

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[47] 28 M.J. 60 (C.M.A. 1989).
[48] 25 M.J. 16 (C.M.A. 1987).
[49] *Yates*, 28 M.J. at 63.
[50] *See also* United States v. King, 28 M.J. 397 (C.M.A. 1989) (unknown person's improper tampering with convening authority's referral action did not deny accused any substantial right; basic requirements for referral of charges were still met).
[51] 28 M.J. 214 (C.M.A. 1989)
[52] *Id.* at 215.
[53] 29 M.J. 14 (C.M.A. 1989).
[54] *Id.* at 16.

3. Pleadings

In the last fifteen months, COMA continued to answer pleadings questions. The court dealt with multiplicity,[55] swearing to charges,[56] and, in ***United States*** v. *Brecheen*,[57] legal sufficiency of charges.

The court in ***Brecheen*** held that leaving the word "wrongful" out of a drug specification does not necessarily make it a defective specification. The court found that despite the "poor draftsmanship," the charges as a whole could reasonably be construed to contain an allegation of wrongfulness.[58] ***Brecheen*** may have been resolved differently if there had not been a guilty plea.

4. *Command Influence*

Command influence remains the mortal enemy of the military justice system.[59] Moreover, it was one of the original reasons for establishing COMA, and the court still views it as being one of its primary oversight responsibilities.[60] In the previous term, the court

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[55]*See* United States v. Haye, 29 M.J. 213 (C.M.A. 1989) (court's admonition to consider allegations of adultery and fraternization separately was insufficient to cure spillover effect of accused's adultery with a superior officer on charge of fraternization with a subordinate); United States v. Hyska, 29 M.J. 98 (C.M.A. 1989) (accused's attempt to distribute marijuana merged into distribution of marijuana on the next day); United States v. Stottlemire, 28 M.J. 477 (C.M.A. 1989) (charges of conspiracy to commit larceny of government funds and attempted larceny of those same funds were not multiplicious for findings, where each offense required proof of separate element, and overt acts alleged and proven in each charge were clearly different); United States v. Guerrero, 28 M.J. 223 (C.M.A. 1989) (accused's act of simultaneously soliciting false testimony from two potential witnesses was one violation of a single provision of military law prohibiting obstruction of justice; number of witnesses embraced in a single request for false testimony was not determinative of appropriate units of prosecution); United States v. Flynn, 28 M.J. 218 (C.M.A. 1989) (offenses of assault with intent to commit rape and assault with intent to commit sodomy were not multiplicious for charging or findings, although committed against the same victim, where each assault involved separate acts, there was a lapse of time between acts albeit of short duration, and criminal intent harbored at the time of the acts was different).

[56]*See* Frage v. Moriarty et *al.*, 27 M.J. 341 (C.M.A. 19881 (swearing charges before officer not authorized to administer oaths for military justice purposes does not comply with article governing charges and specifications, regardless of perceptions of officer who believes he is properly sworn; "good faith' exception to the article does not exist).

[57]27 M.J. 67 (C.M.A. 1988).

[58]*Id.* at 69. ***See*** *also* United States v. Woods, 28 M.J. 318 (C.M.A. 1989) (failure to allege traditional words of criminality in a UCMJ article 134, clause 1 specification was not fatal).

[59]United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986).

[60]*Id.* at 400.

in *United States v. Levite*[61] and *United States v. Cruz*[62] displayed its intolerance of any indication of unlawful command influence. Two recent cases, *United States v. Sullivan*[63] and *United States v. Mabe*,[64] further illustrate the court's approach to unlawful command influence allegations.[65]

In *Sullivan* the accused was one of four airmen facing drug charges assigned to a hospital unit. While these cases were being investigated, the unit first sergeant and hospital administrator held noncommissioned officer and officer calls where they indicated that testifying for these soldiers might adversely affect one's career.[66] Sullivan's case, however, was the last to go to trial and occurred after command influence was litigated in the previous trials. Defense counsel requested extra time to prepare the issue, but the military judge denied the motion. COMA affirmed, noting that there had been prior litigation of the issue, that the defense called seven witnesses on sentencing, and that the defense proffered no new information.[67]

Sullivan is of particular note because it is an excellent example of appropriate corrective action by the command and trial judiciary once a problem of unlawful command influence arises. The corrective action included: **1)** additional commander's calls where all hospital personnel were informed that, if requested as defense witnesses, testimony was their duty; 2) the government received a blanket order to produce all defense witnesses, and each such witness was advised of their duty to testify truthfully and assured of no adverse consequences from the testimony; **3)** the offending parties were transferred, eliminating access to the rating process; and **4)** liberal continuances were granted to allow the corrective actions and the cleansing process to work.[68]

The latest command influence case, *United States v. Mabe*,[69] could have far-reaching consequences. Here, COMA had before it an in-

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[61] 25 M.J. **334** (C.M.A. 1987).
[62] 25 M.J. **326** (C.M.A. 1987).
[63] 26 M.J. **442** (C.M.A. 1988).
[64] 28 M.J. 326 (C.M.A. 1989).
[65] *See also* Vanover v. Clark, 27 M.J. **345** (C.M.A. 1988) (failure of military judge to dispel appearance of evil after convening authority allegedly withdrew charges from prior court-martial and referred them to another court-martial warranted extraordinary action to give accused benefit of ruling during initial court-martial that excluded the accused's allegedly bad checks).
[66] *Sullivan*, **26** M.J. at **442.**
[67] *Id.* at **444.**
[68] *Id.* at **443.**
[69] 28 M.J. **326** (C.M.A. 1989).

complete copy of a letter written by Chief Trial Judge of the Navy to the Chief Judge of the Transatlantic Judicial Circuit.[70] This letter caused the court grave concern, as it appeared to relay complaints concerning inordinately lenient sentences imposed during bench trials.[71] The court remanded for further inquiry.[72] If the courts find unlawful command influence we could see relief granted on sentencing in hundreds of cases and perhaps also on findings. After all, if lenient sentences in bench trials are unpopular, how would acquittals be received? If this severe consequence does not occur, it is probably because the Chief Judge of the Transatlantic Judicial Circuit reported the letter.

5. Discovery

With the military's open case file approach, few discovery issues should reach COMA. However, one discovery case of note did come before the court in *United States* v. *Trimper*.[73]

In *Trimper* the accused was an Air Force judge advocate charged with use of cocaine and marijuana. When Captain Trimper testified in his own behalf he denied ever using illegal drugs[74] or having submitted to a private urinalysis.[75] The trial counsel then sought to offer in rebuttal a private urinalysis allegedly commissioned by the accused and admissions concerning the urinalysis report he allegedly made to an office co-worker. Ultimately, both the laboratory report and the testimony of the co-worker were admitted into evidence.[76]

At trial and on appeal the accused sought exclusion of this evidence as a sanction for the prosecution's failure to perform its disclosure obligations.[77] Here the court held that

> even if the evidence had shown that trial counsel willfully violated Mil. R. Evid. 304(d)(1) in not disclosing a statement prior to appellant's arraignment, . . . the judge was still free to determine that it would be "in the interests of justice" to

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[70] *Id.*
[71] *Id.* at 326-27.
[72] *Id.* (the decretal paragraph directs within ten days the government file a complete copy of the letter in question or an explanation for the inability to file the letter; and after the Navy Marine Court of Military Review renders its decision return of the record directly to COMA).
[73] 28 M.J. 460 (C.M.A. 1989).
[74] *Id.* at 462-63.
[75] *Id.* at 464-65.
[76] *Id.* at 465.
[77] *Id.*

> admit the statement when the statement demonstrated that appellant had lied as a witness.[78]

Do we now have a lying accused exception to the discovery rules?

6. *Article 32, UCMJ*

Article 32 investigations and significant development this year are synonymous. *United States* v. *Connor*,[79] *United States* v. *Hubbard*,[80] and *United States* v. *Spindles*' substantially change how the defense must view its opportunity to cross-examine at the article 32 investigation.[82]

In *Connor* the court held that testimony of a witness at an article 32 investigation may be admissible under the ''former testimony" exception to hearsay rule, even though the defense chose for tactical reasons to reserve impeachment until trial. COMA said it is enough that the defense counsel had an unrestricted "opportunity" to cross-examine the witness.[83]

Then, in *Hubbard* the court said admissibility of former testimony from the article 32 investigation was not precluded even where, after the giving of that testimony, material information is obtained about which the defense had no opportunity to cross-examine the absent witness.[84] Further, the court in *Spindle* noted that absent any suppression of evidence by the prosecution, admissibility of the article 32 testimony was unaffected by defense counsel's lack of useful information to use in cross-examining the witness.[85]

7. *Speedy Trial*

COMA continued to address speedy trial issues this year. While pro-

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[78] *Id.* at 469 (quoting United States v. Callara, 21 M.J. 259, 263 (C.M.A. 1986)).
[79] 27 M.J. 378 (C.M.A. 1989).
[80] 28 M.J. 27 (C.M.A. 1989).
[81] 28 M.J. 35 (C.M.A. 1989).
[82] *See also* United States v. Nickerson, 27 M.J. 30 (C.M.A. 1988) (accused has no per se right to revoke waiver of article 32 investigation despite withdrawal from guilty plea agreement).
[83] *Connor*, 27 M.J. at 389. *See also* United States v. Arguello, 29 M.J. 198 (C.M.A. 1989) (accused was denied his right to due process by trial counsel's use of negative test result on discarded urine sample and its supporting documentation to show that accused ingested marijuana, contrary to Department of Defense directive and service regulations governing the use and limitations of urinalysis results).
[84] *Hubbard*, 28 M.J. at 32.
[85] *Spindle*, 28 M.J. at 36.

viding rules that recognize the unique needs of military service, the court is clearly concerned that speedy trial rules are often treated as numbers games.

In *United States v. Maresca*[86] Judge Cox, writing for the court, said the immediate commander must notify an accused of charges as soon as possible after they have been preferred and the accused can reasonably be found. He goes on in a footnote to refer to *United States* v. *Carlisle*[87] where he lectured that *"ON DAY NUMBER 1, EVERYONE... SHOULD KNOW WHAT DAY WILL BE NUMBER 120,"*[88] and to refer to what he calls "the Government's sarcastic and inexplicable response to this observation ... that 'it is difficult to know when day 120 will be if it is unknown when day 1 was.'"[89] He points out that "[b]lock 12 of the Charge Sheet was designed to memorialize this important event. It has a space for a date. If the immediate commander had obeyed the law, day 1 would be crystal clear."[90] Judge Cox no longer is amused by this issue.

In *United States* v. *Ramsey*[91] Judge Cox said the government was not accountable, for speedy trial purposes, for times between date of notification of appeal from an adverse pretrial ruling and the date that the stay of trial proceedings for review was dissolved.[92] This includes the seventy-two hours allowed, absent bad faith, to determine whether to seek appellate relief.[93]

Most recently, Judge Cox, writing in *United States v. Longhofer*,[94] found that a reasonable period of time required to obtain security clearances for participants in a trial involving highly classified information may be excluded under the good cause exclusion in Rule for Courts-Martial 707(c)(9). The government may "exclude the time it takes, to the extent the time is reasonable" and is not required to show that the trial was delayed because of the process.[95] Also, Judge Cox in dicta indicated for the first time that the article 32 investigating officer could approve requested delays for speedy trial purposes.[96]

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[86] 28 M.J. 328 (C.M.A. 1989).
[87] 25 M.J. 426 (C.M.A. 1988).
[88] *Id.* at 428.
[89] *Maresca*, 28 M.J. at 331 n.4

[91] 28 M.J. 370 (C.M.A. 1989).
[92] *Id.* at 372.
[93] *Id.* at 373.
[94] 29 M.J. 22 (C.M.A. 1989)
[95] *Id.* at 29.
[96] *Id.* at 28.

Future litigation in the speedy trial arena should be anticipated.[97] Clearly an inordinate number of speedy trial issues will arise as long as the only remedy is dismissal and the government does not conscientiously monitor its cases.

8. Immunity

This past term COMA continued its work in the area of immunity. The court did so by laying out the rules for dealing with immunized testimony. In *United States v. Boyd*[98] COMA examined whether the government met its heavy burden of proving that the decision to prosecute, as well as new evidence, was developed wholly independently of the accused's immunized testimony. In *Boyd* the prosecution sought to demonstrate that no use was made of the immunized testimony by calling three witnesses, including the staff judge advocate, who testified it had not been used. COMA reversed, holding that what is required to permit a prosecution to go forward, after granting immunity, "is something more than the mere representations" by government officials; there must be an affirmative showing of the independent source for each and every item of evidence.[99] The court also reiterated its suggestion, in *United States v. Gardner*,[100] that the government should ''catalog" or "freeze" the evidence it has before granting immunity.[101]

B. TRIAL ISSUES

1. Court-Martial ***Personnel***

This year the subject of court-martial personnel received a renewed emphasis as the court looked at the roles and conduct of the parties. COMA addressed issues as to counsel, members, and military judges.

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[97] *See also* United States v. Robinson, 28 M.J. 481 (C.M.A. 1989) (speedy trial rule requiring that accused be brought to trial within 120 days of time that restraint is imposed should be construed to sometimes permit separate speedy trial clock calculations, even though several offenses are preferred at the same time); United States v. Higgins, 27 M.J. 150 (C.M.A. 1988) (delay in court-martial, caused by government's processing an accused's request for administrative separation in lieu of court-martial *outside* local command, was excludable from government accountability as a delay for good cause under R.C.M. 707(c) (8)); and United States v. McCallister, 27 M.J. 138 (C.M.A. 1988) (the "demand prong" of *Burton* no longer serves a useful function as a distinct means to the end of a speedy trial).

[98] 27 M.J. 82 (C.M.A. 1988).

[99] *Id.* at 85.

[100] 22 M.J. 28, 32 (C.M.A. 1986).

[101] *Boyd*, 27 M.J. at 85.

Two counsel cases of note deal with the competency of the defense counsel to testify and yet remain on the case.[102] In United States *v. Baca*[103] the defense counsel took the stand on a competency motion to testify as to his difficulties in dealing with the accused because of his mental state. After defense counsel's testimony, the military judge relieved him from the case because of his testimony and emotional involvement in the case. COMA found that neither of these reasons warranted severing the attorney-client relationship.[104] The court reached a similar result in United States *v. Cook*.[105] In *Cook* the military judge advised the accused that his options were to relieve his counsel if he testified on the speedy trial motion or insist that he not testify.[106]

COMA decided one case on the selection of court members during the term. United States *v. Smith*[107] involved intentional inclusion of personnel, not the typical case of exclusion of personnel.[108] First Lieutenant Smith was charged with indecent assault against a female officer during a field problem at Fort Irwin. He was offered non-judicial punishment, but against counsel's advice demanded trial by court-martial. At his court-martial, he was convicted and received two years' confinement and a dismissal. On appeal, he alleged error in the selection process because the government's policy was to place women on court-martial panels when sex crimes were involved. In this case a trial counsel, but not the prosecutor, nominated three women whom he thought were "hard core."[109] Although finding that the convening authority may take gender into account in selecting court-members, COMA reversed, finding that the policy here was not designed to achieve a more representative panel but a particular result.[110]

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[102] *See also* United States v. Sparks, 29 M.J. 52 (C.M.A. 1989) (if accused, after full disclosure and inquiry by military judge, wishes to be represented by defense counsel who previously acted for prosecution, accused has no complaint so long as chosen counsel meets customary standards of professional competence); and Unites States v. Bradford, 28 M.J. 125 (C.M.A. 1989) (accused was not denied effective appellate representation by reason of his appellate defense counsel's failure to raise issue of sentence appropriateness).

[103] 27 M.J. 110 (C.M.A. 1988).

[104] *Id.* at 116.

[105] 27 M.J. 212 (C.M.A. 1988).

[106] *Id.* at 215.

[107] 27 M.J. 242 (C.M.A. 1988).

[108] *See, e.g.*, United States v. McClain, 22 M.J. 124 (C.M.A. 1986).

[109] *Smith*, 27 M.J. at 247.

[110] *Id.* at 250.

As part of the renewed emphasis by COMA on the role and conduct of the parties, we have seen several opinions reviewing the conduct of the military judge. In *United States v. Griffith*[111] the military judge, after findings of guilt were entered by the panel, said basically for the first time in his judicial career he believed the verdict was wrong—the members convicted an innocent accused. But he went on to say he did not have the power to do anything except to recommend that the convening authority grant relief.[112] Chief Judge Everett tells the military judge he was wrong. A military judge has the power up until the time he authenticates the record to take remedial action on behalf of the accused, "whether this error involves jury misconduct, misleading instructions, *or insufficient evidence*."[113] He may decide whether the accused has been prejudiced only by legal error, however, such as legal insufficiency of the evidence, and he may not assess the credibility of the evidence.[114]

Just as the stature of the military judge was seemingly improved in *Griffith*, in another Chief Judge Everett opinion, *United States v. Burnett*,[115] COMA limited the power of judges in dealing with unruly counsel. In *Burnett* the relationship between the military judge and the civilian defense counsel was less than harmonious from the start. Matters continued to worsen until finally, while examining a defense witness, the civilian defense counsel referred to a previous question by telling the witness it was the question that the judge had prevented her from answering earlier.[116] The military judge immediately ordered a contempt proceeding.[117] The members found counsel in contempt of court and fined him $100.[118] On appeal, however, the case was set aside. The court noted initially that a court-martial possesses *no inherent authority* to protect its proceedings beyond the statutory power set forth in article 48, UCMJ.[119] With this preliminary finding the court said first, that it doubted counsel's conduct was contemptuous, and second, that it was better to delay the contempt proceeding until the end of trial so as not to prejudice the accused.[120]

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[111] 27 **M.J. 42 (C.M.A.** 1988).
[112] *Id.* at **44.**
[113] *Id.* at 47.
[114] *Id.* at 48.
[115] 27 **M.J.** 99 **(C.M.A.** 1988).
[116] *Id.* at 101.
[117] *Id.* at 103.
[118] *Id.*
[119] *Id.* at 104.
[120] *Id.* at 105-06.

Judge Cox vigorously dissented in *Burnett,* noting that he hopes "this decision does not entirely emasculate the military judge's position."[121] He points out even the most sarcastic "venom spewed out in a courtroom" may be rendered nonpoisonous by the cold unemotional record of trial.[122]

Despite the temporary setback of *Burnett,* the court does seem intent upon placing the military judge on the same footing as federal district court judges. Most recently, in *United States v. Scaff,*[123] COMA said the military judge's authority to call the court into session without the presence of members at any time after referral of charges to court-martial empowers the judge to convene a post-trial session to consider newly discovered evidence and to take whatever remedial action is appropriate. Specifically, the court said this empowers the military judge, in proper cases, to set aside findings of guilt and the sentence.[124] If the convening authority disagrees with the military judge's rulings, the only remedy is to direct trial counsel to move for reconsideration or initiate a government appeal.[125]

2. *Motions*

During this year COMA decided several significant cases involving search and seizure, self-incrimination, and confrontation.

a. Search and Seizure

COMA is close on the heels of the Supreme Court in limiting the fourth amendment's application. Despite having several cases in this area, the issues decided seem to be more closely related to an article 66, UCMJ,[126] review of the facts than an article 67, UCMJ,[127] review

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[121] *Id.* at 108 n.1.
[122] *Id.* at 108.
[123] 29 M.J. 60 (C.M.A. 1989).
[124] *Id.* at 65.
[125] *Id.* at 66. ***See** also* United States v. Beckerman, 27 M.J. 334 (C.M.A. 1989) (temporary assignment of a district legal officer to act as a general court-martial judge did not comply with UCMJ article governing military judges of general courts-martial); United States v. Ray, 26 M.J. 468 (C.M.A. 1988) (military judge did not abuse his discretion in permitting government to reopen case to put on evidence of wrongfulness in drug case where defense simply rested after government's case-in-chief; but C.J. Everett, concurring notes, however, "this certainly is not a practice to be encouraged").
[126] 10 U.S.C. § 866 (1982).
[127] 10 U.S.C. § 867 (1982).

of the law—thus, they have limited precedential value.[128]

***United** States v. White*,[129] however, is a significant case for the military commander and the fourth amendment. In *White* the commander called in Airman White and told her that he had received information of her use of drugs. After advising Airman White of her article 31, UCMJ, rights he told her she could clear up this matter by consenting to a urinalysis. The commander also told Airman White that if she did not consent, he would order her to submit to a urinalysis and, if necessary, have her catheterized. Airman White then decided to consent.[130] COMA found the consent invalid. The court said:

> In our view, the commander had at least two legitimate courses of action. First, he could have simply requested appellant's consent without indicating his ace in the whole. Then the judge might have scrutinized the circumstances to determine if her will was overborne . . . ; or the commander could have meaningfully explained to her the consequences of his alternatives. Then it could not be claimed that her choice was secured by threat of the order.[131]

Do we now have a fourth amendment rights warning requirement?

b. Self-Incrimination.

The court has dealt with several cases involving an accused's rights

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[128]*See, e.g.*, United States v. Simmons, 29 M.J. *70* (C.M.A. 1989) (accused's presence in the car with cocaine and paraphernalia in heavy drug-trafficking area would have given probable cause for command-directed urinalysis, and thus, allegedly involuntary nature of accused's "consent" to urinalysis did not invalidate test, even though accused was not told that results of the "consent" test could be used against him and that the results of the command-directed test were inadmissible); United States v. Fagan, 28 M.J. 64 (C.M.A. 1989) (accused was not "seized" for purposes of fourth amendment when he and fellow Marines were directed to proceed to Naval Investigative office for purpose of being fingerprinted); and United States v. Thatcher, 28 M.J. 20 (C.M.A. 1989) (government failed to establish, by clear and convincing evidence, that its intrusion into service member's room several hours in advance of health and comfort inspection of other rooms, after service member had been identified as a suspect in theft of government property, was lawful "military inspection" rather than illegal "search").

[129]27 M.J. 264 (C.M.A. 1988).

[130]*Id.* at 265.

[131]*Id.* at 266. ***See** also* United States v. Whipple, 28 M.J. 314 (C.M.A. 1989) (COMA found the accused voluntarily consented to a urinalysis as part of a flight physical).

against self-incrimination.[132] *United States v. Coleman*,[133] *United States* v. *Fassler*,[134] and *United States* v. *Quillen*[135] warrant special attention.

In *Coleman* the accused asserted his right to counsel to the German police. Despite "actual knowledge" that counsel had been requested and that the accused refused to make a statement, the CID agents took the accused to their office and, after a proper rights warning, resumed questioning.[136] COMA affirmed, holding that the "bright line rule" of *Edwards v. Arizona*[137] does not apply to a re-

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[132]*See, e.g.*, United States v. Brabant, 29 M.J. 259 (C.M.A. 1989) (acting commander's actions, in ordering accused to meet with commander after he had already invoked right to remain silent and before he could consult with attorney, were functional equivalent of "reinitiation of interrogation," notwithstanding that officer's purpose may only have been to advise accused of rights); United States v. Spaulding, 29 M.J. 156 (C.M.A. 1989) (confession is not automatically inadmissible, even though it was made after another, involuntary confession; prosecution must rebut presumption that later confession was result of same influence which led to prior confession); United States v. Wynn, 29 M.J. 143 (C.M.A. 1989) (any error in admitting evidence of accused's silence when he was apprehended was harmless in view of testimony concerning direct observation of the accused as he took a bottle of cologne, put it in his pocket, and stepped outside the exchange building); United States v. Williams, 29 M.J. 112 (C.M.A. 1989) (regulation requiring servicemember, upon request, to "present valid and bona fide information or documentation showing the continued possession or lawful disposition . . . of" specified items did not unlawfully compel disclosures); United States v. Sievers, 29 M.J. 72 (C.M.A. 1989) (accused who, in his capacity as base security officer, had to fill out incident/complaint report of theft which he and another service member had committed did not have a fifth amendment privilege to falsely indicate on the report that suspects were unknown); United States v. Martinez, 28 M.J. 56 (C.M.A. 1989) (absent clear agreement by counsel on the record that self-incriminating testimony offered by accused during suppression hearing can be used against accused on the merits, such use of the accused's testimony would not be allowed); United States v. Morris, 28 M.J. 8 (C.M.A. 1989) (even if the special agent was entitled, without giving required warning, to question accused about possible murder or assault on basis that accused had left base alleging someone was going to be killed and he had to do something to stop it, justification of "emergency" could not be utilized as a basis for unwarned interrogation after special agent became aware that no emergency existed); and United States v. Hallock, 27 M.J. 146 (C.M.A. 1988) (error in admitting unwarned statements by accused was "unquestionably harmless" where: 1) specification to which statement was relevant was dismissed by military judge; 2) military judge instructed the members to disregard the witness's testimony; 3) there was no showing of any possible "spillover effect" to other charges; and 4) no request for further instructions was made by the defense).

[133]26 M.J. 451 (C.M.A. 1988).

[134]29 M.J. 193 (C.M.A. 1989).

[135]27 M.J. 312 (C.M.A. 1988).

[136]*Coleman*, 26 M.J. at 452.

[137]451 U.S. 477 (1981) (once a suspect has indicated his desire to deal with a police interrogator only through his counsel, he may not be interrogated further by authorities until such counsel has been made available unless he, himself, initiates further communications).

quest for counsel made to foreign authorities.[138]

In *Fassler*, however, the court emphasized the "bright line rule." The court held that the accused, who had been charged with an unauthorized absence and who had requested counsel, could not thereafter be interrogated at the initiative of investigators about an offense for which he was confined or about any other suspected offense.[139] Further, COMA said the good faith of the investigators was not relevant because the focus must be "on the state of mind of the suspect and not the police."[140]

In *Quillen* a civilian store detective employed by the Army and Air Force Exchange Service (AAFES) observed the accused gluing security tapes on boxes containing a movie camera and a video cassette recorder. Unfortunately for Quillen, the security tape he used was a different color from the tape being used by the exchange that day. When Quillen left the exchange he was stopped by the detective. She then escorted him to the exchange manager's office for questioning. She questioned Quillen, but did not advise him of his article 31 rights.[141] Judge Sullivan, for the court, found that civilian store detectives employed by AAFES must read soldiers their article 31 rights before questioning.[142] Judge Cox, dissenting, indicated he is "of the opinion that the exchange service is an instrument of the United States rather than an instrument of the military. Article 31 only applies to the latter."[143]

c. Confrontation

During the past year COMA addressed confrontation issues involving a child victim and unavailability. *United States v. Quick*[144] provides trial counsel an excellent example of how to keep the defense from "crying wolf" about the lack of opportunity to confront the victim. COMA found the accused was not denied the right to confrontation of four-year-old victim where 1) the child had previously testified under oath at the article 32 investigation; 2) she was sit-

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[138] *Coleman*, 26 M.J. at 453. *See also* United States v. Jordan, 29 M.J. 177 (C.M.A. 1989) (civilian police were not acting as agents of military authorities in questioning accused regarding murder and, therefore, were not obligated to notify accused's military counsel before taking statement from accused after accused waived his rights).

[139] *Fessler*, 29 M.J. at 197.

[140] *Id.* (quoting Arizona v. Roberson, 108 S. Ct. 2093, 2101 (1988)).

[141] *Quillen*, 27 M.J. at 313.

[142] *Id.* at 314.

[143] *Id.* at 316 n.1.

[144] 26 M.J. 460 (C.M.A. 1988).

ting outside courtroom during the trial; 3) the trial counsel offered that the child could be called as a hostile witness by the defense; and 4) the government offered to call the victim if compelled by the defense.[145]

The next three cases deal with unavailability. In *United States v. Burns*[146] COMA found that the government never fully invoked assistance of judicial process to assure the presence of the victim-witness at trial. Specifically, there was no showing that anyone attempted to deliver personally to the witness a subpoena along with "fees and mileage," as required by article 46, UCMJ. Thus, there was no showing of "unavailability."[147]

In *United States* v. *Koistinen*[148] a drug supplier, who was a civilian, asserted his right against self-incrimination in a trial by court-martial. COMA found him to be unavailable as military authorities could not grant immunity and civilian authorities would not grant immunity.[149] The court then admitted his pretrial statement under Military Rule of Evidence 804(b)(3)—a statement against penal interest.[150]

In *United States v. Ferdinand*,[151] however, COMA found the seven-year-old victim of alleged indecent acts by her father available within meaning of the hearsay rule and, thus, that admission of the transcript of a videotaped interview violated the confrontation clause.[152] The court made this finding despite a state juvenile court order prohibiting the victim from testifying at any hearing or court proceeding outside juvenile court and the mother's statement that she could not in clear conscience produce the victim to testify.[153] The court makes clear "affirmative measures to protect an accused's Sixth Amendment right to confront and cross-examine witnesses . . . do not end simply with service of a subpoena."[154] In dicta the court did suggest "a child may be found to be unavailable to testify if a psychiatrist or psychologist has determined that participation in trial would be too traumatic for the child."[155]

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[145] *Id.* at 462.
[146] 27 M.J. 92 (C.M.A. 1988).
[147] *Id.* at 97.
[148] 27 M.J. *279* (C.M.A. 1988).
[149] *Id.* at 281.
[150] *Id.* at 282.
[151] 29 M.J. 164 (C.M.A. 1989).
[152] *Id.* at 166.
[153] *Id.* at 167.
[154] *Id.*
[155] *Id.*

3. *Government Appeals*

COMA decided one case involving government appeals during the year. In *United States v. True*[156] the court held that the military judge's order abating the court-martial because the government declined to fund an expert investigator under a judicial order was the functional equivalent of a "ruling of the military judge which terminated the proceedings" under article 62a.[157] Thus, the ruling was a proper subject for appeal by the government. The court noted *United States v. Browers*,[158] where it held that the military judge correctly decided the government was not entitled to appeal his denial of a continuance, but said "an abatement is not a continuance, especially where intractibility has set in and the direction of a dismissal is imminent."[159]

4. *Pleas*

With over sixty percent of all courts-martial consisting of guilty pleas,[160] it is not surprising that the court decided several cases involving guilty pleas and the providence inquiry.[161] *United States v.*

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[156] 28 M.J. 1 (C.M.A. 1989).

[157] *Id.* at 2.

[158] 20 M.J. 356 (C.M.A. 1985).

[159] *True*, 28 M.J. at 4.

[160] Clerk of Court Note, *Military Justice Statistics FY 1987-1989*, The Army Lawyer, Feb. 1990, at 62.

[161] *See, e.g.*, United States v. Jeffress, 28 M.J. 409 (C.M.A. 1989) (acceptance of guilty plea to kidnapping offense was proper, although kidnapping convictibn under UCMJ article clauses proscribing conduct that is service-discrediting or contrary to good order and discipline requires more than incidental detention or asportation and accused only moved victim some 15 feet; accused moved victim away from traveled area into greater darkness where there was increased risk of harm to victim, and dragging victim away from beaten path was not inherent in offense of forcible sodomy); United States v. Clark, 28 M.J. 401 (C.M.A. 1989) (it was unnecessary for the military judge to ask the accused whether he agreed with his counsel that no entrapment defense was raised, in accepting accused's guilty plea, in view of accused's specific agreement to stipulation of fact which precluded entrapment defense); United States v. Hubbard, 28 M.J. 203 (C.M.A. 1989) (where accused plead guilty to larceny and at the providence inquiry gave sworn testimony which clearly established guilt of a different but closely related offense of receiving stolen property having approximately the same maximum punishment, accused's plea of guilty could be treated as provident); and United States v. Romanelli, 28 M.J. 184 (C.M.A. 1989) (testimony at the rehearing on sentence that tended to show the accused had been entrapped would not demonstrate improvidence of guilty pleas, even though the evidence was inconsistent with the facts admitted by the pleas of guilty). See *also* United States v. De Young, 29 M.J. 78 (C.M.A. 1989) (it was error for the military judge not to rule on defense counsel's objection to uncharged misconduct contained in stipulation of fact); United States v. Rooks, 29 M.J. 291 (C.M.A. 1989) (although providence of guilty plea should generally be determined within four corners of the record, appellate court should not hesitate to order suitable additional inquiry in an appropriate case).

Holt,[162] concerning the use of the providence inquiry as evidence, and *United States* v. *Dock*,[163] on acceptance of guilty pleas in a capital case, warrant special attention.

First, in *United States v. Holt* COMA said the sworn testimony of the accused during a providence inquiry may be received as an admission during the sentencing portion of trial and presented by a properly authenticated transcript or by persons hearing the accused's statement.[164] The court in *Holt* did indicate that uncharged misconduct should not be received during the providence inquiry if it is not closely connected to the charged conduct and that this information can be the subject of a proper defense objection.[165] With *Holt*, defense counsel must be particularly alert during the providence inquiry. If the military judge inquires into matters not necessary to establish the providence of the accused's guilty plea, the defense counsel must object to preserve the issue.[166]

Next, in *Dock* COMA decided that the accused's guilty pleas to crimes of unpremeditated murder and robbery by means of force and violence were, in context, pleas to the capital offense of felony-murder, which the court was not at liberty to accept. Why? Article 72, UCMJ, prohibits the acceptance of guilty pleas to an offense that subjects the accused to the death penalty.[167]

5. *Voir Dire and Challenges*

The court decided several cases during the past year in the area of voir dire and challenges.[168] In *United States v. Smith*[169] the court said the military judge could properly limit voir dire to preclude

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[162] 27 M.J. 57 (C.M.A. 1988).
[163] 28 M.J. 117 (C.M.A. 1989).
[164] *Holt*, 27 M.J. at 59, 60.
[165] *Id.* at 60.
[166] *Id.*
[167] 10 U.S.C. § 872 (1982).
[168] *See also* United States v. Newson, 29 M.J. 17 (C.M.A. 1989) (military judge improperly permitted government to exercise conditional peremptory challenge of enlisted member and to withdraw that challenge and exercise another one after accused exercised peremptory challenge *to* another enlisted member and reduced enlisted membership below one-third quorum); United States v. Nigro, 28 M.J. 415 (C.M.A. 1989) (court member's claim of impartiality was not undermined by his failure to follow military judge's preliminary instructions not to consult any source as to matters involved in prosecution); and United States v. Williams, 28 M.J. 484 (C.M.A. 1989) (military judge's erroneous characterization of expert during voir dire had to be measured by standard of plain error, where accused's counsel did not object to interjection by military judge).
[169] 27 M.J. 25 (C.M.A. 1988).

defense counsel from inquiring into panel members' attitudes as to a mandatory sentence of life imprisonment. Moreover, COMA found this limitation did not deprive the defense of its ability to exercise peremptory challenges. Next, in *United States v. Reichardt*[170] the court said the military judge must conduct a proper voir dire of a potential court-martial member who has been the victim of a crime similar to the offense with which accused is charged to erase any doubts as to partiality.

In *United States* v. *Murphy*[171] Judge Cox, writing for the court, said no per se disqualification is required for a senior member of a court-martial who rates or endorses the efficiency report of a junior member. Chief Judge Everett, in his opinion, however, did indicate that a per se exclusion rule could be adopted administratively by the services, but that it was not mandated by *United States* v. *Harris*[172] or the UCMJ.[173] In *United States v. Moore*[174] COMA again looked at the *Batson*[175] issue and held that once trial counsel challenges a minority member of the accused's race, and the defense objects, *Batson* is triggered per se and trial counsel must explain his reasons for the challenge.

6. *Crimes and Defenses*

Crimes and defenses continue to occupy much of the court's time. We will highlight only the most significant cases.[176]

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[170] 28 M.J. 113 (C.M.A. 1989).
[171] 26 M.J. 454 (C.M.A. 1988).
[172] 13 M.J. 288 (C.M.A. 1982).
[173] *Murphy*, 26 M.J. at 458.
[174] 28 M.J. 366 (C.M.A. 1989).
[175] Batson v. Kentucky, 106 S. Ct. 1712 (1986), held the Constitution requires the trial court to inquire concerning discrimination on the basis of race in the selection of a petit jury in a criminal trial. The inquiry described there is in two parts: 1) if the defense makes out a prima facie case of discrimination, considering all the facts and circumstances available, then the trial court will require government counsel to give an explanation for the use of the challenge; and 2) if the trial court is not convinced that the explanation is racially neutral, the peremptory challenge will be disallowed.
[176] *See, e.g.*, United States v. Reichenbach, 29 M.J. 128 (C.M.A. 1989) (prior to date ECSTASY was listed in schedule I as a "controlled substance," rather than a "controlled substance analogue," service member could be prosecuted under general article for violation of sections of Comprehensive Drug Abuse Prevention and Control Act governing controlled substance analogues); United States v. Harris, 29 M.J. 169 (C.M.A. 1989) (flight from attempted apprehension does not constitute resisting apprehension); United States v. Layne, 29 M.J. 48 (C.M.A. 1989) (conduct of parties to conspiracy is sufficient to show agreement required to establish offenses); United States v. Williams, 29 M.J. 41 (C.M.A. 1989) (facial similarity between military offense and federal crime does not mean that offense must be brought under UCMJ article clause

a. Crimes

In *United States* v. *Harrison*[177] the court followed its recent precedent in *United States* v. *Jackson*.[178] In *Harrison* the accused made a false statement that his commander had written the second paragraph on a pay inquiry form in order to get an appointment to get the accused paid. The court found this was a false statement within the meaning of article 107, UCMJ,[179] because the battalion finance clerk was asking a question that was related to the performance of her job.[180]

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proscribing noncapital crimes and offenses, resulting in adoption of law on those offenses; rather, charge may be brought under any of the clauses, proscribing disorders prejudicial to discipline, service-discrediting conduct, or noncapital crimes and offenses, where appropriate, and if elements of offense were satisfied under first or second clauses, the offense could be alleged, prosecuted, and established under one of those); United States v. Roach, 29 M.J. 33 (C.M.A. 1989) (COMA will defer CGCMR's construction of its own regulations to hold that order of ship's commanding officer that service member not consume alcohol during ship's in-port visit violated regulations and on that basis the challenged order was illegal and unenforceable at court-martial); United States v. Dayton, 29 M.J. 6 (C.M.A. 1989) (military judge properly advised court members that possession or use of controlled substances does not establish predisposition to distribute); United States v. Marks, 29 M.J. 1 (C.M.A. 1989) (accused's putting flame on canvas litter was "willful and malicious" and constituted aggravated arson, although accused contended that he merely put flame to canvas litter to see if it was flame retardant); United States v. Hale, 28 M.J. 310 (C.M.A. 1989) (accused could not be convicted of wrongful appropriation of a rental car and dishonorable failure to pay a just debt, which was incurred after the deadline for returning the car); United States v. Bolden, 28 M.J. 127 (C.M.A. 1989) (accused could be convicted of larceny on the basis of helping a serviceman obtain government housing benefits as married person where the marriage was a sham and was entered solely to obtain allowance for off-base housing, which he rented from accused); United States v. Pugh, 28 M.J. 71 (C.M.A. 1989) (COMA affirms conviction despite accused's contention that he had placed a device resembling a bomb near a security policeman as a practical joke, as there was sufficient evidence from which it could be inferred that the victim would at least have been very "concerned" for his safety and the safety of the area as the natural and probable consequence of accused's conduct); United States v. Massey, 27 M.J. 371 (C.M.A. 1989) (even though the burden of proof as to mental responsibility has been changed, COMA perceives no intent by Congress to change the principle that "[m]ilitary law accords a 'preferred rating' to questions affecting the accused's sanity"); United States v. Austin, 27 M.J. 227 (C.M.A. 1988) (accused's second, incomplete application for conscientious objector status did not place any limitation on whether accused could be ordered to draw his weapon); United States v. McKinley, 27 M.J. 78 (C.M.A. 1988) (accused could not be found guilty of lesser included offense where Manual for Courts-Martial said there were no lesser included offenses and the judge and counsel agreed); United States v. Mervine, 26 M.J. 482 (C.M.A. 1988) (a debt is not a proper subject of larceny); and United States v. Karen Davis (previously known as Charles W. Marks), 26 M.J. 445 (C.M.A. 1988) (cross-dressing is a crime under article 134).

[177] 26 M.J. 474 (C.M.A. 1988).

[178] 26 M.J. 377 (C.M.A. 1988).

[179] 10 U.S.C. § 907 (1982).

[180] *Harrison*, 26 M.J. at 476.

The court also decided two sigmficant "sex" cases. In *United States v. Orben*[181] COMA found the accused's conduct of displaying non-pornographic magazines to a child constituted taking of indecent liberties, given that the display was accompanied by the proscribed intent. Then, in *United States v. Bradley*[182] the court held that an explicit threat and display of force was not necessary for a drill sergeant to be convicted of rape of a recruit's wife, given the highly coercive nature of the encounter between the parties—late at night, in a secluded trailer, and to discuss infractions allegedly committed by her husband.[183] But, perhaps the most significant aspect of *Bradley* was the court's expansion of its practice of using names of rape victims in the opinions.[184]

The court also resolved many issues with respect to AIDS (Acquired Immune Deficiency Syndrome) prosecutions. First, in *United States* v. *Woods*[185] COMA held that a servicemember who engages in sexual intercourse without protection, knowing that his seminal fluid contains a deadly virus capable of sexual transmission, could be convicted of conduct prejudicial to the good order and discipline under article 134, UCMJ. Next, in *United States w. Womack*[186] the court said that a "safe sex" order issued to a servicemember infected with the AIDS virus did not violate any constitutionally protected privacy interest. Then the court, in *United States* v. *Stewart*,[187] found the accused committed aggravated assault by knowingly exposing the victim to AIDS. The court found that testimony of a thirty to fifty percent chance of death resulting from exposure to the virus was sufficient to permit an inference that the means was likely to produce death or grievous bodily harm.[188] COMA has now accepted all three theories of AIDS prosecutions.

The court also decided three article 133, UCMJ, cases of note. First, in *United States v. Norvell*[189] the court held that Captain Barbara Norvell engaged in conduct unbecoming an officer by wrongfully catheterizing herself to conceal marijuana usage. Moreover, the court said the conduct did not have to be published or otherwise communicated to be conduct unbecoming an officer.[190] In *United States*

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[181] 28 M.J. 172 (C.M.A. 1989).
[182] 28 M.J. 197 (C.M.A. 1989).
[183] *Id.* at 200.
[184] *Id.* at 198.
[185] 28 M.J. 318 (C.M.A. 1989).
[186] 29 M.J. 88 (C.M.A. 1989).
[187] 29 M.J. 92 (C.M.A. 1989).
[188] *Id.* at 93.
[189] 26 M.J. 477 (C.M.A. 1988).
[190] *Id.* at 479.

v. Guaglione[191] Lieutenant Guaglione was charged, among other things, with conduct unbecoming an officer by fraternizing with enlisted members of his softball team by entering a legal house of prostitution in Frankfurt, Germany. On appeal, COMA reversed, holding an officer's mere entry into a house of prostitution with subordinates without participating in or encouraging any sexual conduct was not conduct unbecoming an officer.[192] Then, in *United States v. Lewis*[193] COMA found that the accused's conviction for conduct unbecoming an officer and a gentleman was supported by evidence that, after being directed by his commander to assist a fellow officer in his unit in improving his professional performance, he charged his fellow officer $2000 for tutoring in platoon leadership skills.

b. Defenses

United States v. Benedict[194] is another important case in the area of the insanity defense. Benedict, an Air Force major, was charged with child abuse. In his defense, two psychiatrists were called, who testified that he suffered from pedophilia and that he was not mentally responsible for his actions. The government called a psychiatrist, who, fortified with the report of a three-person sanity board, testified that pedophilia is not a psychosis and that it therefore cannot be a mental disease or defect. COMA held: 1)the sanity board report was not admissible, as it allowed the government to smuggle in the testimony of two other experts without cross-examination;**2)** psychiatrists can testify only as to their medical diagnosis and not to a legal opinion; **3)** good character may be relevant in a mental responsibility case because it shows that if the accused were sane, he would never act this way; and **4)** a psychosis is not required for a mental disease or defect to exist.

7. *Evidence*

During this period the court was required to address many evidentiary issues. The most significant of these issues involved uncharged

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[191] 27 M.J. 268(C.M.A. 1988).
[192] *Id.* **at** 272.
[193] 28 M.J. 179 (C.M.A. 1989).
[194] 27 M.J. 253 (C.M.A. 1988).

misconduct, character evidence, expert testimony, and polygraph evidence.[195]

a. Uncharged Misconduct.

In *United States* v. *Cuellar*[196] the accused was charged with molesting his ten-year-old niece. In order to prove the case, the prosecution desired to call four other females who allegedly had been abused by the accused from 1980 to 1982—arguing that this evidence was "textbook Military Rule of Evidence 404(b)'' material. The defense objected, noting first Military Rule of Evidence 403, and second that the incidents involving two of the girls had been the subject of criminal charges of which the accused was acquitted in a state court. In the alternative the defense wanted at least to have the court informed that the accused was acquitted. The military judge admitted into evidence the information concerning the other incidents, but did not inform the members of the fact of acquittal.[197]

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[195] *See also,* United States v. Corbett, 29 M.J. 253 (C.M.A. 1989) (testimony by government witness that persons other than accused whom he had accused of using drugs had been convicted was not relevant, even if he had testified as a government witness at the trial of the other persons who were found guilty, as those convictions did not establish the witness' credibility, even after he had been impeached by showing that he had made false accusations against some people); United States v. Stroup, 29 M.J. 224 (C.M.A. 1989) (statement made by conspirator more than year after discovery of conspiracy to acquire blank government checks for purpose of forging and negotiating them was not admissible in accused's general court-martial under hearsay exception for statements of coconspirator made during court of and in furtherance of conspiracy); United States v. Browning, 29 M.J. 174 (C.M.A. 1989) (whether an adjudication by one of several states is a conviction is a matter of state law); United States v. Hughes, 28 M.J. 391 (C.M.A. 1989) (accused had no privilege to invoke to prevent admission of testimony of his wife's out-of-court written and oral statements concerning his use of marijuana at her birthday party); United States v. Wind, 28 M.J. 381 (C.M.A. 1989) (serviceman's sworn statement, naming accused as one of the persons to whom he had distributed drugs, was not shown to be sufficiently against serviceman's penal interest to be admissible under hearsay exception); United States v. Pollard, 27 M.J. 376 (C.M.A. 1989) (deviating from a regulation on handling urine samples does not render a sample inadmissible as a matter of law; however, such deviation may be considered along with all other factors in determining if evidence lacks sufficient reliability to be considered by the finders of fact); United States v. Allen, 27 M.J. 234 (C.M.A. 1988) (North Carolina divorce-revocation decree, procured after the article 32 investigation, which declared accused's 1984 divorce void ab initio, was entitled to full faith and credit in a trial by court-martial; existence of a marriage is generally a question of fact, normally to be decided in accordance with state law); and United States v. Yeauger, 27 M.J. 199 (C.M.A. 1988) (unsworn statement of another servicemember who identified accused as coactor in larcenies was admissible under residual hearsay exception where: 1) statement coincided with physical evidence; 2) statement interlocked with another witness; 3) statement was incriminating to the declarant; and 4) the declarant testified at trial).

[196] 27 M.J. 50 (C.M.A. 1988).

[197] *Id.* at 52-53.

COMA agreed in part. First, the court found there were "close parallels" between the previous acts and the crimes at bar and thus that they were admissible under Military Rule of Evidence 404(b).[198] Second, citing *Mirandes* v. *Gonzales*[199] and *United States* v. *Huddleston*,[200] the court said evidence of "uncharged misconduct" no longer needs to be "clear and conclusive." Moreover, the military judge no longer needs to make a preliminary finding that the conduct occurred. Instead, the military judge need only decide whether the court members could reasonably find by a preponderance of the evidence that the uncharged misconduct occurred.[201] Third, affirming the principles of *United States v. Hicks*,[202] the court held that evidence of misconduct can be used despite prior acquittals, so long as the prosecution was not conducted by the same sovereign and thus subject to collateral estoppel.[203] Finally, the court said it was error, however, not to let defense counsel bring out the fact that the accused had been acquitted.[204]

Next, in *United States v. McIntosh*[205] COMA determined that evidence that the accused, in a prosecution for graft, was being dunned by creditors and subject to counseling by his commanders was admissible to show the accused's motive. The military judge erred, however, by not informing the members of the limited purpose for which the evidence could be considered.[206] Note that there was no request for a limiting instruction and that Military Rule of Evidence 105 states that when evidence is admissible for one purpose, but not another, "the military judge, *upon* ***request,*** shall restrict the evidence to its proper scope and instruct the members accordingly." The court in *McIntosh* did not cite rule 105. *McIntosh* serves as a reminder that the reviewing courts may find some evidence so potentially prejudicial that the failure give an instruction sua sponte is error.[207]

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[198] *Id.* at 54.
[199] 26 M.J. 411 (C.M.A. 1988).
[200] 108 S. Ct. 1496 (1988) (interpreting the comparable Federal Rule of Evidence).
[201] *Cuellar*, 26 M.J. at 54.
[202] 24 M.J. 3 (C.M.A. 1987).
[203] *Cuellar*, 26 M.J. at 54-55. Note that Hicks is improperly cited as being on point. In ***Hicks*** the prior convictions were by court-martial; therefore collateral estoppel applied.
[204] *Id.* at 56.
[205] 27 M.J. 204 (C.M.A. 1988).
[206] *Id.* at 207.
[207] *See, e.g.*, United States v. Neely, 25 M.J. 105 (C.M.A. 1987) (military judges "should" sua sponte instruct on the appropriate use of expert testimony containing the opinions of other non-testifying witnesses; however, the court held the failure to instruct here did not constitute plain error).

Finally, in *United States V. Reynolds*[208] **COMA** reiterated that modus operandi evidence enjoys logical relevance only to prove identity. The court went on to say, however, that if prior acts of accused are significantly similar to charged acts and thus evidence a particular "design" or "system," and they are relevant to prove or disprove a fact in issue, uncharged conduct may be admitted to prove such design or purpose.[209]

b. Character Evidence

The court seems to be reversing a trend of the past few years—that is, if it smells like character evidence it will be admitted. Seemingly, their were few limitations on character testimony. But now, in *United States V. Williams*[210] and *United States V. Jenkins*[211] **COMA** notes that the character witness must have a sufficiently close relationship to justify the formation of a reliable judgment.

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[208] 29 M.J. 105 (C.M.A. 1989).

[209] *See also* United States v. Joyner, 29 M.J. 209 (C.M.A. 1989) (evidence that results of random urinalysis test taken by service member nearly one year prior to latest test had mistakenly been interpreted as reflecting "negative" concentration of marijuana was admissible, in proceeding for use of marijuana, to rebut service member's volunteered assertion that he had never used marijuana and that he would not have asked for urinalysis test unless he had been innocent); United States v. Castillo, 29 M.J. 145 (C.M.A. 1989) (evidence of uncharged misconduct must be admitted if judge concludes that fact finder could reasonably find by preponderance of the evidence that the uncharged misconduct occurred, even though judge himself would not make that finding, under evidence rule providing for admission of evidence of uncharged misconduct); United States v. Chambers, 29 M.J. 76 (C.M.A. 1989) (error, if any, arising from denial of accused's motion in limine to exclude evidence of a prior rape allegation, where the accused was acquitted, was not prejudicial error as none of the conditions stated by the military judge under which the evidence might be admissible ever materialized); United States v. Brown, 28 M.J. 470 (C.M.A. 1989) (operations specialist chief was not competent to testify in his own right to purported commission of uncharged act of misconduct by accused when chief's information regarding incident was derived secondhand from police report); United States v. Ferguson, 28 M.J. 104 (C.M.A. 1989) (testimony of accused's two stepdaughters regarding sodomies committed against them when they were "very little" and "real young" was not admissible with respect to charged sodomy allegedly committed against one stepdaughter to establish accused's modus operandi; identity was not an issue at trial and testimony lacked "close parallels" with charged sodomy); United States v. Clarke, 27 M.J. 361 (C.M.A. 1989) (defense counsel's affirmatively informing members of accused's prior rape conviction in opening argument on findings and adducing evidence of that conviction in defense's case-in-chief waived the accused's claim that evidence of the conviction would be unduly prejudicial if admitted for any purpose); and United States v. Gamble, 27 M.J. 298 (C.M.A. 1988) (testimony regarding prior act of uncharged sexual misconduct was insufficient to establish modus operandi or plan where the similarity to the crime at bar was limited to the facts that on both occasions the accused talked to an adult female and then had an illicit sexual contact with her).

[210] 26 M.J. 487 (C.M.A. 1988).

[211] 27 M.J. 209 (C.M.A. 1988).

In *Williams* a witness's two interviews with the child victim, which lasted for a total of 1% hours, were not sufficient to permit the witness to form a reliable assessment of the child victim's character for truthfulness.[212] The court, however, noted that the duration of observation may not be critical, but the way the witness formed the opinion of person's character must be considered.[213] Similarly, in ***Jenkins*** a clinical psychologist's testimony regarding an accused's honesty, good military character, and character as a person who would not use drugs was properly excluded when the basis for the opinion was a few marital counseling sessions and speaking with him on the phone a few times.[214]

c. Experts

The issue of experts[215] could become one of the most active,

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[212] *Williams*, 26 M.J. at 490.

[213] *Id.*

[214] *Jenkins*, 27 M.J. at 211. ***See*** *also* United States v. Pearce, 27 M.J. 121 (C.M.A. 1988) (character witness, who testified as to the accused's honesty, could be cross-examined by the government as to the accused's prior involvement in another larceny in order to rebut the premise that the accused was an honest person); and United States v. Wilson, 28 M.J. 48 (C.M.A. 1989) (military judge should not have prevented members from considering evidence of accused's good military character with respect to sodomy, adultery, and indecent language charges involving wives of accused's military subordinates).

[215] *See* United States v. Peel, 29 M.J. 235 (C.M.A. 1989) (military officer, who was chief social worker in mental health clinic, had advanced degree in social work, had done dissertation on "crisis intervention," and had specialized training and experience in counseling rape victims as well as in crisis intervention, was qualified as expert, and his testimony regarding behavior of alleged rape victim who social worker had observed was admissible); United States v. Boulden, 29 M.J. 44 (C.M.A. 1989) (expert's testimony as whole reasonably implied that presence of benzoylecgonine metabolite in urine was proper basis upon which to identify cocaine use and supported conviction for wrongful use of cocaine); United States v. Turner, 28 M.J. 487 (C.M.A. 1989) (forensic toxicologist who was assigned to consult with defense in preparation for trial of charge of wrongfully using cocaine and to be present with counsel to advise him during trial, especially with respect to expert testimony being offered by government witnesses, was a "lawyer's representative" for purposes of evidence rule governing lawyer-client privilege; thus, prosecutor was not free to interview toxicologist prior to trial); United States v. Farrar, 28 M.J. 387 (C.M.A. 1989) (witness's recognized expertise in drug abuse counseling did not qualify him to express opinion on ultimate issue regarding accused's status as non-abuser of drugs, where opinion was grounded entirely in witness's estimation of accused's credibility based on mannerisms and body language during extensive three-hour interview); United States v. Lapeer, 28 M.J. 189 (C.M.A. 1989) (defense counsel's examination of expert about potential for rehabilitation of accused and effect of confinement opened door to cross-examination of expert about quality of rehabilitation program at Disciplinary Barracks); United States v. Lee, 28 M.J. 52 (C.M.A. 1989) (clinical psychologist's testimony that alleged victim's symptoms were consistent with traumatic, possibly sexual, experience was relevant in prosecution for committing indecent acts upon body of female under 16); and United States v. Gordon, 27 M.J. 331 (C.M.A. 1989) (military judge did not abuse his discretion in permitting government expert in toxicology to remain in courtroom during testimony of other government witness despite defense objection).

especially with respect to when the government has to provide the accused a psychiatrist, investigator, or another expert. In *United States v. VanHorn*[216] the court held that a government expert, who had divergent views from a defense-requested expert on proper testing procedures in a urinalysis case, was not an "adequate substitute" under R.C.M. 703(d) (employment of expert witnesses). Chief Judge Everett warned that because the government has been given "considerable latitude" in its urinalysis program, it is only fair that the accused have "meaningful access to experts."

d. Polygraph Evidence

United States v. *West*[217] follows *United States* v. *Gipson*[218] and continues to dig deeper into the use of polygraph evidence. Here the court found that the accused's offer to take a polygraph test on the condition that the charges would be dismissed if he passed and a similar offer to take sodium pentothal were irrelevant.[219] The court, however, specifically noted that the result might be different if the accused made an unconditional offer to take the test and agreed to let the test be used against him if he failed.[220]

8. Instructions

Although the cases are varied as to the types of instructions involved, the cases seem to run along two main lines: 1)where no instruction is given, and 2) where an improper/partial instruction is given. The cases seem to establish that the government is better off if even an erroneous instruction is given because then it will be tested for harmlessness. If an instruction is not given at all, then the case will probably be reversed.

Two cases illustrate the latter proposition. First, in *United States v. Turner*[221] COMA held that the accused, an Army captain who received two free automobile engines from a subordinate, was entitled to an instruction on the defense of mistake of fact, where there was some evidence that would have supported the accused's belief he was entitled to the engines. Second, in *United States* v. *Rose*[222]

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[216]26 M.J. 434 (C.M.A. 1988).
[217]27 M.J. 223 (C.M.A. 1988).
[218]24 M.J. 246 (C.M.A. 1987).
[219]*West*, 27 M.J. at 225.
[220]*Id.* at 225, 226.
[221]27 M.J. 217 (C.M.A. 1988).
[222]28 M.J. 132 (C.M.A. 1989).

the court said an instruction on self-defense was warranted by testimony from witnesses other than the accused to external facts that might have inferentially showed whether the accused believed that he was in danger of death or serious bodily harm. In both cases prejudicial error was found when the military judge failed to instruct on the affirmative defense.[223]

9. Sentencing

The court was also active in the area of sentencing.[224] Of particular note were COMA's opinions on prior punishment, testimony on rehabilitative potential, and evidence about the possible effects of a punitive discharge.

In *United States v. Pierce*[225] COMA allowed the accused to be tried by court-martial for a major offense despite previously being pun-

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[223]*See also* United States v. Evans, 27 M.J. 34 (C.M.A. 1988) (military judge's curative instructions and general inquiry of members provided adequate remedy when members heard inadmissible evidence of out-of-court identification; court notes that "preferred" method for curing this type error is a curative instruction and not a mistrial; but court also advises that military judges make an individual inquiry of each court member and not a general inquiry of the members when determining prejudice). *But see* United States v. Eckhoff, 27 M.J. 142 (C.M.A. 1988) (military judge's instruction that a profit motive forecloses the defense of entrapment was error; a profit motive is but one element in determining whether an accused is predisposed to commit an offense and not a per se bar).

[224]*See* United States v. Antonitis, 29 M.J. 217 (C.M.A. 1989) (testimony regarding whether accused would retain her security clearance after being convicted of drug offense was not relevant to her rehabilitative potential, so as to be admissible under rule; rehabilitative potential referred to accused and was based upon assessment of accused's character and potential, and fact that some administrative rule or security officer might deny accused authorization to work with classified materials was not relevant to whether she possessed requisite character and will to become responsible member of military community); United States v. Fontenot, 29 M.J. 244 (C.M.A. 1989) (various papers, including handwritten statements of prison guards, that had been attached to forms reflecting disciplinary actions against accused for infractions during pretrial confinement were not included in accused's military personnel file and. thus, were not admissible during pre-sentencing as evidence of accused's character of prior service); United States v. Gunter, 29 M.J. 140 (C.M.A. 1989) (testimony of head of base drug and alcohol abuse control program that accused's potential for rehabilitation and refraining from drug use was poor was admissible during pre-sentencing portion of trial); United States v. Caniete, 28 M.J. 426 (C.M.A. 1989) (convictions, which were obtained between date of offense for which accused was on trial and date of trial, were "prior convictions" admissible as aggravation evidence); United States v. Wingart, 27 M.J. 128 (C.M.A. 1988) (once findings have been entered M.R.E. 404(b) is no longer of consequence; uncharged misconduct is not admissible unless it constitutes "aggravating circumstances" under R.C.M. 1001(b)(4)); United States v. Shroeder, 27 M.J. 87 (C.M.A. 1988) (statute requiring vote by three-fourths of court members in order to impose life imprisonment did not negate mandatory life imprisonment for felony murder).

[225]27 M.J. 367 (C.M.A. 1989).

ished nonjudicially, but specified that the accused cannot be twice punished for the same offense and that prior nonjudicial punishment cannot be exploited by the prosecution at a court-martial for the same conduct. The court also said that the accused must be given complete credit for any and all nonjudicial punishments suffered, day-for-day, dollar-for-dollar, and stripe-for-stripe. Who has the duty to apply this credit? The convening authority must provide proper credit. Clearly the better practice would be to set aside the article 15 prior to trial.

In *United States V. Ohrt*[226] the court said testimony of the commander, that the accused did not have potential for continued service because there is no place in the military for illegal drugs, lacked a proper foundation to show that it was personalized and based on the accused's character and potential. It is clear the court will not allow trial counsel to bring a commanding officer before a court-martial preemptively to influence the members into returning a particular sentence—a punitive discharge. As the court said in *United States V. Horner*,[227] "the commander's view of the severity of the offense . . . is simply not helpful to the sentencing authority."[228]

Then, in *United States V. Henderson*[229] COMA said that evidence about the possible effects of a punitive discharge on the accused's retirement benefits was so collateral as to be confusing and inadmissible. The court noted that the accused was at least three years away from his anticipated retirement date and, in fact, would have been required to reenlist to be eligible for retirement.

C. POST-TRIAL ISSUES

While the 1984 Manual had as one of its purposes elimination of some of the government's post-trial burdens, COMA continues to stress the importance of the accused's post-trial rights. In particular, the court has expressed concern with the accused's rights to submit petitions for clemency and their review by the convening authority, staff judge advocates commenting upon legal errors raised by the accused in *all* post-trial submissions, and the content of any staff judge advocate addendum.

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[226] 28 M.J. 301 (C.M.A. 1989).
[227] 22 M.J. 294 (C.M.A. 1986).
[228] *Id.* at 296.
[229] 29 M.J. 221 (C.M.A. 1989).

In *United States* v. *Hill*[230] the court held that staff judge advocates must respond to any allegation of legal error submitted by the defense in the post-trial submissions, even if made after initial service with the post-trial recommendation.[231] Moreover, on appeal, unless the court of military review is convinced that a "properly prepared recommendation would have no effect on the convening authority," the case should be remanded.[232]

In *United States* v. *Craig*[233] a new action was required where the record of trial and allied papers did not show that the convening authority considered clemency matters properly submitted by accused.[234] Then, in *United States* v. *Heirs*[235] COMA found a new post-trial recommendation was required where the addendum to the post-trial recommendation referred to an inadmissible statement that was incident to an improvident guilty plea.[236]

Why does the Army lead the other services in post-trial processing problems? Could the answer be the Army's post-trial processing time report? Does the post-trial processing report cause some staff judge advocates to focus on speed as opposed to attention to detail?

D. POWERS OF THE COURTS

COMA's assertion of its own role in the military justice system has not been limited to *U.S.N.M.C.M.R. v. Carlucci*.[237] In one of the most

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[230] 27 M.J. 293 (C.M.A. 1988).
[231] *Id.* at 296.
[232] *Id.*
[233] 28 M.J. 321 (C.M.A. 1989).
[234] *Id.* at 322.
[235] 29 M.J. 68 (C.M.A. 1989).
[236] *Id.* at 69. ***See** also* United States v. Curry, 28 M.J. 419 (C.M.A. 1989) (Congress gave the convening authority the discretion to decide, under the circumstances of the particular case, whether a post-trial recommendation from a nonlawyer "legal officer" of the command would suffice, or whether, instead, a recommendation of a "staff judge advocate" should be obtained); United States v. Myers, 28 M.J. 191 (C.M.A. 1989) (military due process would be satisfied if in cases in which whereabouts of parties were unknown, after reasonable efforts were exhausted, the United States elected to constructively serve an accused with notice of decisions of Courts of Military Review); and United States v. Montesinos, 28 M.J. 38 (C.M.A. 1989) (in a case subject to review under article 66, the convening authority loses jurisdiction of the case once he has published his action or has officially notified the accused thereof; from that point on, jurisdiction is in the appellate courts and the only further contact that the convening authority has with the case occurs in the event of remand or if he is empowered to suspend or remit the sentence).
[237] 26 M.J. 328 (C.M.A. 1988). *See also* U.S.N.M.C.M.R. v. Cheney, 29 M.J. 98 (C.M.A. 1989) (COMA is a "court" for purposes of the Equal Access to Justice Act, but NMCMR cannot recover attorney fees as proceeding was not a civil "action"); and United States v. Engle, 28 M.J. 299 (C.M.A. 1989) (execution of a discharge from the service does not deprive COMA of jurisdiction to grant a petition for review).

publicized cases, *Unger v. Ziemniak*,[238] COMA found jurisdiction to review a ruling at a special court-martial.

Navy Lieutenant Susan Unger was ordered to provide a urine sample. The applicable Navy directive calls for "direct observation" of the private parts of the person providing the sample. Consistent with this requirement, a female chief petty officer insisted that Lieutenant Unger "disrobe from the waist down, sit on a toilet, and urinate into a collection bottle," while being viewed from a distance of approximately 18 inches.[239] Lieutenant Unger refused to comply with the observation requirements but gave a sample which ultimately tested negative for drugs. Her executive officer gave her an order to provide another urine sample under direct observation. She refused, claiming her constitutional rights to privacy, freedom from unreasonable searches and seizures, and, in her view, that direct observation by an enlisted person constituted fraternization and demeaned her status as an officer. She was offered an article 15, which she refused, and her case was referred to a special court-martial. She then petitioned COMA for extraordinary relief.

A special court-martial could dismiss Lieutenant Unger or place her in confinement, and thus it could never be appealed to a court of military review (CMR) or to COMA. Because Lieutenant Unger's case could not qualify for review, did CMR or COMA have the power to issue an extraordinary writ?

Chief Judge Everett, writing for the court, found extraordinary writ jurisdiction under the All-Writs-Act[240] supervisory jurisdiction.[241] COMA has "jurisdiction to require compliance with applicable law from all courts and persons purporting to act under its authority."[242] The court found, however, that because of various ways to conceal drug free urine, it is not unreasonable per se to require direct observation.[243]

Judge Cox concurred only in part.[244] He noted: "[I]t now appears that the dissents in *Jones v. Commander*, 18 M.J. 198, 200 (C.M.A. 1984), and *Dobzynski v. Green*, 16 M.J. 84, 86 (C.M.A. 1983) (this

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[238] 27 M.J. 349 (C.M.A. 1989).
[239] *Id.* at 351.
[240] 28 U.S.C. § 1651(a) (1982).
[241] McPhail v. United States, 1 M.J. 457 (C.M.A. 1976).
[242] *Unger*, 27 M.J. at 353 (quoting *McPhail*, 1 M.J. at 461).
[243] *Id.* at 357.
[244] *Id.* at 359.

Court has jurisdiction over certain nonjudicial punishments), have crept their way into majority status and are now the law of this court. I do not need to reach this expansive conclusion here."[245]

What was Lieutenant Unger's ultimate fate? She was convicted of willful disobedience of an order and sentenced to a reprimand, forfeiture of $500.00 pay for four months, and the loss of 150 slots on the promotion list. She then resigned from the Navy.[246]

The court also proposed to change its Practice and Procedure Rules.[247] Under the proposed change the court will answer certified questions of "military law," not simply "military justice." DOD did not concur in the proposed rule change. Judge Cox advised one of the authors that, should COMA adopt the proposed rule change, the court will make clear that it pertains only to military justice questions.

In addition, COMA has not hesitated to enhance the powers of the CMR's. In *United States v. Hilton*[248] and *United States v. Evans*[249] the court advised the CMR's that they need not apply waiver unless they so desire. In *United States v. Baker*[250] the court continued to

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[245] *Id.* at 360.

[246] *See* Washington Post, Mar. 9, 1989, at A18.

[247] 54 Fed. Reg. 20,631 (1989).

Rule **4.** Jurisdiction.

. . . .

(c) Certification of Questions of State Law.

(1) The Court may, in its discretion—

(A) answer a question of military law certified to it by the Supreme Court of the United States, a United States Court of Appeals, a United States District Court, the United States Claims Court, or an appellate court of a state if the question may be determinative of a case pending in the certifying court and it appears to the certifying court that there is no controlling precedent in the decisions of this Court; and

(B) on its own motion or on motion of a party, certify to the highest court of a state, where authorized by such state's law, a question of the law of that state which may be determinative of a case pending in the Court if it appears to the Court that there is no controlling precedent in the decisions of the courts of the state.

[248] 27 M.J. 323 (C.M.A. 1989) (failure to mise an error of constitutional dimension may foreclose appellate review of those claims in some cases; but this practice need not be followed where fitting precedent from appellate courts has militated against the objection or when the court deems it necessary to review the case).

[249] 28 M.J. 74 (C.M.A. 1989) (CMR had authority to refuse to apply doctrine of waiver pursuant to its congressional charter to a f f i only such findings of guilty and sentence as it finds correct in law and fact).

[250] 28 M.J. 121 (C.M.A. 1989).

advance this position by finding that a CMR not only has the power, but also the independent duty to consider the appropriateness of sentences adjudged.[251]

Finally, the court found in *United States* v. *Conley*[252] that there is no constitutional impediment or limitation on reconsideration by appellate courts of previous decisions that result in more severe burdens on criminal defendants. But in his dissent Chief Judge Everett would require an adequate explanation for the CMR's change of mind. Chief Judge Everett's concern was that the court's 180-degree reversal ("the accused can be adequately punished without an unsuspended bad conduct discharge" versus "an unsuspended bad conduct discharge is appropriate") created the appearance that the government had expressed its dislike for a sentencing decision and the court had promptly caved in and reversed itself.[253] This certainly appears in line with the explanation the court requires when other unlawful command influence issues are raised.[254]

VI. CONCLUSION

COMA had a very busy year during 1989. During the year, the court answered many of the hard questions, eliminated its backlog, and substantially expanded its jurisdictional reach. In fact the turmoil of the last few years appears over, and smoother sailing seems ahead. But with reaching this new plateau of success will any of the judges decide it is time to move on? Will Chief Judge Everett return to North Carolina when his present term ends in the fall? Also, even if all the current judges stay on the court, what of the effect of the legislation? Specifically, what effect will two new judges on a five judge court have on our practice? Only time will provide answers to these questions and more.

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[251] *See also* United States v. Baker, 29 M.J. 126 (C.M.A. 1989) (cause would be remanded to the Court of Military Review for further review of sentence appropriateness, where it appeared that Court might have overlooked possibility that some of the circumstances to which accused called attention could properly be taken into account on sentence appropriateness and were not limited to consideration for clemency purposes).

[252] 28 M.J. 210 (C.M.A. 1989).

[253] *Id.* at 213.

[254] *See also* Boudreaux v. U.S.N.M.C.M.R., 28 M.J. 181 (C.M.A. 1989) (CMR retained ancillary jurisdiction over case which it had remanded, to ensure that case was resolved in manner consistent with mandate of court, notwithstanding that accused received punishment on remand well below the statutory threshold for mandatory review); United States v. Hoff, 27 M.J. 70 (C.M.A. 1988) (COMA reinstates language in specification that was left out when N.M.C.M.R. consolidated charges and then affirms case); and United States v. Flowers, 26 M.J. 463 (C.M.A. 1988) (CMR sitting en banc can reconsider sua sponte a decision of a panel of the court despite its prior ruling).

ELECTRONIC SURVEILLANCE AND RELATED INVESTIGATIVE TECHNIQUES

by M. Wesley Clark*

I. INTRODUCTION

The U.S. Army Criminal Investigation Command (USACIDC)[1] increasingly relies upon electronic surveillance (ELSUR) and other related investigative approaches to craft cases suitable for successful prosecution both within and without the rubric of the Uniform Code of Military Justice.[2] It has been the experience of the USACIDC that not everyone within the Army trial prosecution, trial defense, appellate, and law enforcement communities (including the USACIDC itself) may be fully aware of these techniques or of the authorization procedures required before they may be used. Additionally, many would-be practitioners of these arcane, black arts may not be completely aware of the myriad regulatory, constitutional, and statutory strictures that govern the use of these very effective, but sensitive,

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[1]What is today known as the USACIDC (the Army's "felony" investigators, Army Reg. 195-2, Criminal Investigation - Criminal Investigation Activities, para. 3-3a (30 Oct. 85) [hereinafter AR 195-2]) first began in Nov. 1918 at the direction of General John Pershing, Commander of the Army Expeditionary Forces in Europe during World War I. A criminal investigation division ("CID") within the Military Police (MP) Corps was established in order to effectuate the perceived need for detective (as opposed to purely police) capabilities. Presently, there is no "CID" as such, however, "USACIDC still retains the 'D' in its acronym [and upon the face of special agent badges] as a[n] historical reminder of the first Criminal Investigation Division." U.S. Army Criminal Investigation Command, Pam. 360-1, U.S. Army Criminal Investigation Command, at 3-4 (30 June 85). The USACIDC or CID of the modern era started in 1971 when it was created as a Major Army Command (MACOM) and stovepipe organization pursuant to General Order No. 47 (21 Sept. 71); as a "stovepipe," the USACIDC reports directly to HQDA. Today, therefore, the "D" in both USACIDC and CID has no translatable meaning, and serves only as a somewhat curious and parenthetical reminder of the past.

[2]Uniform Code of Military Justice arts. 1-140, 10 U.S.C. § 801-940 (1982) [hereinafter UCMJ].

investigative measures.[3] This article discusses several ELSUR and related techniques available to the military law enforcement community[4] and examines the authorization procedures required prior to their use. The article begins by providing legal definitions of terms peculiar to ELSUR and discusses how approval is secured to conduct consensual ELSUR operations. Next is a discussion of non-consensual intercepts and jurisdictional concerns with regard to such operations to the extent they are conducted outside the United States. Then, the article analyzes the procedures required to use pen registers, trap and trace devices, video surveillance, tracking devices, and pagers.

Any prudent analysis of ELSUR conducted for criminal law enforcement purposes should begin with a review of Title III of the Omnibus

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[3]Military police are also permitted to conduct ELSUR, provided the offense under investigation falls within their investigative jurisdiction and satisfies the conditions at para. 1-4e, Army Reg. 190-53, Military Police - Interception of Wire and Oral Communications for Law Enforcement Purposes (3 Nov. 1986) [hereinafter AR 190-53]. During the past four years, the author is only aware of one TLE operation conducted by military police. TLE (technical listening equipment) is more fully explained at note 18, ***infra.***

[4]This article discusses ELSUR conducted for criminal law enforcement purposes unrelated to intelligence and counterintelligence. ***See generally*** AR 190-53, para. 1-2c, which lists the kinds of ELSUR considered outside the scope and purpose of AR 190-53. The categories not contemplated by AR 190-53 are a) signal intelligence (SIGINT) activities ***(see*** AR 381-3); b) administrative telephone monitoring and recording activities and command management monitoring activities ***(see*** AR 105-23); c) Department of the Army (DA) communication security activities **(see** AR 380-53); d) monitoring telephone communications in DA Command and Control System (DACCS) Operations Centers ***(see*** AR 525-1); e) interceptions arising from technical surveillance countermeasures surveys **(see** AR 381-14); f) interceptions for foreign intelligence and counterintelligence purposes, except when the interception occurs during an investigation of ***criminal*** acts of espionage, sabotage, or treason conducted under the provisions of AR 381-20; g) recording of emergency telephone and/or radio communications at MP operations desks (paras. 3-20 to 3-22, AR 190-30); h) closed circuit video tape systems, to include those with an audio capability, employed for security purposes (para. 3-23, AR 190-30); and i) the recording of interviews and interrogations by law enforcement personnel, providing the person being interviewed is on notice that the testimony or statement is being recorded (para. 3-24, AR 190-30). Of these types of ELSUR which fall outside the AR 190-53 umbrella, only (g) and (i), above, impact upon the criminal investigator with any degree of regularity; (i) is self-explanatory, and (g) will be discussed later. AR 190-53 was written to govern only the "interception of wire and oral communications and the use of pen registers and related devices for law enforcement purposes, both in the United States and abroad." AR 190-53, para. 1-1. Parenthetically, the federal statute regulating ELSUR conducted for intelligence purposes is the Foreign Intelligence Surveillance Act of 1978 (commonly referred to as FISA), codified at 50 U.S.C. §§ 1801-1811 (1982); ***see also*** (f), immediately above.

Crime Control and Safe Streets Act of 1968.[5] Title III provides the statutory matrix within which all domestic, nonconsensual ELSUR for law enforcement purposes (as opposed to reasons connected with intelligence/counter-intelligence) is conducted. Congress had acted upon and followed the dictates found in the seminal Supreme Court opinion, *Katz v. United States*[6]. Congress required more than the search and seizure requirements contained in the fourth amendment' and in Federal Rule of Criminal Procedure 41.[8] The result was a new, specialized search and seizure warrant regime to accommodate the competing demands of constitutional rights protection and the legitimate investigatory needs of law enforcement, the latter confronted with the ever increasing sophistication of the criminal adversary. The legislative structure that Congress created to address the nonconsensual interception of wire and oral communications[9] has changed little over the past twenty years and has served the nation well.

Although several Title III provisions are relevant to the following analysis, it should be pointed out that the USACIDC has never conducted (to the author's knowledge) any ***domestic*** nonconsensual intercepts, and, given the realities of the USACIDC's investigative mandate and the enforcement jurisdictions assigned to other federal law enforcement agencies (especially the FBI), it is unlikely that the USACIDC will ever conduct a domestic Title III operation. An in-depth discussion of Title III is therefore outside the scope of this ar-

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[5]Omnibus Crime Control and Safe Streets Act of **1968,** Title III, Pub. L. No. **90-351,** codified at **18** U.S.C. §§ **2510-2520 (1982)** [hereinafter Title III], as *amended by* Electronic Communications Privacy Act of **1986,** Pub. L. No. **99-508** [hereinafter ECPA]. In simplified terms, Title III prohibits within the United States the warrantless, nonconsensual interception of wire, oral, and (now) electronic communications. The proscription against the warrantless, nonconsensual pickup of electronic communications is relatively new and was engrafted upon Title III by the ECPA.

[6]Katz v. United States, **389** U.S. **347 (1967).**

[7]U.S. Const. amend. IV.

[8]Fed. R. Crim. P. **41.**

[9]With the advent of the ECPA, *supra* note **5,** the coverage of Title III has been expanded to keep pace with emerging technology and now covers not only wire and **oral** communications, but electronic communications (e.g., electronic mail, also referred to as "E-mail," which encompasses messages between computers) as well. *See generally* **18** U.S.C.S. § 2510(12) (Supp. **1989).** E-mail is more fully described and defined in the ECPA legislative history, S.Rep. No. **99-541,** *reprinted in* **1986** U.S. Code Cong. & Ad. News **3555, 3562** [hereinafter ECPA Legislative History].

ticle and, indeed, much fine work has already been written on this score.[10]

II. DEFINITIONS

At the outset, it is important to recognize that some ELSUR terms, most from Title 111, have become and are now words of art; their misuse will on occasion confuse at best and at worst will cause misapplication of the law. ***Wire communication,*** drawn from Title 111, "means any *aural* transfer in whole or in part through the use of

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[10]Preparation for and the conduct of any Title III intercepts are complex matters that require a lot of manpower support (to monitor the listening post, perhaps as much as **24** hours a day, 7 days a week), logistical considerations/resources (physical surveillance of the intercept targets; follow up leads during the intercept which are revealed while the intercept is on-going; equipment needed to set up the listening post, to include pen registers and tape recorders, both reel-to-reel and cassette; physical location of the listening post and possible necessity for lease; arrangement with telephone company for leased lines and expenses incident thereto), and funding (*e.g.*, for logistical expenses; for agent overtime to include possible temporary duty (TDY) costs; perhaps to hire extra stenographic help for tape transcriptions; foreign language translators). A Title III intercept is very manpower expensive. Just envision a not uncommon tap on a telephone with three lines. At a ***minimum*** this would require 9 agents, 3 for each line working 8 hour shifts. Consider also that these nine agents could not perform any other duties for at least thirty days. (Although a Title III can be extended beyond its initial authorization period, intercept authority may statutorily be granted for no more than 30 days at any one instance, 18 U.S.C. § 2518(5) (1982)).

Title III's are usually most effective when targeting significant conspiracies, often those involved with nefarious activity characteristic of organized crime, to include narcotics offenses. Realistically, if the USACIDC were to commence an investigation of such a conspiracy, the inquiry (or at least the role of lead agency) would most likely be assumed by the FBI or DEA, either one of which (not the USACIDC) would actually conduct any required Title III ELSUR. Candidly, it is unclear whether the USACIDC has the expertise necessary to conduct a sophisticated Title III, which may require a series of undetectable court-authorized break-ins, initially to install and camouflage the listening equipment, then to maintain it (if the TLE was not "hard-wired," that is, powered by the room's electrical circuitry, it would have to be run by batteries that will periodically have to be replaced by fresh ones), and lastly to retrieve it. A court may properly authorize such break-ins. Dalia v. United States, 441 U.S. 238 (1979).

A further reason for not discussing Title III in depth is that there are two very excellent treatises which discuss not only Title III, but also all electronic surveillance and related matters. ***See*** C. Fishman, Wiretapping and Eavesdropping (1978; supplemented yearly in December); and J. Carr, The Law of Electronic Surveillance (1988; updated continuously). ***See also*** U.S. Attorneys' Manual, chapter ***7,*** title 9 [hereinafter USAM; ***see*** note 167 ***infra);*** Raezer, ***Needed Weapons in the Army's War on Drugs: Electronic Surveillance and Informants,*** 116 Mil. L. Rev. 1 (1987).

facilities for the transmission of communication by the aid of wire.""
Should there be a telephone communication, for example, not containing the human voice, it could not constitute a ***wire*** communication.[12] In short, the term "wire communication" encompasses what we daily recognize as a telephone call. Nonconsensually intercepting one within the United States without a warrant, with limited exceptions, constitutes a federal felony punishable by a fine and up to five years in prison.[13]

Often the term "wire" is used in an inexact sense, such as when an informant is wearing a "wire" or when the CID is going to "wire" its undercover Drug Suppression Team (DST) member. "Wire," used loosely in these contexts, does not refer to a type of communication (wire) but rather to the manner in which an ***oral*** communication is to be electronically heard. "Wire," here just used as both a noun and verb, in these cases refers to the placement of a concealable transmitter or tape recorder with or upon the consenting conversation participant.

In distinction to a wire communication, an *oral* communication is most frequently associated with what one would recognize as a face-to-face talk. Title III defines the term as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation."[14]

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[11] 18 **U.S.C.S.** § 2510(1) (1979 & Supp. 1989) (emphasis added). The broadcast portion only of a cordless telephone communication (as opposed to cellular telephone traffic) is not considered a wire communication. Section 2510(1) continues, specifying that the term "wire communication . . . does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit." The rationale behind the disparate treatment accorded cordless and cellular phones was the very diminished expectation of privacy believed understood by all to be commensurate with cordless telephone usage. The Senate Report on the **ECPA** noted that "[t]he radio portion of these [cordless] telephone calls can be intercepted with relative ease using standard **AM** radios." **ECPA** Legislative History, *supra* note 9, at 3563. **Thus,** without flouting federal law one may nonconsensually intercept and record with impunity the broadcast portion of cordless telephone conversations.

[12] 18 **U.S.C.S.** §§ 2510 (1) and (18) (1979 & Supp. 1989).

[13] 18 **U.S.C.S.** §§ 2511 (1)(a) and (4) (1979 & Supp. 1989).

[14] 18 **U.S.C.** § 2510(2) (1982). Note the important difference by omission between "wire" (§ 2510(1)) and "oral" (§ 2510(2)) communications. Title III is contravened, in general, by the nonconsensual, warrantless interception of *all* telephone (wire) conversations. However, it is violated by the acquisition of *only* those oral communications uttered with a reasonable expectation of privacy. Thus, all wire communications are statutorily presumed to be undertaken with a reasonable expectation of privacy.

Consensual intercepts, whether oral or wire, must of necessity either be undertaken by members of law enforcement (including those assisting the authorities, such as victims, witnesses, and informants, all of whom are said to be acting "under color of law") or by the general public. Because this type of ELSUR comprises the overwhelming bulk of USACIDC electronic surveillance operations,[15] the federal definition of this intercept category is especially important both for the Army investigator and those who would seek to provide him advice: "It shall not be unlawful . . . for a person acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or one of the parties to the communication has given *prior* consent to such interception."[16]

Similarly and to the same legal effect, a private citizen acting for his own purposes (i.e., not acting for sanctioned law enforcement purposes) may intercept and record wire, oral, or electronic communications

> where such a person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any state.[17]

Several years ago on Allan Funt's popular TV show *Candid Camera,* actress Loni Anderson portrayed the personnel officer of a fictitious company. During the skit, Ms. Anderson would conduct "interviews" face to face with young, male job applicants. As one scene unfolded, and as audio and video recordings were secretly being made (presumably with Ms. Anderson's consent), two teenage boys were ushered in to see Ms. Anderson. After a few minutes of polite, preliminary conversation, Ms. Anderson uttered a preplanned excuse and left the room. This was deliberate, of course, so the lads' candid reaction to Ms. Anderson and the manner in which she was

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[15]The other types being "Title III" operations (conducted outside the United States); pen register; trap and trace; and video-only surveillance.

[16]18 U.S.C.S. § 2511(2)(c) (Supp. 1989) (emphasis added). In the usual fact setting confronting the USACIDC, the consenting party is the one to be wired: an undercover special agent, a "semi-covert" Drug Suppression Team member, and/or an informant. There are, of course, any number of permissible variations limited only by the agent's imagination: have all three wired with microphones; have two wired with mikes and one with a microcassette recorder; have all three present without wires, but wire the location; double-wire the consenting party (microphone and tape recorder); etc.

[17]18 U.S.C.S. § 2511(2)(d) (Supp. 1989).

dressed could be captured for Mr. Funt's viewing audience. Unless, however, the boys' approval had been obtained in advance, as soon as Ms. Anderson left the "interview room," a consensual (Ms. Anderson's) intercept became nonconsensual surveillance, Title III was contravened, and a federal felony was committed.

Consensual intercepts are conducted in two basic fashions: wire a consenting party to the conversation you wish to monitor or wire the place (car, room, etc.) where the consenting conversant will be. The advantages to the latter are: **1)** avoiding the danger that the agent/investigator/source might be patted down; **2)** enabling the use of the electricity in the car, room, etc., to power your intercept equipment, thus avoiding battery concerns; and **3)** if it is a warm climate, allowing the consenting party to wear the expected light and abbreviated attire (i.e., clothing that would not readily lend itself to the concealment of listening or recording devices).

The disadvantages to this last type of consensual intercept are equally obvious, including the *Candid Camera* scenario just discussed. If the consenting party leaves the intercept spot and the listening devices are still being operated, a Title III violation will be committed. Should this become apparent, monitoring agents must be alert to shut down recording *and* listening as soon as the consenting party leaves and equally alert to restart if the consenting party returns. The second worry attendant with site consensual monitoring is the possibility that the intercept targets may rendezvous with the consenting party at the location you have wired, but then move somewhere else to hold substantive discussions. Depending upon the content of these communications, the investigators may lose valuable evidence as well as the ability to adequately monitor the progress of the talks and the safety of the consenting party.

III. CONSENSUAL INTERCEPTIONS—AN OVERVIEW AND INTRODUCTION TO THE APPROVAL PROCESS

A consensual interception operation (CIOP) conducted by an Army criminal investigator, such as a USACIDC special agent, that uses technical listening equipment (TLE)[18] to acquire wire or oral com-

[18] "TLE" is currently the Army term in vogue and is generally used rather loosely to encompass anything smacking of electronic surveillance; logically, it should only include devices capable of aurally acquiring oral or wire communications. The term previously in favor but now heard infrequently, "WIMEA" (wiretap, investigative monitoring, and eavesdrop activities), was more descriptive, and as such, more accurate. "Eavesdrop" is usually used to refer to the electronic monitoring or bugging of *oral* communications.

munications contravenes neither Title III nor the fourth amendment. Speaking about consensual intercepts, Justice White has written,

> Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights [citation omitted]. For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with the defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person [citation omitted]; (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency.[19]

Before a CID special agent may conduct a consensual TLE operation, however, the agent must comply with the regulatory dictates of Department of Defense Directive 5200.24,[20] as implemented by Ar-

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[19] United States v. White, 401 U.S. 745, 751 (opinion of White, J.), ***reh. denied,*** 402 US. 990 (1975). "[A]ll . . . Circuit Courts of Appeal have accepted ***United*** *States v.* ***White*** . . . as constitutional authority for the principle that search warrants are not required to authorize consensual interceptions; and that the Supreme Court has denied certiorari on every subsequent consensual interception case for which certiorari was sought." Fishman, *supra* note 10, at § 9.

Attorney General William French Smith commented in his November 7, 1983, Memorandum to the Heads and Inspectors General of Executive Departments and Agencies, subject: Procedures for Lawful, Warrantless Interception of Verbal Communications, that

> [t]he Fourth Amendment to the Constitution, [and] Title III of the Omnibus Crime Control and Safe Streets Act of 1968 as amended [18 U.S.C.S. § 2510-2521 (Supp. 1989)] . . . permit government agents, acting with the consent of a party to a communication, to engage in warrantless interceptions of telephone communications and verbal, non-wire communications [citations omitted]. Similarly, the Constitution and federal statutes permit federal agents to engage in warrantless interceptions of verbal, non-wire communications when the communicating parties have no justifiable expectation of privacy. Since such interception techniques are particularly effective and reliable, the Department of Justice encourages their use by federal agents for the purpose of gathering evidence of violations of federal law, protecting informants or undercover law enforcement agents, or fulfilling some other similarly compelling need.

[20] Dep't of Defense Directive [hereinafter DODD] No. 5200.24, Interception of Wire and Oral Communications for Law Enforcement Purposes, (Apr. 3, 1978), ***codified*** *at* 32 C.F.R. Part 32 (1988). This DODD is undergoing major revision necessitated both by significant flaws and by substantial changes made in the law of electronic surveillance since the directive was promulgated, particularly the passage of the ECPA.

my Regulation 190-53[21] and USACIDC Supplement 1 to that regulation.[22]

The approval process, not daunting, will be discussed in greater detail below, but suffice it to say that the procedure is relatively simple (not even probable cause need be shown) and relatively quick. The field agent desiring to employ consensual ELSUR submits a TLE request to his region headquarters.[23] Once approved by the region commander, the proposed TLE operation is submitted to the Office of the Staff Judge Advocate (OSJA), Headquarters, USACIDC,[24] where it is reviewed for compliance with AR 190-53 and USACIDC Supplement 1. Upon completion of that review (which may have included informal coordination with the Office of General Counsel, Department of the Army (SAGC)), the OSJA seeks permission from the USACIDC Commanding General to proceed. If the Commanding General provides this authorization, the OSJA will prepare a formal memorandum seeking authorization to conduct the CIOP and will transmit it to the SAGC's office for consideration. The SAGC and his staff historically have provided excellent support for these operations. Assuming a TLE request is received by the OSJA on a Monday and assuming there is nothing especially unusual about the request, a decision from SAGC could normally be anticipated within one to

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[21]AR 190-53. For the same reasons discussed in note 20 *supra*, this regulation is in dire need of revision. However, inasmuch as AR 190-53 is the Army implementation of DODD 5200.24, any substantive change will of necessity await revision of the DODD.

[22]USACIDC Supplement 1 to AR 190-53, Interception of Wire and Oral Communications for Law Enforcement Purposes (1 Dec 85) [hereinafter USACIDC Supp.], is valid despite the seeming inconsistency between its effective date and that of the current AR 190-53 (3 Nov 86). The USACIDC Supplement was prepared to complement the previous version of AR 190-53 (1 Nov 78). The present AR 190-53 made little change to the 1978 version other than 1) to incorporate Interim Change No. I02 dated 5 Nov 82 (expired 5 Nov 84) and 2) to misapply Smith v. Maryland, 442 U.S. 735 (1979), incorporating what the interim change drafters erroneously believed was the correct nature of pen register law after ***Smith. See*** *generally* pen register discussion, ***infra.*** In sum, although the USACIDC Supplement targeted an AR 190-53 version once removed, the Supplement is still authoritative inasmuch as little substantive revision occurred between the 1978 and 1986 regulations.

[23]Operationally, the USACIDC divides itself into five regions: First, Second, Third, Sixth, and Seventh. With some lack of precision, it may be said that First Region includes the midwest and northeast United States (25 states); Second Region takes in Germany, The Netherlands, and Italy; the southwestern U.S. (9 states), Puerto Rico, and Panama constitute the Third Region; the west coast (including Alaska), southwest, and northwest (15 states) comprise the Sixth Region; and the Seventh Region is made up of Korea, Japan, Okinawa, and Hawaii.

[24]The complete address is Commander, Headquarters, U.S. Army Criminal Investigation Command, ATTN: CIJA-ZA, 5611 Columbia Pike, Falls Church, VA 22041-5015; AUTOVON 289-2281/commercial (202) 756-2281; Defense Data Network (DDN)/OPTIMIS electronic mail username: CIJA. Fax number: AUTOVON 289-1027/commercial (202) 756-1027.

three days, and certainly by Friday of that same week. Emergency requests to conduct TLE operations have been approved by SAGC in less than an hour after having first been received by the **OSJA.**

Headquarters, USACIDC, and its OSJA strongly support the USACIDC's use of ELSUR. The USACIDC has deployed technical listening equipment worldwide to its subordinate elements, where it is readily available for use.[25] It can prove invaluable whenever criminal intent must be proved, motive memorialized, and entrapment defenses nullified. Further, this equipment can serve to ensure

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[25]Generally, the USACIDC is broken down by size and chain of command into regions (*see supra* note 23), districts, field offices, resident agencies, and branch offices. Most of this equipment is maintained at the district and field office level where it can then be shipped via one of the many overnight express services anywhere it is needed both within the region and, as appropriate, outside the region as well. As of April 1989, the USACIDC ELSUR equipment inventory included, among other items, 40 pen registers (*see* discussion, *infra*.), 106 concealable microcassette recorders, 50 telephone consensual interception kits, 4 microwave transmission systems, 48 receiver/recorders used in conjunction with 126 transmitters, and 13 audio-video transmitter/receiver sets. All this equipment is valued at roughly $3-4 million.

The USACIDC's "work horse" TLE combination is a transmitter employed with a receiver/recorder, sometimes backed up by a miniature tape recorder. If possible, "double wiring," i.e., using both a transmitter and a concealable tape recorder on the consenting party, is the preferred approach. Conversations directly tape recorded offer the best fidelity and are thus best suited for courtroom presentation; however, tape recorders can malfunction or can be turned off by a source with a change of heart. Consider also that a tape-only intercept cannot tell the backup agent what is happening. Transmitted conversations, assuming adequate reception, overcome the last problem, and should the concealable recorder fail, the radio transmission can be recorded at the receiver (or if no tape machine is available, at least the discussion can be noted by overhearing agents for purpose of future testimony).

It goes without saying that the preferred approach just discussed is not always best. If there is the distinct possibility the source will be patted down, no TLE should be used on the informant; however, it may be possible to wire the location where the meeting will be held, a directional mike might be feasible, etc. If the weather is hot and the clothes worn by everyone appropriately abbreviated, the source cannot wear concealing attire (to better hide TLE) that would obviously be out of place for the climate. If the intercept will be in and about a lot of tall buildings, etc, the transmission might be worthless.

During the first quarter of 1989, the USACIDC received approval from the SAGC to conduct 33 consensual intercept and pen register operations. Of these intercepts, 23 (or 70%) targeted drug suspects. During the second quarter, 35 electronic surveillance operations were authorized; 23 or 66% represented intercepts conducted in furtherance of drug related investigations. These totals include intercept operations that were extended or reinstituted.

Ken Wagoner, Assistant Deputy Director for Technical Services, Air Force Office of Special Investigations (OSI), told the author on March 31, 1989, that OSI conducted approximately 80 consensual intercepts in furtherance of criminal investigations during 1988. Tracy Ogren, Staff Judge Advocate's Office, Naval Investigative Service Command (NISC), reported on March 31st that 406 consensual intercepts were authorized by the Navy General Counsel in 1988. Unlike the USACIDC, both OSI and NISC have intelligence and counterintelligence missions. (NISC was unable to break down its TLE figures into intelligence and criminal investigation categories.)

the safety of the agent or informant to be inserted and can alert surveillance/backup team personnel if the conversation and its participants should move to a location other than the listening post location initially projected. TLE employment should always be seriously considered and anticipated for all one-on-one discussions and transactions. For example, TLE would be useful in cases involving drug and reverse drug buys,[26] especially with regard to unobserved or unsupervised transactions such as those involving informants. Use of electronic surveillance might be the only way to convincingly prove many white collar crimes (e.g., bribery, graft, gratuities, false claims and statements, contract fraud, etc.) because the physical activities upon which they are based (signing a contract, submitting a claim, paying a subcontractor, compensating a raw materials supplier) will probably and outwardly appear to be innocent. Only by ferreting out the ***meaning*** behind these activities, the intent, will the criminality become obvious. Often, the only way to surface this hidden intent is by using someone or something "inside" (either an informant or nonconsensual ELSUR of wire, oral, or electronic communications). Because the usual informant will be as odious as those under suspicion, the informant testimony simply will not be credible without sufficient corroboration. Consensual ELSUR, if competently employed, and assuming the targets are obligingly inculpatory, provides the assurance that the court member wants to see in the government's case and goes a long way toward removing any doubts that the panel might have considered to be reasonable.

In a contested case there is no more powerful evidence than the defendant's guilt spewing from his own mouth. ELSUR evidence allows everyone in the courtroom to go back in time, to be "present" when crimes were planned, conspiracies were formed, misdeeds were accomplished, and wrongdoings were covered up. Defenses that might have been raised (entrapment, innocent purpose, someone else did it, etc.) never become an issue. Parenthetically, of course, because of the tremendous evidentiary effectiveness of ELSUR operations,

[26] Both of the USACIDC's sister military criminal investigative organizations, the NISC (formerly the Naval Investigative Service, which is why today it is sometimes still referred to as "NIS") and the OSI, routinely conduct reverse drug buys (selling/distributing real or artificial drugs), and their operations regulations specifically provide for this investigative technique. Civilian law enforcement agencies commonly conduct such operations, sometimes by the shipload. Historically, the USACIDC as a policy matter has shunned this approach, although now the stance is being actively reconsidered.

they can prove to be an extraordinarily useful guilty plea inducement.[27]

It is a fair assessment to say that USACIDC special agents generally do not like the Army's TLE authorization process and view the approval chain as overly extended and bureaucratic, especially when compared to the perceived relative ease with which civilian (including federal) law enforcement agencies conduct consensual ELSUR operations.[28] Army agents would prefer that the approval process be decentralized and left certainly no higher than at the USACIDC region command level. The field often asks why the current approval level is as high as the service general counsel. This is fair inquiry.

The comparatively stringent consensual ELSUR authorization procedures followed by the Navy, the Air Force, and the USACIDC, which include the solicitation and receipt of TLE approval from the respective service general counsels, arose because of backlash (and the spirit of a settled lawsuit) in the early 1970's stemming from the warrantless, *nonconsensual* electronic surveillance of U.S. citizens liv-

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[27]The author successfully prosecuted a contested Title III wiretap case, United States v. Iavaronne and Battisti, E.D.Pa. Cr. No. 82-00140(1,2), *aff'd mem.*, 720 F.2d 667, 668 (3d Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984), and one involving the use of consensual intercepts, United States v. Salamone, M.D.Pa. Cr. No. 84-00150, ***rev'd** on other grounds* (judge improperly conducted voir dire), 800 F.2d 1216 (3d Cir. 1986). In addition, the author returned the indictment in United States v. Klepfer, M.D.Pa. Cr. No. 83-00049(1), a consensual tape case, which resulted in the defendant's guilty plea.

[28]Note, however, that both NISC and OSI must receive authorization from their respective service general counsels.

The FBI is divided into field offices (supervised by a SAC—Special Agent-in-Charge) and then into resident agencies. FBI consensual wire intercepts may be approved by the appropriate SAC, but consensual oral intercepts must be approved in Washington at FBI headquarters (FBIHQ) by the appropriate section chief (*e.g.*, organized crime, etc.), Criminal Investigative Division, FBIHQ. In emergency circumstances, a SAC may approve a consensual oral intercept. Discussion with Michael Smith, Legal Counsel Division, FBIHQ, March 31, 1989.

Until issuance of the Attorney General's November 7, 1983 memorandum, *supra* note 19, all federal agencies were mandated to obtain Justice Department authorization before they could institute any *oral* (non-wire) consensual intercept. (In practice this approval authority was delegated to and reposed with the Director, Office of Enforcement Operations, Criminal Division, DOJ.) Said the 1983 memorandum: "By memorandum dated October 16, 1972, the Attorney General directed all federal departments and agencies to obtain Department of Justice authorization before intercepting verbal communications without the consent of all parties to the communication."

ing abroad.[29] Stated plainly, the military services are today burdened in their consensual ELSUR operations by regulation, not by the Constitution or by statute, because of military intelligence TLE excesses of the past. That legacy, still with us, requires that consensual TLE approval authority reside in a position that is subject to both political oversight and the political process, a job subject to Senate advice and consent (i.e., the service general counsels).[30]

IV. THE CONSENSUAL INTERCEPTION REQUEST: STEPS AND PROCESSES

Unlike some agencies,[31] the Army processes wire and oral intercept requests in identical fashion. Normally, the investigating agent will forward his request (usually following a HQUSACIDC suggested

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[29]Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144 (D.D.C. 1976). "[T]he wiretaps alleged in the case arise in a situation which, if located within the United States, clearly would require prior judicial authorization .... The only distinguishing factor is the presence of the Army and plaintiffs overseas." *Id.* at 159. Chief Judge Jones went on to hold: "Further, absent exigent circumstances, prior judicial authorization in the form of a warrant is required for electronic surveillance by the Army of American citizens or organizations located overseas ...." *Id.* Although the Defense Department argued the obvious, that no federal district judges sat outside the United States, the district court was nonplussed, finding the absence of the American federal bench in Europe "not an obstacle to the warrant requirement [because t]he court's authority over federal officials is sufficient to require an official to present for approval in the United States a warrant for a wiretap overseas." *Id.* at 160. ***But see*** Fed. R. Crim. P. 41 and United States v. Conroy, 589 F.2d 1258, 1268 n.15 (2d Cir. 1979) (suggesting that given the wording of Rule 41 a federal district court does not have the authority based solely upon the fourth amendment to issue warrants with respect to searches conducted outside the judicial district.)

Interim Change No. 102 to the 1 Nov 78 version of AR 190-53 specifically stated that "[i]t puts into effect amendments to Army regulations required by settlement of ***Berlin Democratic Club.***"

[30]DODD 5200.24, encl. 2, para. A2, states that non-emergency consensual TLE requests are to be acted upon "by the Secretary of a Military Department, or a designee, or, in their absence, the DOD [Department of Defense] General Counsel. This approval authority shall not be delegated to an official below the level of Assistant Secretary or Assistant to the Secretary of a Military Department." For the "level" of the SAGC, ***see*** Army Reg. 10-5, para. 2-3 and fig. 2-1, Organization and Functions - Department of the Army (1 Dec. 1980). "Written approval of the request shall be made by the Secretary of the Army, the Under Secretary of the Army, the Army General Counsel or in their absence, the DOD General Counsel or a single designee. This approval shall not be further delegated." AR 190-53, para. 2-5a(2).

In practice, all USACIDC TLE requests (including emergencies and weekend applications) are personally acted upon by the SAGC or, in his absence, by an Acting SAGC.

[31]*E.g.*, the FBI.

format[32]) to his region headquarters,[33] where the proposed intercept operation is assessed by the region technical services coordinator (TSC)[34] and reviewed by the region judge advocate for legal sufficiency before it is submitted to the region commander. The commander then will decide whether the request should be sent forward to the OSJA, HQUSACIDC.[35]

A. REQUEST FORMAT AND CONTENTS

A suggested TLE request format exists[36] and has been widely used throughout USACIDC by case agents for a number of years. Of course, the style or form are of minor value other than convenience for the legal reviewers at the region and at OSJA, HQUSACIDC. If this preferred format is used universally, every TLE application will contain the same type of information in exactly the same part of the request. The requestor, however, may also find this template useful as a checklist. Note that the format does call for some information not found in AR 190-53. These differences, which will be detailed below, have been required by the SAGC (albeit not compelled by either the Constitution or statute) and consequently are included (when applicable) in all USACIDC TLE requests. The point to be stressed is that all TLE requests are judged by content, not form. Failure to

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[32] Andrews, *Consensual Interceptions,* The Detective, Spring/Summer 1984, at 32. *The Detective* is the USACIDC's professional quarterly journal. Some of the practices LTC Andrews described in his article, written when he was the USACIDC's SJA, are no longer current. For instance, within HQUSACIDC, TLE requests targeting drug activity are no longer coordinated with the Illegal Drug Branch, Investigative Operations Directorate (IOD), HQUSACIDC. LTC Andrews notes that the TLE request format was "developed in coordination with the Army General Counsel to expedite handling CIOP requests."

[33] Region Headquarters are located as follows:
First Region: Ft. Meade, Maryland
Second Region: Heidelberg, West Germany
Third Region: Ft. Gillem, Georgia
Sixth Region: Presidio of San Francisco, California
Seventh Region: Yongsan, Republic of Korea

[34] For a description of the TSC's duties, see U.S. Army CID, Reg. No. 195-12, Criminal Investigation - Criminalistics Program, para. 4c(3) (2 March 1988) [hereinafter CIDR 195-12].

[35] Enterprising agents in a practice encouraged by some regions simultaneously send their ELSUR requests both to their region headquarters and to the OSJA, HQUSACIDC. This eliminates, in essence, region processing time. Region authority to proceed, if granted, is simply telephoned (usually by the region judge advocate) to the OSJA, HQUSACIDC. In such instances, OSJA, HQUSACIDC, may well have completed its review and document preparation before the region headquarters does.

[36] Andrews, *supra* note 32, at 32. *See also* Appendices C (Format For TLE Request) and D (Sample Request), of USACIDC Supp. 1 to AR 190-53. These last two appendices were prepared from a 19 Oct 84 information paper prepared by (then) CPT Michael Kelly, JA, OSJA, HQUSACIDC, entitled "Requesting Approval for Interception Operations."

follow the universal format or template will in no way detract from the consideration or expeditious handling accorded by the OSJA, HQUSACIDC.

B. ARMY REGULATORY REQUIREMENTS

Paragraphs 2-5 and 1-4e, AR 190-53, permit (with proper authorization) the conduct of consensual intercepts "when at least one of the parties to the conversation has consented to the interception."[37] As discussed earlier, the Army concept of a "consensual" intercept is consistent with Title III in that only one party to the communication need provide consent.[38] A TLE request should identify the consenting party by name and should reflect the fact that this party has, in fact, agreed or consented to have his communications intercepted. Often, the consenting party is a registered or confidential source, and agents will be leery about disclosing the source's identity in either electrical communications or correspondence that perhaps will be seen and read by diverse mail room or message center personnel. Paragraph 2-5a(1)(b)[39] appears, however, to mandate such disclosure in the request. Interpreting its own regulation, the proponent has said in an analogous context that in circumstances where the conversant or party is an informant, the USACIDC assigned source number may be used in lieu of a name.[40]

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[37] AR 190-53, at para. 1-4e.

[38] The point is of more than passing interest. Some state law enforcement agencies may not conduct consensual intercepts unless *all* parties to the conversation agree, an impossibility in an undercover situation. This emasculates a vital and effective investigative technique. For example, Maryland provides with limited exception that "[i]t is lawful . . . for a person to intercept a wire, oral, or electronic communication where the person is a party to the communication and where *all* of the parties to the communication have given prior consent." Md. Cts. & Jud. Proc. Code Ann. § 10-402(c)(3) (1989) (emphasis added). ***See*** *generally* Carr, *supra* note 10, at § 3.5(b)(i) and Fishman, *supra* note 10, at § 11.

[39] AR 190-53.

[40] Memorandum from COL George H. Braxton, Chief, Office of Army Law Enforcement, to the Commander, U.S. Army Criminal Investigation Command, subject: Request for Interpretation of Paragraph 6-2a (1), AR 190-53 (July 23, 1987). Assuming for the sake of argument that the interpretation provided by the Office of Army Law Enforcement were incorrect, a failure to follow this or any other Army or DOD regulatory provision regarding electronic surveillance cannot be a serious basis for suppressing evidence. United States v. Caceres, 440 U.S. 741 (1979). The importance of *Caceres*, of course, lies in the fact that it involved a consensual interception performed by a federal agency (IRS) in violation of its own guidelines. The IRS consensual intercept procedures then in effect, and at issue in the case, directed its personnel to seek approval from senior officials within the Justice Department. The Justice Department approval had not been granted at the time certain probative and inculpatory tapes were recorded by the IRS.

> [T]he agency was not required by the Constitution or by statute to adopt any particular procedures or rules before engaging in consensual monitoring and recording. Respondent argues that the regulations concerning electronic

Paragraph 2-5a(1)[41] requires ''theMACOM investigative or law enforcement official" to prepare the TLE request, which is to contain *only four categories of information*, and which ultimately is sent to the SAGC staff for a review and an eventual decision by the General Counsel. In practice, the request (a written memorandum based upon telephonic and written information provided from the field) is drafted at OSJA, HQUSACIDC, signed for the Commander, USACIDC, and is then forwarded (along with any underlying electrical or electronic mail messages from the requesting field element) to the SAGC action officer (usually a judge advocate major) either by courier, electronic mail (E-mail), or (most often) by telefax.[42]

Paragraph 2-5a(1)(a)[43] mandates that the TLE request specify ''thefacts and circumstances requiring the intended interception." This provision seeks nothing more than a summary of the investigation with some articulate explanation of why TLE usage is thought to be needed or otherwise advantageous. Although probable cause is not the applicable evidentiary standard, it is unlikely that a consensual ELSUR operation would be approved by the SAGC absent some articulable, reasonable, and fairly recent basis to believe the intercept target has committed, is committing, or is about to commit either a wrong against the Army or a crime about which the Army has a *bonafide* interest. Further, there should be good cause to believe that should the CIOP be authorized, the Army will, in fact, have an opportunity to intercept the target.

This same regulatory provision (without helpful elaboration) further demands that the requestor specify the "means" by which the intercept is to be conducted. This unspecific requirement would appear to be satisfied by a description of the "type" of interception equipment to be used, such as by providing the brand name and model, whether it is a recorder, transmitter, etc., and whether the surveillance will be an oral or a wire intercept. There should be some

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> eavesdropping, even though not required by the Constitution or by statute, are of such importance in safeguarding the privacy of the citizenry that a rigid exclusionary rule should be applied to all evidence obtained in violation of any of their provisions . . . . [W]e decline to adopt any rigid rule requiring federal courts to exclude any evidence obtained as a result of a violation of the rules.

Caceres, 440 US. at 749-50, 755. Mr. Justice Stevens further wrote, "In these circumstances, there is simply no reason why a court should exercise whatever discretion it may have to exclude evidence obtained in violation of these regulations" Id. at 757.

[41]AR 190-53.

[42]HQUSACIDC has its own **FAX** machines, *supra* note **24.**

[43]AR 190-53.

discussion of the manner in which the device will be installed or operated, such as whether a recorder will be taped to the informant or whether a transmitter will be secreted in an agent's handbag.

Also required[44] is a discussion of ''theplace in which [the intercept] would be conducted." Satisfying this demand appears to be relatively simple if the intercept is to take place at a known street address. More often than not, however, the exact location where a criminal discussion will be held cannot be known in advance. Conspirators in criminal activity, a furtive business, are wary of law enforcement surveillance and may seek to rendezvous at a number of successive locations in attempts to defeat such observation before they feel secure enough to consummate the criminally proscribed transaction. Keeping in mind that consensual intercepts intrude on neither fourth amendment nor statutory restrictions, it is probably not necessary to specify the precise location of the intercept, although the stated location should be as close to the exact locaton as is possible at the time.

USACIDC TLE requests contain as detailed a "place" description as is available at the time of the application. Some may be no more specific than "in and about Fayetteville, NC." Recognizing the uncertainty of the intercept location (indeed, there may be many different ones during the course of a thirty- or sixty-day intercept) and in an abundance of caution, USACIDC requests to the SAGC usually will contain a clause to the effect that "the exact locations where the intercepts will occur are not now known [assuming this is the case], but most will probably take place on-podoff-post in and about Anchorage, AK."

If the intercept operation is directed at wire, not oral communications, the requestor may not be able to specify a "place." Such an instance does not seem to be contemplated by the regulatory provision. In an attempt to comply with what it views as the spirit of the paragraph, in such circumstances the USACIDC memorandum to the SAGC will specify all phone numbers then known over which conversations will be monitored and recorded (originating and receiving numbers). The USACIDC will always know (except, perhaps, in fast-breaking bomb threat scenarios) the consenting party's number (indeed, calls might even be made to or from a government undercover line), but may not know and might never know the telephone(s) that the target will use.

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[44] *Id.* **at para.** 2-5a(1)(a).

Lastly, paragraph 2-5a(1)(a) asks for the planned "duration" of the intercept. Consensual intercepts (wire and oral) may be approved for up to thirty days within the United States, subject to any number of extensions (each up to thirty days), and for up to sixty days for interceptions conducted outside the U.S. (also subject to extensions, each up to sixty days).[45] It is rare that the life expectancy of any criminal investigation can be plotted with any degree of precision. Therefore, the overwhelming majority of U.S.-originated TLE requests seek full thirty-day authorizations and those to operate outside the country seek a sixty-day duration.

A TLE request is to specify ''the names of all persons whose conversations are to intercepted.''[46] It is not uncommon that although the intercept target may initially be identified in a loose sense (general appearance, height, weight, sex, skin color, facial hair, build, alias, etc.), the suspect's name may not be known at the start of a CIOP and, indeed, it may never be known. In fact, it would be the rule rather than the exception that the names of intercept targets would *not* be known at the start of storefront sting operations or when telephone bomb threat ELSUR operations are begun.

The regulation is prepared for these exigencies and allows a thirty day grace period at the conclusion of the intercept to provide the SAGC with the "name of the nonconsenting party or parties." If the data is not known by then, it may still be provided "whenever it is later discovered."[47]

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[45] *Id.* at para. 2-5b(1). It should nonetheless be noted that **USACIDC** offices have sought and do request intercept authorizations for less than the regulatory maximums. To the extent this can reasonably be forecast, this is laudatory and certainly in keeping with the spirit of the regulation—which is to use electronic surveillance (certainly a highly intrusive police activity) as little as possible, consistent with legitimate law enforcement needs and objectives. **A** TLE authorized for 14 days, for example, may nevertheless be extended upon its expiration. Conversely, one approved for 30 days may be shut down sooner (or not conducted at all) if the CIOP is not fruitful or if it has been so successful that no further information is needed. **AR** 190-53 encourages TLE shut downs in these last two instances: "The interception *shall* be terminated **as** soon as the desired information is obtained, or when the interception proves to be nonproductive." **AR** 190-53, para. 2-5b(1) (emphasis added).

[46] *Id.* at para. 2-5a(1)(b); ***see** also supra* note 40. In any event, it appears clear that the only names required are of nonconsenting parties (neither a wired source nor agent would fall under this category).

[47] *Id.* This is not a terribly stringent standard—nor should it be. Assume a wired informant enters a bar and successfully makes a preplanned buy from the investigation's target. There may be dozens of people in the bar who were intercepted, whose conversations are obviously irrelevant to the investigation and whose identities may never become known with the exercise of reasonable diligence. The **OSJA, HQUSACIDC,** instructs its field elements that only "reasonable" effort need be expended in attempts to identify interceptees; this is the standard employed in more exacting, albeit analogous, Title III circumstances and should therefore suffice here where there are neither statutory nor constitutional concerns. *See generally* 18 **U.S.C.** § 2518(8)(d) (1982).

Suppose a TLE operation were approved to target Benjamin Franklin. Your source (Aaron Burr), who is wired, meets with Franklin to discuss criminal activity at the agreed upon time and place. As the pair converse, they are joined by a third, James Madison. Unknown to the source until then, Madison is a conspirator with Franklin. Of necessity, Madison's remarks are recorded along with Franklin's rather earthy tales of France. During the course of the evening Madison reveals that William Patterson is also a member of the criminal conspiracy, engaged in unspeakable criminal endeavors. Assuming technical accuracy, proper custody chains, satisfactory voice identification, and the like, may Madison's remarks be played back against him at trial despite the fact that he was not an interceptee authorized by the Army General Counsel? Relying upon what was said, broadcast, and recorded between the source, Franklin, and Madison, may crack USACIDC Special Agent (SA) Alexander Hamilton consensually intercept Patterson without *further* authorization from SAGC (assuming the initial thirty days has not run)?

The answer to the first query is, "yes." Madison's words were intercepted incidentally to Franklin's remarks. A response to the second inquiry must be more equivocal: "it depends." An approved TLE request that had asked for permission to intercept "Benjamin Franklin and others as yet unknown" would have provided sufficient basis to intercept Patterson without the need to seek separate and additional authority from the SAGC. Importantly, however, SA Hamilton must have learned of Patterson's involvement from the SAGC-authorized intercept of Franklin. If SA Hamilton had learned of Patterson's complicity in some fashion other than during the Franklin intercept, distinct and separate authority (a "supplemental" approval) would have been required from the SAGC. This should suggest the obvious to the prudent military law enforcement professional: in an abundance of caution, TLE requests should seek permission to intercept the identified target(s) as well as "others as yet unknown."[48] To rely upon this language, however, there should be a bona fide and articulable basis upon which to believe there will be other suspects involved besides the one(s) identified for intercept so far.

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[48]If "unknown others" were to be intercepted without having been specifically authorized by the SAGC, absent some egregious fraud or law enforcement misconduct, recorded inculpatory remarks should nonetheless be admissible. *Caceres*, 440 U.S. 741 (1979).

Paragraph 2-5a(1)(b) further demands a description of the criminal role played by each intercept target. This asks for nothing more than a common sense description of each interceptee's "job" within the criminal activity being investigated (e.g., drug wholesaler, fence, muscle, counter-surveillance, pilot, etc.). The regulation also demands that a TLE request contain a "statement that in the judgment of the person making the request the interception is warranted in the interest of effective law enforcement."[49] Inasmuch as this representation is made by the Staff Judge Advocate, HQUSACIDC, in all TLE request memoranda sent to the SAGC, it is neither fatal nor necessary for requests sent from the field to HQUSACIDC to contain this averment.

After considering all of the foregoing provisions of paragraph 2-5 *(Consensual **Intercepts**),* it might appear that all regulatory requirements necessary for evaluation of a consensual intercept would have been successfully negotiated. Such is not the case, however, because paragraph 2-5 incorporates by reference additional requirement~The SAGC cannot authorize consensual intercepts planned in furtherance of a petty offense investigation. ELSUR operations may be considered only if in pursuit of 1) "[a] criminal offense punishable under the United States Code or UCMJ, by death or confinement for 1 year or more," or 2) if the inquiry focuses on "[a] telephone call involving obscenity, harassment, extortion, bribery, bomb threat, or threat of bodily harm."[51] Generalizing somewhat, the crime under investigation must be either a felony or connected with coercive, abusive, or menacing use of the telephone.[52]

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[49] AR 190-53, para. 2-5a(1)(c).

[50] *Id.* at para. 2-5a(2), which provides that "[a]pproval will be based on the standards set forth in paragraph 1-4e." ***See** also **id.*** at para. 2-5c: "Requests for consensual interceptions shall be submitted only under the conditions prescribed in paragraph 1-4e . . . ."

[51] *Id.* at para. 1-4e(2). This subparagraph further demands that the call have been made to "a person authorized to use the telephone of a subscriber-user on an installation, building or portion thereof, under DOD jurisdiction or control, and when the subscriber-user has also consented to the interception."

[52] TLE applicants would serve their cause well by specifying the exact provision of the UCMJ or U.S.C. they think has been contravened. If the felonious nature of the crime under investigation is not clear on the face of the request, the SAGC staff may well demand a statutory citation in order to determine if the planned CIOP comports with the felony prerequisite. The issue has never come up, but arguably the felony prerequisite could be satisfied if a state felony occurs or is expected to occur on a federal enclave. ***See*** Assimilative Crimes Act, 18 U.S.C. § 13 (1982), which provides that

> [w]hoever within or upon any [special maritime and territorial jurisdictions of United States] . . . is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State . . . in which such place is

C. USACIDC REQUIREMENTS

As noted earlier, CIOP requests must meet certain USACIDC requirements in addition to those prescribed by the DOD Directive as implemented by Army Regulation. For the most part, the additional requested information has been embodied in USACIDC regulatory guidance[53] as the result of SAGC request.

The interception code name or, if there is none, the investigation sequence/report of investigation (ROI) number should be provided.[54] This helps track the CIOP, especially if later there are TLE extensions or spin-off intercepts.

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situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

Somewhat related, query whether a TLE would be approved with respect to an overseas investigation of a non-extraterritorial U.S.C. provision. The question has never surfaced. Not all U.S.C. penal provisions reach criminal acts conducted outside the United States. Those provisions which do reach are said to be extraterritorial. Determining whether a statute is extraterritorial in nature (i.e., in real world terms, "indictable") can be a chore. The extraterritorial nature of many provisions is not always apparent from the statute's face. *Compare* 18 U.S.C.S. § 1203 (Supp. 1989): " . . . whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person . . . shall be punished . . . ," *with* 18 U.S.C. § 641 (1982): "Whoever . . . steals [a] thing of value of the United States . . . [s]hall be fined . . . or imprisoned . . . or both." The first law is clearly extraterritorial, but what about the second? The answer is not necessarily resolved by reading the statute. Case law has to be examined and, at least in this instance, supports the proposition that theft from the government committed outside the United States is extraterritorial in nature and consequently may be both indicted and prosecuted. United States v. Cotten, 471 F.2d 744 (9th Cir.), *cert. denied*, 411 *U.S.* 936 (1973).

[53] USACIDC Supp.

[54] *Id.* at app. C, para. A(1). Operation code names seem to have fallen from grace and are now rarely used. A "sequence number" is actually a combination of letters and numbers manufactured "froma four-digit, annual, sequential number beginning with 0001, the last two digits of the calendar year, and the USACIDC unit letters preceded by the letters 'CID.' An example would be: 0115-85-CID867." USACIDC Reg. No. 195-1, Criminal Investigation • CID Operations [hereinafter CIDR 195-1]. In the example, the CID "unit" corresponding to "867" is the Mainz Resident Agency (RA); "0115" would therefore indicate that this is the 115th case opened by the Mainz RA in 1985. Sequence numbers are required to be constructed and assigned when, *inter alia*, "[a] USACIDC unit receives an indication by whatever means or from whatever source, of an alleged criminal incident which is or may be, within USACIDC's investigative responsibility. If any inquiry is required to determine whether or not the incident is within USACIDC's investigative responsibility, a sequence number will be assigned." *Id.* at para. 6-2a(1).

A sequence number becomes a ROI number by the addition of two number/letter groupings at the end, one a case number and the second an offense code(s). "Case numbers will be allocated by the USACRC [U.S. Army Crime Records Center] to region commanders for their further allocation in blocks to subordinate USACIDC units." *Id.* at para. 6-3d. ROI numbers are assigned (or sequence numbers become ROI numbers) whenever "[a] criminal investigation is initiated." *Id.* at para. 6-3b(1). After these additions, the sequence number being used in this example is now configured as a ROI number: 0115-85-CID867-54001-7C2H/7F5A1. The first and second number/letter codes refer to, respectively, housebreaking at an exchange facility and larceny of $50.00 or more from a nonappropriated fund instrumentality. *Id.* at App. A.

The USACIDC Supplement to AR 190-53also requests information on the type of case being investigated,[55] the method of investigation,[56] the circumstances causing the investigation,[57] and the focus and targets[58]—as well as their statuses.[59] With all due respect to the original drafters, except for the last demand these provisions use different semantics to seek the same information required by the Army Regulation.[60] The "status" is explained by specifying whether the intercept target is a civilian or is subject to the UCMJ.[61] This distinction is most important if the ELSUR is to take place inside the United States because Posse Comitatus Act[62] (PCA) concerns may come into play.

Historically and because of the PCA, the SAGC has been somewhat loathe to permit the USACIDC to consensually intercept civilians within the United States. This reluctance has been eased somewhat with the advent of two Department of Defense Inspector General (DODIG) proclamations, in which the DODIG specifically delegates to the USACIDC (and the other military law enforcement organiza-

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[55]USACIDC Supp., App. C, para. B(1).
[56]*Id.* at para. B(2).
[57]*Id.* at para. C(1).
[58]*Id.* at para. C(2).
[59]*Id.*
[60]*Compare* AR 190-53, para. 2-5a(1).
[61]USACIDC Supp., App. C, para. C(2).
[62]The Posse Comitatus Act (PCA), 18 U.S.C. § 1385(1982), provides that "[w]hoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be [punished]." It is generally believed that the PCA is inapplicable to military activity outside the United States. *See* Washington Post, Dec. 16, 1989, at 4. "Posse Comitatus" literally means "the body of men that a peace officer of a county is empowered to call to assist him in preserving the peace." The Random House College Dictionary 1035 (1980). For more on the PCA and related issues, see generally 10 U.S.C. Ch. 18, Military Cooperation with Civilian Law Enforcement Officials, § 371-380 (1982 & Supp. V 1987); 32 C.F.R. Part 213, DoD Cooperation with Civilian Law Enforcement Officials, (§§ 213.1-213.11)(1988); Army Reg. 500-51, Emergency Employment of Army and Other Resources - Support to Civilian Law Enforcement (1 July 1983) (hereinafter AR 500-51); Rice, *New Laws and Insights Encircle the Posse Comitatus Act*, 104 Mil. L. Rev. 109 (1984); Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Fbsse Comitatus Act, 70* Mil. L. Rev. 83 (1975); Furman, *Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act*, 7 Mil. L. Rev. 85 (1960); DODD No. 5525.5, DOD Cooperation With Civilian Law Enforcement Officials (Mar. 22, 1982).

tions) authority to investigate fraud[63] (including *theft)* and certain drug offenses64 (including some off post) committed by civilians. Im-

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[63]Dep't of Defense Instruction No. 5505.2, Criminal Investigation of Fraud Offenses, paras. C4 and D4 (Nov. 6, 1987) [hereinafter DODI]. The DODI defined "fraud" at para. C4 to be rather encompassing and includes, without necessarily being limited to,

> theft/embezzlement from the Government, bribery, gratuities, conflicts of interest, and violations of anti-trust laws, as well as fraud (*e.g.*, false statements and false claims) in the following areas: pay and allowances; procurement; property disposal; commissary/subsistence; nonappropriated funds; Civilian Health and Medical Program of the Uniformed Services (CHAMPUS); foreign military sales; and personnel matters.

Para D4 of the DODI asserts that

> [f]raud investigations conducted by the military criminal investigative organizations [to include the USACIDC] are undertaken for the primary purpose of furthering a function of the Department of Defense. Accordingly, such investigations are not restricted under 18 U.S.C. 1385, the "Posse Comitatus Act." In addition, the Posse Comitatus Act does not apply to investigations conducted by, under the direction of, or at the request of the IG, DOD.

With regard to the last point, see 5 U.S.C.A. App. 3, § 8(g) (Supp. 1989)(5 U.S.C. App. 3 is the Inspector General Act of 1978).

[64]DODIG Memorandum for the Secretary of the Army, Navy, and Air Force, subject: "Criminal Investigation Policy Memorandum Number 5—Criminal Drug Investigative Activities," (10 Oct. 1987) [hereinafter Memo 5]. Para. D3b of this memorandum authorizes the USACIDC to make off post drug buys from civilians under two defined sets of circumstances: 1) "[i]f there are reasonable grounds to believe that such person [i.e., one not subject to the UCMJ, a civilian] has committed a drug offense in conjunction with a member of the Armed Forces, *and* the investigative actions are undertaken to obtain evidence concerning all illegal drug transactions between such person and any member of the Armed Forces"; and 2) "[i]f there are reasonable grounds to believe that such person is the immediate source of the introduction of illegal drugs onto the military installation *and* the investigative actions are undertaken to obtain evidence concerning all persons engaged in drug trafficking on the installation." *Id.* at paras. D3b(1) and (2) (emphasis added). "Immediate source," a term of art, is defined to mean "a person who is directly and immediately involved in the transfer or distribution of illegal drugs to DoD personnel." *Id.* at para. C4. The purpose of the criminal policy memorandum is to ensure that targeted off-post civilian drug activity has a clear, articulable, and definite military nexus. *See* PCA, *supra* note 62.

Memo 5 off-post drug buy operations targeting civilians can be approved by USACIDC region commanders after the region judge advocate ensures that the request satisfactorily addresses the following conditions precedent:

a. that reasonable grounds exist to believe the target "is a significant supplier of drugs to military personnel," *id.* at para. E2b(1) ("significant" remains undefined);

b. that the request articulates a genuine need for military law enforcement involvement, "with particular reference to the reason why non-DoD investigative agencies are unable or unwilling to investigate to conduct the investigation," *id.* at para. E2b(2);

c. that the request proposes "[a] specific plan designed to obtain information about drug trafficking on the installation or other drug trafficking by military personnel," *id.* at para. E2b(3); and

d. that the application affirmatively states that the local civilian prosecutor supports the proposed buy operation, *id.* at para. E2b(4).

Memo 5 is not as clear as it might be with respect to whether concurrence must be sought from a local, state, or federal prosecutor or from a local, state, or federal law enforcement agency. *Compare* Memo 5 paras. C1, D3c(1), and E2b(4). It would appear, however, that concurrence from a state or local prosecutor could not be sought unless the servicing U.S. Attorney's office (USAO) had first been consulted and either 1) expressly declined on the matter; or 2) had a standing declination with respect to the proposed Memo 5 buy because the purchase would be below certain threshold

portantly, investigations conducted by the DODIG and its *delegates* are specifically exempted from PCA constraints.[65] It seems to follow, therefore, that because the overwhelming number of USACIDC TLE operations targeting civilians inside the U.S. involve either white collar crime, contract fraud (including theft from the government), or drug sales to soldiers, the PCA should no longer be seen as serious concern or impediment to the conduct of consensual intercepts aimed at these categories of crime.

Like Department of the Army guidance, the CID supplement requires that the ELSUR locations be specified[66] and that a desired com-

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amounts established by the USAO for prosecuting marijuana, cocaine, heroin, LSD, PCP, and other drug cases in federal district court. ***See*** Memo 5, paras. Clc and D3c(1).

Stepping in somewhat to fill this apparent hole, the USACIDC, in addition to specifying adherence to the Memo 5 request format, also requires that Memo 5 applications "be coordinated" with "the appropriate Federal, State, or local law enforcement agency" and with "the supporting staff judge advocate." USACIDC Reg. No. 195-8, Criminal Investigation - Criminal Investigation Drug Suppression Program, paras. 3a, c, and App. M (25 Apr. 1989) [hereinafter CIDR 195-8]. Approved operations run for up to 60 days, subject to extension requests. *Id.* at para. 4e, and Appendix M; ***see*** *also* Memo 5, para. E2a.

USACIDC drug buys made pursuant to Memo ***5*** from civilians off post are not subject to the Posse Comitatus Act, 5 U.S.C.A. App. 3, § 8(g) (Supp. 1989). Memorandum to the author from Edward G. Allan, Legal Remedies Advisor, DODIG (Dec. 6, 1989). ***See*** *also* United States v. Bacon, 851 F.2d 1312 (11th Cir. 1988).

Even though a Memo 5 operation may already have been approved at USACIDC region headquarters level, a TLE request made in support of such an off-post drug operation must nevertheless contain all facts necessary to support the Memo 5 authorization.

The SAGC will not approve a TLE in connection with the operation unless it, too, is convinced that all Memo 5 prerequisites have been satisfied. The SAGC does not feel bound by a USACIDC region commander's determination and accords itself the opportunity to conduct a ***de*** *novo* determination. Thus, a TLE request in support of a Memo 5 operation which fails to contain sufficient information to underpin the Memo 5 finding will not be favorably considered by the SAGC.

See *also* United States v. Bacon, 851 F.2d 1312 (11th Cir. 1988); Moon v. State, 75 p.2d 45 (Alaska App. 1990).

[65] 5 U.S.C.A. App. 3, § 8(g) (Supp. 1989).

[66] USACIDC Supp., App. C, para. C(3).

mencement date be articulated.[67] Taken together, both the Army and CID regulations demand to know "why" the TLE operation is to be conducted—an explanation of its purpose. Suggested reasons include corroboration of informant information,[68] protection/backup for the person wired (usually a source or law enforcement operative),[69] protection of government property and buy/flash monies,[70] coordination of law enforcement elements during a buy-bust,[71] acquisition of evidence sufficient to underpin search and arrest warrants/authorizations or Title III orders,[72] and (somewhat importantly) to "[o]btain evidence for trial by proving intent, knowledge, motive, or lack of entrapment."[73]

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[67] *Id.* at App. C, para. A(2). Unfortunately, few agents take advantage of or seek advance approvals. Although the practice is discouraged, the vast majority of intercept requests are submitted at or just before the desired commencement time, which puts some strain on the TLE authorization machinery. Indeed, a significant number of CIOP applications seeking approval for the weekend are telephoned in to the OSJA, HQUSACIDC, on Friday afternoons. If an intercept can be anticipated, advance approval can put less of a burden on the system, giving the investigating agents plenty of time to observe the intercept location; an opportunity to select surveillance locations; a chance to identify where best to situate the receiving devices; the occasion to obtain all necessary TLE from other USACIDC offices, from the region headquarters, from sister law enforcement agencies, etc.; the time to ensure the TLE is in working order; an opportunity to make any necessary repairs; time to ensure the person to be wired fully understands how to operate the TLE (if it is not otherwise set in the "on" position by the agent to avoid possible cold feet/interference by the source); time to guarantee that there are fresh batteries on hand, plenty of audio tape, etc; and occasion to ensure that the target, person to be wired, case agent, etc., is not going to be on leave, performing temporary duty elsewhere, transferred, or separated from the service.

[68] And it should be added, substantiation of any law enforcement operative who may be participating. Some juries do not believe police, especially those undercover, any more than they credit informant testimony. *Id.* at App. C, para. D(1)(A).

[69] *Id.* at App. C, para. D(1)(B). Because of counter-surveillance, it may not be possible for covering law enforcement personnel to get close enough to the meeting in order to see if the wired party is in any danger.

[70] *Id.* at App. C, para. D(1)(c). "Flash" money is cash shown or "flashed" by informants or police operatives to drug sellers so that the latter will believe the "buyers" have the intent and sufficient capital to complete the drug transaction *being* negotiated. This "flash" money is, of course, only window dressing and is to be distinguished from actual purchase or buy money.

[71] *Id.* at App. C, para. D(1)(D). "Coordination of law enforcement elements" should be effected during any intercept for that matter. An intercept operation may originally be set to occur in one location. Upon arrival, the intercept target, for whatever reason, might decide to move the meeting elsewhere. Covering agents, providing both physical surveillance and backup protection, need to have the ability to move with the target and the wired source (or operative). Unless a wire is used, those support forces might not be able to discreetly follow the action. At a minimum this might result in the loss of evidence, and at worst, this could result in the injury or death of the undercover agent or informant.

[72] *Id.* at App. C, para. D(1)(E).

[73] *Id.* at App. C, para. D(1)(F).

Additionally, there is the regulatory inference that TLE requests may only be authorized upon a showing that the information expected from the intercept ''isnecessary for a criminal investigation and cannot reasonably be obtained in some other, less intrusive manner.''[74] Because this quoted language appears philosophically to follow a similar Title III provision,[75] this DA regulatory proviso is interpreted to refer only to nonconsensual intercept applications.

Proceeding to the technical part of the consensual ELSUR application, the request should specify the type of TLE to be used, including brand names.[76] Armed with this information, the technical service coordinators (TSC's) can provide assistance and advice regarding how best to position equipment, whether on the wearer or at a location, and what type devices are best suited to the planned intercept. The request should state whose TLE is to be used,[77] and if it is not USACIDC equipment, there should be some explanation of why some other organization's equipment will be used. The consenting party/TLE wearer should be named or, if it is necessary to protect that name, the source number needs to be specified.[78]

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[74]AR 190-53, para. 1-4c. The provision also advises that ''[i]interception of wire and oral communications is a special technique which shall not be considered as a substitute for normal investigative procedures." It is clear beyond peradventure that today, consensual electronic surveillance is a usual, pedestrian law enforcement technique and occurrence.

[75]18 U.S.C. § 2518(3)(c) (1982) provides that one of the findings which a judge must make when considering the merits of Title III application and affidavit is that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."

[76]USACIDC Supp., App.C, para D(2)(A). Failure to identify with specificity the TLE to be used is certainly not fatal. If the agents conducting the operation have to borrow equipment, the precise nomenclature may not be known until the last minute. In any event, to compensate for this eventuality as well as equipment malfunctions, all TLE request memoranda prepared by the OSJA, HQUSACIDC contain the phrase, "should any of this equipment malfunction or otherwise become unavailable, it is expected that devices with similar capabilities will be substituted.''

[77]USACIDC Supp., App. C, para. D(2)(B).

[78]*Id.* at App. C, para. C(2)(c). If a TLE operation begins with a particular person identified as the wearer/consenting party, and it becomes necessary to either add another "wearer" or replace the first entirely, a new TLE request (a "supplemental") must be submitted to the SAGC following exactly the same procedures as any initial TLE. Because the only thing different or new is the different "wearer," a supplemental need only reference the first request, indicate region commander authorization for the "wearer" addition/replacement, and provide a brief explanation of what occasioned the need for the charge.

Would failure to request supplemental approval in such a circumstance prove fatal to the proffered admission of electronically surveilled conversations? It should not, see United States v. Caceres, 440 U.S. 741 (1979). Apparently unaware of this rather dispositive case, at least one trial judge was inclined to exclude taped evidence because the USACIDC had wired an agent other than the one approved. Believing AR 190-53 ''inure[d] to the benefit of the accused,'' the court indicated its predisposition: ''[B]ecause the agency failed to follow its own regulations in making this tape, I'm prepared to exclude it." Record at 438, United States v. Hill, GCM 445681 (U.S. Army Field Artillery Center and Ft. Sill, 8 Mar. 84).

The TLE application should reflect whether the consenting party/TLE wearer is a civilian or a member of the military.[79] If a civilian is to be used, his age should be indicated,[80] and if he is a minor, the request should indicate not only that the child has agreed to participate, but also that the parents or guardians have also assented to the minor's participation.[81]

Next, the application should say what other law enforcement entities, if any, will be participating in the intercept operation.[82] Additionally, the following requirements with regard to civilian law enforcement and prosecutorial involvement must be satisfied:

***DOMESTIC ON** POST*

—Civilian Target: the appropriate local prosecutor (Assistant District Attorney or Assistant U.S. Attorney) must support the planned intercept.[83]

—Military Target: no special or extraordinary coordination is required, although common sense would suggest that it would be helpful to discuss the matter (as with all proposed TLE operations) with the servicing staff judge advocate's office.

***DOMESTIC OFF** POST:* regardless of the target's status (civilian or military), the operation must be supported by both the appropriate

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[79] *Id.* at App. C, para. D(2). This distinction can be important, especially for Memo 5 *(supra* note *64)* purposes. It will be more difficult underpinning a request for off-post drug purchase approval and a related TLE if the consenting party is not a soldier. Also, TLE operations using consenting civilians who are put in harm's way could conceivably result in a lawsuit if the civilians are injured or assaulted during the course of the intercept operation.

[80] USACIDC Supp., App. C, para. D(2).

[81] *Id.*

[82] *Id.* at App. C, para. B(3).

[83] *Id.* The logic behind the demand for civilian prosecutor input is rather straightforward. Not only should legal advice concerning ELSUR be welcome, especially because such counsel can be jurisdiction-specific, but thought should also be given to the wisdom and viability of the entire planned intercept operation. If the authorities who would be the ones to prosecute are not supportive, this would strongly suggest the ELSUR should not be conducted. In the past, and when federal offenses were under investigation, the SAGC has authorized intercepts that had been assented to by members of the Judge Advocate General's Corps who were also "dual-hatted" as Special Assistant U.S. Attorneys (SAUSA's). Recently, however, the office of the SAGC—in an unexpected and atypical display of no confidence in the uniformed lawyer—has advised that all concurrences from U.S. Attorney's Offices must henceforth originate from civilian AUSA's or SAUSA's, *unless* (perhaps) the intercept operation is to be conducted solely on post.

civilian prosecutorial and law enforcement authorities.[84] Further, the military interest justifying the need to conduct an intercept operation off the installation should be reflected.[85]

EXTRATERRITORIAL: with regard to consensual intercepts to be conducted outside the United States,

—regardless of whether the intercept is to occur on or off post, if the target is a foreign national, the local host nation (LHN) prosecutor must approve the conduct of the operation.[86]

—if the intercept is to be on post *and* the target is a soldier, a dependent, or an American Department of Defense employee, no special or extraordinary coordination with LHN law enforcement or prosecutorial authorities is necessary.

—if the intercept targets either a soldier or an American civilian off post, the LHN prosecutor must assent.[87]

Borrowing a Title III requirement,[88] the DA regulation mandates that all consensual intercepts "shall be terminated as soon as the desired information is obtained, or when the interception proves to be nonproductive."[89]

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[84] *Id.* The latter is especially important. Local law enforcement must be either in position or available to provide police assistance should violence erupt or arrests become necessary. Although CID agents may apply for, receive, and execute federal *search* warrants (CIDR 195-1, para. 3-3b; *see also* Fed. R. Crim. P. 41, 28 C.F.R. § 60.2(b), 60.3(a)(2) (1988), and 4 Jan. 1985 DODIG Memorandum for the Secretary of the Army, Navy, and Air Force, subject: "Criminal Investigations Policy Memorandum Number 6 - Requesting, Serving and Executing Search Warrants" [hereinafter Memo 6]), they have no comparable federal *arrest* authority, especially off the installation ("arrest," a term of art, must not be confused with "apprehend," "detain," or "restrain"). *See* Fed. R. Crim. P. 4(a), 4(d)(1); AR 195-2, para. 3-21b; CIDR 195-1, para. 3-2b; DAJA-AL 1988/1113, 2 Feb. 1988: " . . . USACIDC agents may swear to a Federal complaint, but they may not execute a Federal arrest warrant . . . . [T]he execution of a Federal arrest warrant constitutes that direct exercise of military authority over the person of civilians for the purpose of civil law enforcement which Congress intended to [and did] prohibit [by passage of the PCA, *supra* note 62]." Even on the installation, agents have no more than citizens' arrest power vis-a-vis civilians, 32 C.F.R. § 503.1(a) (1988); they may "apprehend"/"restrain" persons not subject to the UCMJ for the commission of on-post crimes, but not "beyond such time as may be required to dispose of the case by orderly transfer of custody to civil authority or otherwise, under the law." *Id.* at § 503.1(b). *See* AR 500-51, para. 3-5c and DODD No. 5525.5, DoD Cooperation with Civilian Law Enforcement Officials (Mar. 22, 1982), at para. A3c, Encl 4.

[85] *Id.* at App. C, para. C(4). This is to satisfy PCA concerns *See generally supra* note 62.

[86] *Id.* at App. C, para. B(3).

[87] *Id.*

[88] "Every order . . . shall contain a provision that the authorization to intercept . . . must terminate upon the attainment of the authorized objective, or in any event in thirty days." 18 U.S.C. § 2518(5) (1982).

[89] AR 190-53, para. 2-5b(1).

By regulation, routine TLE requests are to arrive at the OSJA, HQUSACIDC, seven *working* days before the scheduled intercept commencement date,[90] and extensions, reinstitutions, and supplementals (adding targets or consenting parties) are to arrive five *working* days ahead of time.[91] "Emergency" requests by telephone may, of course, be made at any time.[92]

Emergency or expedited requests must contain ***all*** of the same information required in a "routine" application; the only difference is the method of processing (telephone) in lieu of written memoranda. Typically in such situations, the USACIDC region judge advocate—having already secured approval to conduct the intercept from the region or acting region commander—will telephone the OSJA, HQUSACIDC, with the request. Assuming the request information is complete, the OSJA—as with a routine request—will brief the Commander, USACIDC,[93] and seek permission[94] to forward the request to the SAGC. The OSJA then must contact the SAGC action attorney, who in turn must solicit the concurrence of the SAGC or, if he is not available, from the Acting SAGC. When all necessary approval officials are in place, emergency requests can be authorized in less than an hour after they are phoned into the OSJA, HQUSACIDC.[95]

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[90]USACIDC Supp., para. 2-5d(1).

[91]*Id.* at para. 2-5d(2).

[92]They seem to abound on Fridays after 1500.

[93]When the Commander, USACIDC, is absent from the area or otherwise unavailable, the Deputy Commander will be briefed. If he, too, is absent or otherwise unavailable, approval will be sought from the Chief of Staff, HQUSACIDC. ***See*** USACIDC Supp., paras. 1-6g(2) and 1-6h.

[94]The OSJA, HQUSACIDC, has on rare occasions advised the Commander, HQUSACIDC, to deny TLE requests. Generally, however, the limited number of "bad" TLE requests that survive region scrutiny are denied informally. In such an instance, the region judge advocate will be told that the OSJA, HQUSACIDC, cannot support the request.

[95]An "emergency" intercept is not defined in AR 190-53, para. 2-5 a(3). The USACIDC Supp. suggests by example that it is an "unforeseen operational exigency" or a "serious threat to national security or life." USACIDC Supp., para. 2-5d. Emergency requests may be made 24 hours a day (0730-1600 ET, M-F, OSJA, HQUSACIDC, at AV 289-2281/(202) 756-2281; other times, Staff Duty Officer, HQUSACIDC, AV 289-1996/(202) 756-1996).

An "emergency" in this context has come to mean not only the situation presented where property or persons are at immediate risk of danger, harm, or loss, but also those where expedited handling is needed because it has just been learned that a criminal event that could not have been predicted is about to eventuate.

The OSJA, HQUSACIDC, supports all bona fide supplications which require an expedited response. A significant, distressing number of these require quick handling, however, because of poor planning or none at all. Typically, a source will arrange a drug buy and only after the deal is set will it be realized that TLE usage would be beneficial. Needless to say, the more contrived the emergency TLE requests submitted to the SAGC, the greater the damage to USACIDC credibility.

When an emergency request is approved by the SAGC, it will not be authorized for thirty or sixty days, but rather for between 24-96 hours, with 72 hours as the norm.[96] The OSJA, HQUSACIDC, is to submit a written version of the oral request to the SAGC within 48 hours;[97] to meet this deadline, the OSJA requires that it receive a written request from the field within 24 hours of the oral application.[98]

Routine and emergency TLE authorization periods are computed differently from each other. The date of SAGC authorization counts as day #1 for routine TLE computation purposes, even if authorization is provided at 2359 hours.[99] (A single exception to this would be where, pursuant to an advance USACIDC TLE request, the SAGC TLE authorization provided is specifically worded to permit the commencement of interception at some date certain in the future; in this instance the TLE computation begins to run from the date certain and not on the day the SAGC approved the request.) Emergency authorizations are computed using a 24 hour "clock"; for example, if an intercept were authorized at 1300 on Monday for 72 hours, operation authority would expire at 1300 on Thursday.

Note that it is not uncommon for an emergency TLE request to be submitted either closely before or even contemporaneously with a thirty/sixty day request so that the intercept operation does not suffer from down time that would be occasioned by a gap in intercept authority. In such a case, the "routine" thirty/sixty day request functions, in effect, as an extension application.

Once the OSJA, HQUSACIDC, is informed over the phone by the SAGC staff that the intercept has been approved, the OSJA relays this information by phone to the region judge advocate or, if he is not available, then to either the region TSC or the requesting field element. SAGC approvals are always reduced to writing in the form of a memorandum to the Commander, USACIDC, and upon its receipt, the OSJA, HQUSACIDC, will send a copy of its (OSJA's) requesting memorandum and a copy of the SAGC authorization memorandum

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[96]This is simply SAGC practice, most likely resulting from the desire to minimize being blindsided or bushwhacked by TLE operations that differ in practice from the ones described over the phone.

[97]AR 190-53, para. 2-5a(3).

[98]USACIDC Supp., para 2-5d.

This is in contrast to the federal practice where the day of authorization is not counted; the day after is considered as day #1. *See generally* United States v. Sklaroff, 323 F. Supp 296, 317-18 (S.D. Fla. 1971).

to the region judge advocate. These two documents will then be available to the field if needed during judicial proceedings. The original SAGC authorization memorandum is kept by the OSJA.

D. EXCEPTIONS TO THE NEED FOR SAGC APPROVAL

*1. **Extension** Phones*

There are certain very limited exceptions to the need for SAGC consensual intercept approval. The regulation by its terms specifically permits agents to monitor phone conversations by using extension phones, i.e., they may only listen in.[100] If calls are to be recorded over an extension line, this consensual intercept will now be treated as any other and SAGC authorization would be mandated. The regulation is silent about whether the extension phone must have been previously existing or whether it may include one specifically installed for the listener. The USACIDC has adopted the latter interpretation, finding it to be consistent with the spirit of the regulatory provision.

*2. **SWAT** Team Scenarios*

When special weapons and tactics (known as SWAT) teams or other crisis response units are called upon, designated phone lines (including ones temporarily installed) will probably be dedicated for the duration of the emergency and for related law enforcement activity. An incomplete list of such situations would include kidnappings or hostage takings (e.g., bank robbery, crimes by political extremists) and sniper situations. The consensual interception and recording of calls through the telephone net used during these crises

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[100] AR 190-53, para. 1-4h provides, *inter alia* that, "Army law enforcement personnel are authorized to [consensually] monitor telephone conversations, by use of an extension telephone instrument .... *Such monitoring* is *not considered an interception of wire or oral communication* [emphasis added]. Recordings of conversations under these circumstances, however, must comply with chapter 2 or AR 190-30, chapter 3, section VI." This "interception," of course, suggests the height of sophistry. A communication is intercepted when its contents are acquired; recording only memorializes the acquisition. The provision is carefully drawn; it does not say that extension phone monitoring is not an intercept, it says that it is not *considered* an interception. However legally inconsistent it might otherwise appear to be, the provision is a good one, a practical recognition of common police practice. *But see* Commonwealth v. Brachbill, 555 A.2d 82 (Pa. 1989).

are specifically excepted from AR 190-53, and consequently, no SAGC approval is required.[101]

3. *"Notification Only" to SAGC*

In those situations where any non-DOD police agency wants to conduct a CIOP and desires to wire a USACIDC agent, Military Police Investigator (MPI), DST member, any soldier, or even an Army civilian employee, formal approval from the SAGC to conduct the ELSUR (in the manner just discussed) is not required. The SAGC must be given "prior notice," however, after which the SAGC will dispense "further guidance."[102] The combination of this "prior notice" and "further guidance" equates to a right of first refusal, which would appear to be as much an oversight process, albeit abbreviated, as the formal para. 2-5, AR 190-53 procedure. The concept breaks down at the edges somewhat when a non-DOD police agency wires a soldier or DA civilian and the USACIDC is not informed. The non-DOD police officers will not, of course, have any knowledge of para. 2-5d, AR 190-53; even if they did, it is not clear that they would be obligated to follow it—especially if a DA civilian is the consenting party and the intercepts are to take place off duty and off post.

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[101] Army Reg. 190-30, Military Police - Military Police Investigations, para. 3-21 (IO1, 17 Jan. 1988) [hereinafter AR 190-30], the interim change, provides that

> the recording of telephone conversations at MP operations desks is a form of command center communications monitoring which may be conducted to provide an uncontroverted record of emergency communication. AR 190-53 does not apply to this type recording .... [Additionally, an] MP operations center established to deal with a hostage-type incident (hostage taking, kidnapping, snipers, barricaded criminals, and similar situations) is authorized to monitor and record communications to provide an uncontroverted record of emergency communications. The fact that the operations center is temporary, and not the typical MP operations desk located in an installation building, does not affect its authority to monitor and record communications.

See also AR 190-53, para. 1-2C(7): "This regulation is not applicable to ... [r]ecording of emergency telephone and/or radio communications at Military Police Operations desks ....

[102] *Id.* at para 2-5d. "When a non-DoD agency wishes to use Army civilians or military personnel as a consenting party for an intended interception of a communication, prior notice will be provided to the Office of Army General Counsel who will provide further guidance." Curiously, and seemingly by its terms, if one assumes the consenting party is a civilian Army employee, the SAGC would require notification even when there is no military law enforcement investigation or nexus, when those under investigation reside off post, and when the interception and offense are all off post. To the best of the author's knowledge this situation has yet to occur. However, it does not infrequently happen that civilian police agents want to use their equipment to wire a USACIDC agent, informant, or DST member in connection with the investigation of a civilian.

It would seem that the reason for this abbreviated approval provision is that the SAGC desires to ensure that the Posse Comitatus Act is not contravened. The question that always arises for the USACIDC in these situations, which is not susceptible to an easy answer, is at what point does a CIOP become a civilian TLE operation for purposes of para. 2-5d? Put differently, at what point is the military law enforcement connection to an ELSUR operation slight enough to obviate the need for the formal TLE approval process? If the interception equipment to be used is provided by the civilian police, if they wire the DA consenting party (or a car, location, etc. where the consenting party will be), and if they are responsible for operating the receiving and recording equipment (even if the USACIDC listens in), it has been the USACIDC position that only para. 2-5d notification need be provided to the SAGC. However, if the USACIDC conducts a TLE operation using its equipment at the request of the local police (i.e., USACIDC participation subjectively appears to go over the 50% mark), it is the OSJA, HQUSACIDC, belief and practice that regular, formal approval channels should be followed.

E. RELATED CONSIDERATIONS

1. Surreptitious Oral and Wire Consensual Monitoring by Third Parties or in a Private Capacity

It is not unusual for witnesses, including members of the military, to bring to the USACIDC audio tape evidence of telephone calls and face-to-face conversations that they—as participants—consensually recorded. The question always raised—assuming a crime, proper authentication, voice identification, audio and evidentiary quality—is whether the tapes are admissible. The answer is "it depends" upon the law in the jurisdiction where the tapes might arguably be admitted. For the reasons already discussed, one would not expect admissibility to be a problem in federal district court,[103] although if the recording party were to have monitored the conversation over certain government telephones, the interception would contravene federal regulation.[104] Except for certain enumerated exceptions, such as law enforcement investigations or

> [w]hen performed by any Federal employee with the consent of *all* parties for each specific instance . . . , [c]onsensual listening-in or recording of telephone conversations on the

[103]United States v. Caceres, 440 U.S. 741 (1979).

[104]41 C.F.R.§ 201-6.202-2 (1988), Consensual listening-in or recording. See *also infra* note 107.

> Federal Telecommunications System (FTS) or any other telephone system approved in accordance with the Federal Property and Administrative Services Act of 1949 . . . is prohibited."[105]

At one point the recording of conversations by a member of the Army (including civilian employees), even those monitored face-to-face, was regulatorily prohibited (unless, for example, it was conducted for law enforcement purposes):

> Army policy prohibits the acquisition by mechanical or electronic means of any communication, whether oral, wire, or non-public radio, by any officer or employee of the Department of the Army without the consent of *all* [emphasis added] parties to the communication. This policy prohibits, for example, the act of listening to telephone conversations through the use of telephone extensions or telephone speaker phones, as well as the act of recording telephone or private face-to-face conversations, unless the ***prior*** consent of *all* [original emphasis] parties to such monitoring or recording is obtained.[106]

This provision was not carried forward in the most recent iteration of this regulation but was instead *partially* inserted in other guidance.[107] There does not now seem to be any Army or government-

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[105] *Id.* (emphasis added).

[106] Army Reg. 600-20, Personnel - General - Army Command Policy and Procedure, para. 5-21 (15 Oct. 80) [hereinafter AR 600-20].

[107] AR 600-20, Interim change #102 dated 29 Dec. 1982 (expired 29 Nov 84), specifically provided that para. 5-21 of AR 600-20 "is rescinded." Neither does the current AR 600-20 (30 Mar 88 update) continue the 15 Oct 80 language. However, para. D3, Dep't of the Army Message 1313352 June 83, subject: Monitoring and Recording Conversations, said that "[r]ecison of para. 5-21, AR 600-20, did not rescind Army policies on monitoring and recording conversations." This appears to be so, at least with respect to the monitoring of ***wire*** communications. Army Reg. 25-1, Information Management - The Army Information Resources Management Program (18 Nov. 88) [hereinafter AR 25-11 provides at para. 6-11a that "Army policy permits telephone monitoring or recording . . . provided that the information to be acquired is necessary for the accomplishment of the Army mission and then only in compliance with this regulation." This telephone monitoring and/or recording is permissible in an ***office setting*** "for the purpose of making a transcript or summary of the conversation," id. at para. 6-11b(1). However, the person "desiring to have the telephone conversation monitored or recorded is required to obtain the ***prior expressed consent*** of each of the other parties to the conversation . . . [and the] recording devices used . . . will be equipped with recorder connectors that contain instruments that automatically emit a warning tone once every 12 to 18 seconds during the period of recording," id. at paras. 6-11b(2) and **(4)** (emphasis added). Further, the regulation mandates by exclusion the permissible type of recording equipment to be used in this so-called "office management activity" setting: "Acoustic or inductive type recording devices will not be used . . . ." ***Id.*** at para. 6-11b(3). The AR 25-1 provisions just discussed are based upon paras. D1 and D2, DODD No. 4640.1, Telephone Monitoring and Recording (Jan. 15, 1980).

wide prohibition against the consensual monitoring and recording of ***oral*** communications by persons not under the direction of the USACIDC. Keep in mind, however, the statutory caveat earlier discussed; to be legal under federal law, such private party consensual interception cannot be conducted "for the purpose of committing any criminal or tortious act in violation of the Constitution or the law of the United States or of any State."[108]

The Supreme Court's *Caceres* doctrine also suggests that the admissibility of taped conversations should seldom be a problem before courts-martial.[109] If the forum is a state or local court, the evidence might not be admissible because a number of state statutes specifically prohibit the admission of overheard conversations unless *all* participants agreed to the intercept.[110]

2. *Consensually Intercepting* ***Suspects*** *with* **Counsel** ***or*** *with the Right to* ***Counsel***

A developing and sensitive area of intercept law, with which all agents (and attorneys advising those agents) must be familiar, centers around the situation presented when a suspect to be intercepted either is represented by counsel or has a right to such representation. Bluntly, improper advice about and incomplete consideration of these issues conceivably could involve the legal advisor in bar disciplinary proceedings.

A first step for any lawyer called upon to advise military law enforcement personnel considering an intercept is to ask the agent or investigator whether any of the targets proposed for interception have counsel or have a right to counsel. If the agent or investigator does not know, the advising attorney in cooperation with the agent or investigator should find out.

An overview of the law in this area should start with an examination of the applicability of article 31, UCMJ.[111] Preliminarily, does a wired USACIDC agent, MPI, or informant acting at their behest have to provide a military intercept target with an article 31 rights warning? Article 31(b) is quite specific, stating,

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[108] 18 U.S.C.S. § 2511(2)(d) **(Supp.** 1989).

[109] *See* discussion **of** *Caceres, supra* note 40. *But* **see** United States v. Hill, GCM 445681 (U.S. **Army** Field Artillery Center and Ft. Sill, 8 Mar. 84).

[110] Fishman, supra note 10, at § 8, 11; Cam, supra note 10, at § 3.5(a)(3).

[111] UCMJ art. 31.

> No person subject to [the UCMJ] may interrogate, or request any statement from . . . a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is . . . suspected and that any statement made by him may be used against him in a trial by court-martial.[112]

Both the agent and informant, even if they are civilians,[113] will probably be considered "subject to the code''[114] and on the face of the matter are not excepted from the article 31(b) obligation to provide article 31 warnings to military suspects. *United States* v. *Flowers*[115] fortunately suggests otherwise. Flowers appealed his drug-related court-martial conviction, contending that the undercover MP who bought marijuana from him should have first provided article 31 warnings. The Army Court of Military Review had little difficulty with this argument, holding that ''[t]here is no requirement for an undercover agent to advise a person in accordance with Article 31 while engaged in a controlled purchase of narcotics," and by logical extension, while the suspect is engaged in any ongoing criminal activity.[116] Therefore, when an informant, covert member of the military police, or an undercover agent is present while a military suspect engages in and discusses criminal activity, no article 31 rights warning need be given.[117]

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[112]UCMJ art. 31(b); see also Mil. R. Evid. 305(c) [hereinafter MRE].

[113]The USACIDC has now hired approximately 47 civilian agents mainly to target white collar crime (especially contract fraud); both NISC and OSI have had civilian agents for quite some time.

[114]UCMJ art. 2(a)(1); see also MRE 305(b)(1), which states that those subject to the UCMJ include "knowing agents" of both a person subject to the code and of a "military unit." By its terms, this language should cover civilian informants. Appendix 22 of the 1984 Manual for Courts-Martial reflects that "rule 305(b)(1) makes it clear that under certain conditions a civilian [including OSI, CID, NISC, and civilian agents] may be a 'person subject to the Uniform Code of Military Justice' for purposes of warning requirements, and would be required to give Article 31(b) [Rule 305(c)] warnings."

[115]United States v. Flowers, 13 M.J. 571, (A.C.M.R. 1982), rev'd *on* other grounds, 17 M.J. 54 (C.M.A. 1983).

[116]*Id.* at 572.

[117]*See also* United States v. French, 25 C.M.R. 851 (A.F.B.R. 1958), *aff'd in* relevant part, 27 C.M.R. 245 (C.M.A. 1959), holding that an undercover agent is like an informant, and in such cases ''[t]he provisions of Article 31 are not applicable with respect to conversations concerning the furtherance of existing and *future* [emphases added] illicit enterprises. Incriminating statements by an accused to a so-called "informer" [i.e., an undercover agent] in the course of their relationship are admissible in evidence, notwithstanding any failure of the informer to warn the accused in accordance with the provisions of Article 31 . . . . -- *Id.* at 865.

What if the informant or undercover operative wants to question the suspect about *past* crimes? Must the target be given article 31 warnings? No. In *United States v. Martin*[118] a Naval medical officer was convicted at court-martial for, among other things, indecently assaulting a female patient. During the investigation of the charges, the victim agreed to wear technical listening equipment, and she allowed Naval Investigative Service agents to listen in on the telephone and monitor face-to-face conversations when she spoke with Martin. NIS instructed her "to discuss the alleged rape and assaults and attempt to have the accused acknowledge that the acts did occur."[119] Martin was convicted, based in part upon the consensually monitored conversations. On appeal the medical officer claimed that he should have been warned of his article 31 rights by the assault victim before she questioned him. The Navy-Marine Corps Court of Military Review (NMCMR) was not persuaded, finding that "Congress did not intend [article 31's] literal application in every instance . . . [but only] in situations where, because of rank, duty, or other similar relationship, there was the possibility of subtle pressure on a suspect to respond."[120] Quoting from *United States* v. *Duga*, the court went on to add that when considering whether article 31 rights must be given, it must be determined " 'whether (1) a questioner subject to the Code was acting in an official capacity in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more that a casual con-

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[118] 21 M.J. 730 (N.M.C.M.R 1985).

[119] *Id.* at 731.

[120] *Id.* at 732, where the court also said,

> [W]e find no requirement for the Article 31, UCMJ, protection. Although Mrs. M [the victim], both in the telephone conversation and the "bugged" discussion in the appellant's office, was acting under the instruction of NIS agents, her status as the victim of the alleged offenses and as appellants patient did not change, *i.e* she in no way stood in a position of authority over the appellant. It was therefore not possible for her to impose on him any of the subtle pressure or coercion to make a self-incriminating statement, which Article 31 was intended to counter. In addition, neither situation was of a custodial or punitive nature. Thus, we find that appellant had no rational basis to believe his conversations with Mrs. M were anything more than private, emotion-ridden colloquies [citation omitted] *so* that Article 31, UCMJ, did not apply to them.

Assume the reverse, that Mrs. M was trying to shakedown and blackmail the Naval officer, and further that she was an enlisted woman. Would the Naval officer, wired or not, have to advise an E-1 Mrs. M of her Article 31 rights? *Compare* United States v. Kirby, 8 M.J. 8, 12 (C.M.A. 1979), and the cases cited therein. Judge Cook said in *Kirby* that "[t]o interpret Article 31(b) as requiring warnings by an informant or undercover agent ignores the basis of this Court's opinions in *Hinkson* [17 U.S.C.M.A. 126 (1967)] and *Gibson* [3 U.S.C.M.A. 746 (1954)], which recognized that the intent of Congress in enacting Article 31(b) was to dispel the inherently coercive nature of superior-subordinate relationships in the military and the absence of this coercive element where an informant or undercover agent was involved." *Id.* at 13.

versation.' ''[121] The concurring opinion of Judge Cook in *United States v. Kirby* is along these same lines: ''[T]he conclusion that an informant must advise a suspect of his Article 31(b) rights prior to asking questions is contrary to the precedents and practices of this court.''[122]

It appears, therefore, that one may say with some certainty that a military suspect may be questioned without the need for article 31 warnings 1) about past, present, and future crimes 2) by undercover personnel subject to the UCMJ, which would include not only military members of DOD law enforcement components, but also civilian informants and agents of these organizations.

What if the USACIDC has reason to know that the intercept target has an attorney or has a right to an attorney? May attempts nevertheless be made to elicit incriminating remarks from the suspect without prior notification to counsel? If this were a Title 18, U.S. Code investigation, the answer would be "yes." Harold Fitterer, an insurance company branch manager in Minneapolis, was convicted of ten federal counts, seven of which were for mail fraud, in connection with a scheme to file fraudulent insurance claims with the company for which he worked. Part of the evidence used against Fitterer was the result of a consensual intercept conducted before indictment but after he had retained counsel.

Fitterer argued on appeal that not only had his right to counsel been violated, but also that the prosecutors directing the investigation had violated that portion of the Code of Professional Responsibility proscribing direct communication with one of adverse interest, i.e., a discussion which is not through the suspect's counsel.[123] The Eighth Circuit easily disposed of Fitterer's contentions, noting that neither the fifth nor sixth amendment rights to counsel had attached because, respectively, Fitterer had not been in custody when the incriminating remarks were intercepted nor had he yet been indicted. ''[T]he sixth amendment right to counsel does not attach until adverse judicial proceedings have been initiated . . . . Fitterer was not in custody at the time of the conversation with [the informant] and therefore the fifth amendment right to counsel is not implicated.''[124] The court was equally unimpressed with Fitterer's

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[121] *Id.*; United States v. Duga, 10 M.J. 206 (C.M.A. 1981).
[122] *Kirby*, 8 M.J. at 12 (Cook, J. concurring).
[123] United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir.), *cert. denied*, 464 U.S. 852 (1983).
[124] *Id.*

Disciplinary Rule assertion[125] that the prosecutors could have properly communicated with him only through his counsel and not through an informant. Tersely, and taking the only sensible approach, the Eighth Circuit said,

> We reject Fitterer's contention. Under his view, once the subject of an investigation retains counsel, investigators could no longer direct informants to gather more evidence. We do not believe that DR 7-104(A)(1) of the Code of Professional Responsibility was intended to stymie undercover investigations when the subject retains counsel .... We find no ethical violation on the part of the prosecutors.[126]

Unfortunately, the rule in *Fitterer* cannot be completely employed in matters involving the UCMJ. While the successful parry of the ethical attack should enjoy success, a charge made by a military suspect that he had been intercepted after he had "retained" counsel or after he had a "right" to counsel will be more difficult to repulse.

We know that in the federal courts a sixth amendment right to counsel does not attach until adversarial judicial proceedings have been instituted (often this is when an indictment is returned), and a fifth amendment right does not arise unless there is custodial interrogation. Therefore, if the suspect has an attorney but has not been charged and is not in custody, law enforcement can pose all the questions and use all the guises it desires.

The law in the military with regard to this issue is derived primarily from *United States v. McOmber*[127] and its incorporation into MRE

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[125]The provision at issue, taken from the Minnesota Code of Professional Responsibility, reads at Disciplinary Rule 7-104 as follows: "Communicating With One of Adverse Interest[:] (A) During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so." *Id.* An excellent and recent discussion by the Justice Department concerning the interrogation of suspects represented by counsel is contained in the Attorney General's June 8, 1989, memorandum to all Justice Department litigators, subject: Communication with Persons Represented By Counsel, *reprinted* as Exhibit D to the June 15, 1989 United States Attorney's Bulletin.

[126]*Id.* The Eighth Circuit also said its thinking was shared by the three other federal circuits which had by then considered the issue, United States v. Vasquez, 675 F.2d 16, 17 (2d Cir. 1982); United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir), *cert. denied*, 452 U.S. 920 (1981); and United States v. Lemonakis, 485 F.2d 941, 955-56 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989 (1974).

[127]1 M.J. 380 (C.M.A. 1976).

305(e). It is different from that employed in the federal courts and has to be reckoned with.

In *McOmber* an airman suspected in the theft of a tape deck was advised of his article 31 rights and his right to counsel, afforded him by *Miranda* v. *Arizona*[128] and *United States* v. *Tempia*[129] taken together. McOmber then "immediately requested counsel whereupon [the interrogating agent] terminated the interview after providing the name and telephone number of the area defense counsel."[130]

About two months later, and without notifying McOmber's attorney, the investigating agent again spoke with McOmber after providing the airman with fresh article 31 and right to counsel warnings. McOmber waived his rights and questioning began, concerning not only the tape deck theft, but also regarding nine related larceny offenses. McOmber made a statement that was introduced at his court-martial over defense objection. McOmber was convicted, and he subsequently appealed, based upon what he claimed was a violation of his sixth amendment right to counsel. The admission that had proved so damaging, said McOmber, had been impermissibly elicited from him after the second rights warning.

The U.S. Court of Military Appeals believed that the case agent, who was on notice that the suspect had retained counsel but who nevertheless chose to commence interrogation without the presence of McOmber's attorney, had impermissibly elected "a surreptitious interrogation technique which plainly [sought] to deprive [McOmber] of the effective assistance of counsel."[131] In a strongly worded opinion, the ***McOmber*** court specifically held

> that once an investigator is on notice that an attorney has undertaken to represent an individual in a military criminal investigation, further questioning of the accused without affording counsel reasonable opportunity to be present renders any statement obtained involuntary under Article 31(d) of the Uniform Code. This includes questioning with regard to the accused's future desires with respect to counsel as well as his right to remain silent."[132]

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[128] 384 U.S. 436 (1966).
[129] 37 C.M.R. 249 (C.M.A. 1967).
[130] *McOmber*, 1 M.J. at 381.
[131] *Id.* at 382.
[132] *Id.* at 383.

This *McOmber* rule was subsequently enacted into Military Rule of Evidence (MRE) 305(e), which states that whenever a questioner who is required to give warnings pursuant to article **31,** UCMJ,

> intends to question an accused or person suspected of an offense and knows or reasonably should know that counsel either has been appointed for or retained by the accused or suspect with respect to ***that*** offense, ***the counsel must be notified*** [emphases added] of the intended interrogation and given a reasonable time in which to attend before the interrogation may proceed.[133]

What if a suspect says when first questioned by the USACIDC that, although he has counsel, he did not require his counsel's presence and would gladly confess in his counsel's absence. Is the confession then induced by the USACIDC questioning admissible at court-martial? Probably not. MRE 305(g)(2) provides that

> a waiver of the right to counsel is not effective unless the prosecution demonstrates by a preponderance of the evidence that reasonable efforts to notify the counsel were unavailing or that the counsel did not attend an interrogation scheduled within a reasonable period of time after the required notice was given.

Does this mean the suspect cannot be brought to justice? If the only forum open is a court-martial and the only incriminating evidence in the tainted confession, the likely answer (subject to some exceptions noted below) is that he cannot. However, depending upon the type of jurisdiction (exclusive legislative jurisdiction, concurrent, or partial) that exists at the location where the on-post crime was actually committed, the state may be able to prosecute. If the state is unable or unwilling to prosecute, the local U.S. Attorney's Office may consider prosecuting under federal law.[134]

In the face of ***McOmber*** and MRE 305(e), can a wired undercover agent or informant ever obtain incriminating admissions that can be admitted at a court-martial from a suspect who is represented by counsel? The unsatisfying answer is "it depends."

If the investigator knows that the suspect he wishes to question is represented by a lawyer, the agent may be able to commence

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[133] MRE 305(e).
[134] *E.g.*, **Assimilative** Crimes **Act,** 18 U.S.C. § **13** (1982).

discussions with the target without providing notice to counsel if no questions are posed about the topic that is the basis for the legal representation or if inquiries are made that are not really designed to elicit incriminating statements. The accused in *United States v. Rollins* was an Air Force recruiter convicted of making sexual advances to and assaults upon a number of women seeking to enlist. While the case was being investigated before trial, the Air Force Office of Special Investigations took a written, sworn statement from Rollins, and during that process the recruiter acknowledged he had been warned of the suspected offenses, "coaching applicants and sexual intimacy with Air Force applicants." Up to this point, Rollins apparently was neither in custody nor under charges. Shortly thereafter, the OSI became aware that the recruiter was trying to make telephone contact with at least one of the victims; it also knew that Rollins had "obtained legal counsel," yet nevertheless instructed this victim to return Rollins' calls but not to "ask any questions."

She did as told and recounted at trial what the recruiter said to her, that "some people would be calling her and whatever she did, she should deny everything."[135] Rollins conceived an excellent argument on appeal, contending that the applicant who returned his telephone calls should have given him the right to counsel warnings required by MRE 305(e). Upholding Rollins' conviction, however, the Air Force Court of Military Review stressed much of the fact that the OSI-guided applicant who telephoned Rollins had not

> question[ed] the appellant . . . , [a]lthough obviously the OSI was hoping to gain some information in furtherance of its investigation[.] [The telephone call made by the applicant to Rollins] was not an interrogation which could have triggered the need for a warning and notice to counsel. It was a means to facilitate the receipt of a spontaneous statement [Rollins] wished to make . . . ."[136]

The court continued, "Mil. R. Evid. 305(e) notice to counsel is only required where there is an intent to question or interrogate a suspect."[137] While the result in *Rollins* is consistent with federal practice and to that extent laudatory, it does torture the fabric and arguably the spirit of *McOmber*.

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[135] United States v. Rollins, 23 M.J. 729 (A.F.C.M.R. 1986), *pet. denied*, 24 M.J. 207 (C.M.A. 1987).
[136] *Id.* at 733.
[137] *Id.*

Taking the facts one step further, the government can use a wired informant or undercover operative to affirmatively question the suspect about an offense that is different from the one for which counsel was appointed or retained. *United States* v. *Varraso*[138] held that this result stems from a common sense reading of MRE 305(e), the latter stating that counsel must be notified if "appointed for or retained by the accused or suspect with *respect to that offense* [emphasis added]." "In order to invoke the M.R.E. 305(e) notice requirement, counsel must have been appointed, or retained, to represent the accused in regard to the same offense, or a *related* offense on which interrogation is proposed.''[139] "If the offenses are otherwise unrelated, an investigator may interview an accused as to one offense without contacting the lawyer who represented him only as to the other offense.''[140]

If the questioner knows the suspect has a lawyer, the attorney need not be notified before (to the extent it can be anticipated) **a** suspect makes a spontaneous statement. Although the general rule would be that ''[i]f an accused has a lawyer, and this is known or should be known by the interrogator, the lawyer must be notified and given an opportunity to be present before interrogation may begin,''[141] notice to counsel is not required where the suspect's statements are "spontaneous or given freely and voluntarily, without any compulsion or action by one in authority.''[142]

If a suspect has an attorney but the defense counsel chooses not to appear at the interrogation session, the suspect may waive **his** right to have counsel present; the investigator need not notify counsel before questioning may begin. *United States* v. *Holliday* provides that "when . . . counsel declines the opportunity to be present at an immediately pending interrogation and an accused, after consulting with his counsel and invoking his rights, then himself initiates further communications with the investigator and voluntarily repudiates the exercise of those rights, . . . no further notice under *McOmber* **or** Mil.R.Evid. 305(e) is required.''[143]

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[138]15 M.J. 793 (A.C.M.R. 1983).
[139]United States v. Lewis, 23 M.J. 508, 510 (A.F.C.M.R. 1986) (emphasis added).
[140]United States v. Warren, 24 M.J. 656 (A.F.C.M.R. 1987), ***pet.*** *denied*, 25 M.J. 238 (C.M.A. 1987); ***see*** *also* United States **v.** Applewhite, 20 M.J. 617 (A.C.M.R. 1985).
[141]United States v. Barnes, 19 M.J. 890, 892 (A.C.M.R. 1985).
[142]*Id.* at 893.
[143]United States v. Holliday, 24 M.J. 686, 689 (A.C.M.R. 1987).

Military law enforcement personnel and the lawyers who advise them should always be sensitive to counsel rights, which are grounded upon the fifth and sixth amendments and implemented in part by MRE 305. The general rule is that if law enforcement knows or should know that an interview prospect has retained or appointed counsel with respect to the offense for which he is to be questioned, counsel must be told of the pending interview and given a reasonable opportunity to be present, and, it follows, an informant cannot be sent in to do in a surreptitious manner that which the agent or investigator may not accomplish openly. However, a wired source may properly make inquiries with respect to an offense unrelated to the current attorney-client relationship. Additionally, there is also some authority that permits sending in a wired operative (agent, investigator, or informant) to converse with a represented suspect and to monitor "spontaneous" statements made concerning the offense for which representation was sought—so long as such remarks are not elicited. In such a case, there would be no "intent to question" which would otherwise trigger the counsel notification requirement of MRE 305(e).

V. NONCONSENSUAL INTERCEPTS OUTSIDE THE UNITED STATES

This part of the article considers the conduct of *nonconsensual* intercepts, primarily those conducted outside the United States. Jurisdictional concerns with respect to such monitoring will be surfaced—especially with regard to the issues raised when a planned intercept would target the communications of an American citizen overseas who is not subject to the UCMJ.

Although USACIDC-conducted nonconsensual interceptions outside the United States are rare, they are proposed and do take place. Within the past, a nonconsensual ELSUR operation was conducted in Korea, and more recently, the SAGC refused to provide intermediate approval for a nonconsensual operation to take place in Panama. Such operations are essentially "common law" Title III's, with some twists due to their overseas nature.

Title III has no applicability outside the United States.[144] The manner in which a nonconsensual request will be handled depends upon whether the target is subject to the UCMJ and, if not, whether the target is an American.

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[144] *Berlin Democratic Club*, 410 F. Supp. at 157 n.6: "Title III of the Omnibus Crime Control and Safe Streets Act of 1968 is inapplicable to electronic surveillance abroad. *See* United States v. Toscanino, 500 F.2d 267, 279-280 (2d Cir. 1974)."

A. TARGET SUBJECT TO UCMJ

Conceptually, it should always be kept in mind that a nonconsensual intercept (even one conducted pursuant to Title 111) is nothing more than a search warrant/authorization to search for and to seize communications. USACIDC nonconsensual requests are sent directly to the SAGC with a copy to HQDA (DAPE-HRE).[145] The application is to specify the Major Army Command (MACOM) law enforcement official asking for the intercept authority.[146] In practice, and as with requests to conduct consensual intercepts, the requesting memorandum is signed for the Commander, USACIDC, by the Staff Judge Advocate, HQUSACIDC.

Also like a consensual application, all "facts and circumstances"[147] in support of the request must be delineated, to include the crime "that has been, is being, or is about to be committed."[148] The applicant must set forth the "type" of communication to be intercepted and must explain how it will be "relevant" to the investigation.[149] Both the nature and the "location of the facilities" (telephones) or, if applicable, the "place" where the intercepts are to occur are to be described with particularity.[150] The target's name, if known, must be specified.[151] The application must contain a representation regar-

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[145]Para. 2-2 a(1), AR 190-53, requires compliance with and incorporates by reference para. 2-1a, AR 190-53. DAPE-HRE is the office symbol for the Office of the Deputy Chief of Staff for Personnel, Directorate of Human Resources Development, Office of Army Law Enforcement.

[146]AR 190-53, para. 2-1a(1); *compare* 18 U.S.C. § 2518(1)(a) (1982).

[147]*Id.* at para. 2-1a (2); *compare* para. 2-5 a(1)(a) *with* 18 U.S.C.S. § 2518 (1)(b) (Supp. 1989).

[148]*Id.* at para. 2-1a(2)(a); *compare* para. 1-4e *with* 18 U.S.C.S. § 2518(1)(b)(i) (Supp. 1989).

[149]*Id.* at para 2-1a(2)(b); *compare* 18 U.S.C.S. § 2518(1)(b)(iii) (Supp. 1989). Carr writes that this provision "is the formula by which Title III attempts to satisfy the Fourth Amendment's requirement that a search warrant particularly describe the 'things to be seized.'" Carr, *supra* note 10, at § 4.4(c)(3).

> Because § 2518(5) requires an electronic search to terminate when the authorized objective is obtained, adequate description of the conversations to be overheard is essential if the surveillance is not to be unreasonably protracted . . . . Descriptions which courts have most frequently accepted . . . fall generally into four categories: the crime under investigation, parties to the conversation, location of the conversation, and time of the conversation.

Id.

[150]*Id.* at para. 2-1a(2)(c); *compare* 18 U.S.C.S. § 2518(1)(b)(ii) (Supp. 1989). Fishman says, "The 'description of facilities' requirement is usually satisfied by a simple recitation of the telephone number and the name and address of the subscriber." Fishman, *supra* note 10, at § 63. "If the location to be suggested is a residence, the application should say so and should specify the room or rooms in which the device or devices will be put . . . . " *Id.* § 64.

[151]*Id.* at para. 2-1a(2)(d); *compare* 18 U.S.C.S. § 2518(1)(b)(iv) (Supp. 1989).

ding "whether other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."[152] The TLE that will actually be used is to be identified.[153]

In an effort to limit the intrusiveness of nonconsensual intercepts, the general rule is that all such TLE requests are to state a fixed period of time the operation is to run, up to the regulatory maximum. Normally, surveillance is to cease at the earlier of the fixed period's end or the attainment of the intercept objectives. If the applicant believes that the intercept will have to continue beyond the time when the intercept's objectives will first be met, the applicant must provide an explanation in the written request. If the intercept is approved subject to this proviso, interception may continue past the point when the ELSUR objective might be said to have otherwise been first met, but only up to the regulatory time limit. "If the nature of investigation is such that the interception will not terminate automatically when the described type of communications has been first obtained, a description of the facts establishing probable cause to believe that additional communications of the same type will occur thereafter"[154] must be provided.

Planned minimization procedures, which are to be detailed in the TLE request,[155] are best explained by example. If a nonconsensual wiretap is aimed at the criminal, drug-related communications of a drug dealer and during the course of the intercept the target begins to discuss personal matters, the agent at the listening post should neither overhear nor record such conversations as soon as the agent is prudently sure the conversations are no longer criminal in nature. This is because—as alluded to above—the nonconsensual intercept is conceptually similar to a search warrant/authorization for tangible items; it permits a search and seizure of only some conversations —those that are criminal in nature—and not all conversations. Importantly, however, the agent manning the listening post may listen in and record at intermittent intervals in order to determine if the conversation has turned back to a topic criminal in nature.

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[152] *Id.* at para. 2-1a(3); ***compare*** 18 U.S.C. § 2518(1)(c) (1982).

[153] *Id.* at para. 2-1a(4); there is no parallel Title III provision within the federal sector. This request appears unique to the military and is drawn directly from DODD 5200.24, para. Ala(1)(d) of encl 2. Para. Ala(1)(d) is incorporated by Alb(1)(a). "A few *states* require the *order* to specify the eavesdropping devices which may be used. These provisions restrict the officer's discretion and enable the court to limit the intrusiveness of an electronic search." *Caw,* supra note 10, at § 4.7(b)(3) (emphasis added).

[154] *Id.* at para. 2-1a(5); ***compare*** 18 U.S.C. § 2518(1)(d) (1982).

[155] *Id.* at para. 2-1(a)(6); ***compare*** 18 U.S.C.S. § 2518(5) (Supp. 1989).

Any prior TLE applications "involving any of the same persons, facilities or places" should be detailed in the new application, along with an explanation of the disposition of each such application.[156] If this TLE request is for an extension, the applicant must explain what happened during the previously authorized intercept periods.[157] The fact that nothing transpired may not be critical, such as if the target suddenly and unexpectedly went out of the country for thirty days. Conversely, the fact that the first thirty days of the operation was a smashing success may bode ill for an extension, such as if all intercept goals have been achieved and there is no justification for continued interception.

Any application seeking authorization to intercept a military target must exhibit sufficient probable cause to convince a military judge that the target has violated, is violating, or will violate two categories of crime found in the UCMJ. The first category consists of "murder, kidnapping, gambling, robbery, bribery, extortion, espionage, sabotage, treason, fraud against the government, or dealing in narcotic drugs, marihuana, or other dangerous drugs."[158] The second set of crimes simply includes any felonious offense "dangerous to life, limb, or property."[159] A TLE may also be authorized in furtherance of an investigation of a conspiracy to commit any of the offenses listed in these two categories.[160]

Further, all requests must make a showing and affirmative representation that the proposed intercept "will not violate the relevant Status of Forces Agreement (SOFA) or the applicable domestic law of the host nation."[161] Once the request from the field is in order it is submitted by the OSJA, HQUSACIDC, through the SAGC to the Department of Defense General Counsel (DODGC). If approved by both general counsel offices, the request will next be submitted to a military judge for consideration.[162] If the SAGC were to disapprove a USACIDC request, as a practical matter the denial would not then be "appealed" to the DODGC, despite the fact that AR 190-53 plainly states that the nonconsensual TLE request will either be approved or disapproved "in writing by the DOD General Counsel, or a single

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[156] *Id.* at para. 2-1(a)(7); ***compare*** 18 U.S.C.S. § 2518(1)(e) (Supp. 1989).
[157] *Id.* at para. 2-1(a)(8); ***compare*** 18 U.S.C. § 2518(1)(f) (1982).
[158] *Id.* at para. 1-4d(2)(a); ***compare*** 18 U.S.C.S. § 2516(1) (Supp. 1989).
[159] *Id.* at para. 1-4d(2)(b); the authorized punishment for the crime must be death or a jail term of one or more years.
[160] *Id.* at para. 1-4d(2)(c).
[161] *Id.* at para. 2-2a(4)(e).
[162] *Id.* at para. 2-2a(2).

designee."[163] The plain meaning of this provision is that the DODGC, and not the SAGC, is both the approval and denial authority for such nonconsensual intercepts.

Once the request is authorized by both the SAGC and the DODGC, the application is submitted to a military judge.[164] The application would probably be accompanied by both an agent's affidavit and a proposed order, the latter clearly stating the various probable cause and other findings the judge would have to make before "an ex parte order, as requested or as modified,"[165] can issue.[166] Because all necessary legal documents will almost be clones of ones used in

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[163] *Id.* at para. 2-2a(1). In the recent past, the USACIDC has conducted no nonconsensual intercepts targeting soldiers outside the United States. Three years ago, a nonconsensual tap targeting foreign nationals in the Far East was authorized by the DODGC, i.e., the approval authority was not delegated.

[164] *Id.* at para. 2-2a(2).

[165] *Id.* at para. 2-2a(4).

[166] If the application and proposed order are prepared correctly by the servicing judge advocate, the order will "track" the requisite representations which were discussed earlier (the AR 190-53, para. 2-la requirements). A military court may not issue an intercept order unless it finds:

(a) There is probable cause to believe that a person subject to the UCMJ is committing, has committed, or is about to commit a particular offense enumerated in paragraph 1-4d(2) of this regulation.

(b) Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

(c) There is probable cause to believe that particular communications concerning that offense will be obtained through such interception.

(d) There is probable cause to believe that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(e) The interception will not violate the relevant Status of Forces Agreement or the applicable domestic law of the host nation.

Id. at para. 2-2a(4). Further, each order issued by the military judge must contain specific directions to the agents who will actually conduct the intercept.

Each order authorizing an interception shall specify:

(a) The identity of the person, if known, whose communications are to be intercepted.

(b) The nature and location of the communications facilities as to which, or the place where, authority to intercept is granted.

(c) A particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates.

(d) The identity of the agency authorized to intercept the communications, and of the person authorizing the application.

(e) The period of time during which such interception is authorized, including a statement as to whether the interception shall terminate automatically when the described communication has been first obtained.

Id. at para. 2-2a(5).

domestic Title III's, it makes sense to rely heavily upon the boiler plate examples found in the U.S. Attorneys' Manual.[167]

Although not specified in AR 190-53, the SAGC requires that certain other factors be included in all non-domestic, nonconsensual TLE requests—to include those intercepts targeting only servicemembers. The International Law Division of the appropriate judge advocate office must be consulted and satisfied that the proposed TLE operation is not inconsistent with any relevant treaty, with local law, or with any applicable SOFA provision. Further, the SAGC requires that the intercept receive the approval of the appropriate local host nation prosecutor's office. If this approval cannot realistically be obtained due to political (until recently, this was the case in Panama), corruption, or other reasons, the application should so state and provide as thorough an explanation as possible. In one instance during the recent past when such prosecutorial approval could not be secured without compromising the intercept, the SAGC requested that the USACIDC seek the ***personal*** concurrence of the U.S. Ambassador?

A nonconsensual TLE conducted outside the United States, if approved by a military judge, may be conducted for up to sixty days, subject to any number of justifiable, sixty-day extensions,[169] whereas domestic Title III intercepts and extensions of them can only be authorized for up to thirty days at a time.[170] If a sixty-day extension is warranted, the application not surprisingly "must be forwarded through channels in the same manner as prescribed for original applications."[171]

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[167]Chapter 7, Title 9, U.S. Attorneys' Manual (USAM) is entitled "Electronic Surveillance." The "Form Interception Order" is at 9-7.920 (May 9, 1984). The USAM has since been updated, but its current iteration (1 Oct. 1988) does not contain any boilerplate forms. The "new" USAM says at § 9-7.012 that the "Criminal Division is currently drafting a monograph[, and] . . . [n]ewly drafted model forms incorporating these [ECPA's] concepts are to be included in the monograph." As of July 1989, this "monograph" has yet to be published. The "boilerplate" in the 1984 Manual therefore remains a very useful point of departure. All future references in this article to Title 9, Chapter 7, will be to the edition prior to that of 1 Oct. 1988 unless clearly specified otherwise.

[168]The SAGC has on more than one occasion required U.S. ambassadorial concurrence for the conduct of consensual intercepts targeting nationals in Panama; whether this policy continues in the wake of the December 1989 U.S. invasion (Operation "Just Cause") of that country remains to be seen.

[169]AR 190-53, paras. 2-2a(7), 2-4.

[170]18 U.S.C.S. § 2518(5) (Supp. 1989).

[171]AR 190-53, para. 2-2a(7).

The regulation espouses a *strong* desire that all monitored conversations be recorded, that the conversations recorded be preserved "in such a way as will protect the recording from editing or other alterations," and that the tapes not be destroyed[172] for ten years.[173] Lastly, with respect to nonconsensual intercepts targeting soldiers outside the United States, AR 190-53 contains a regulatory exclusionary rule which compels the suppression of evidence at court-martial, at an article 15 proceeding,[174] *"or in any other proceeding"* if the communications were not intercepted in accordance with AR 190-53 "or applicable law," if the order entered by the military judge was "insufficient on its face," or if the "[i]nterception was not made in conformity with the order of authorization."[175]

B. TARGET NOT SUBJECT TO UCMJ

As an initial matter, applications to conduct nonconsensual intercept operations outside the United States targeting persons not subject to the UCMJ are to contain the same information and are to be processed in the same manner as those applications discussed above that target soldiers.[176] Additionally, an information copy of the request sent to the SAGC is to be provided to the Criminal Law Division, Office of the Judge Advocate General.[177] The application must show probable cause to believe that the criminal conduct in question "would constitute one of the offenses [or a conspiracy to commit one of these offenses] listed in 18 USC 2516(1), if committed in the United States [and] has been, is being, or is about to be committed."[178] Alternatively, the application may present probable cause to believe that one of the following crimes or a conspiracy to commit one of these crimes has been, is being, or will be committed: "Fraud against the Government [whatever that is or however broad its expanse] or any other offense dangerous to life, limb or property and punishable under Title 18 of the United States Code by death or confinement for more than one year."[179]

The applicant must demonstrate probable cause to believe that 1) communications pertinent to the targeted crime will be intercept-

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[172] *Id.* at para. 2-2a(8).

[173] *Id.* at para. 6-4, as incorporated by para. 2-2a(8); ***compare*** 18 **U.S.C.S.** § 2518(8)(a) (Supp. 1989).

[174] UCMJ art. **15** (emphasis added).

[175] AR 190-53, para. 2-2a(9).

[176] *Id.* at para. 2-2(b)(1).

[177] *Id.* at para. 2-lb.

[178] *Id.* at para. 1-4d(3).

[179] *Id.*; must any of these crimes be extraterritorial? The regulation does not address this issue.

ed;[180] and 2) that the telephone or place where the intercepts are to occur "are being used, or are about to be used in connection with the [targeted] offense, or are leased to, listed in the name of, or commonly used by the target of the proposed interception."[181] Additionally, there must be a showing, albeit not by a probable cause standard, that "normal investigative procedures have been tried and have failed, or they reasonably appear to be unlikely to succeed if tried or to be too dangerous."[182]

Should the intercept be approved by both the SAGC and DODGC, coordination is then accomplished "directly with an attorney from the Department of Justice or from a U.S. Attorney's Office for preparation of documents necessary to obtain a court order in accordance with 18 U.S.C. 2518."[183] Although the regulation speaks in terms of forwarding the necessary documents (i.e., requesting memorandum, application, affidavit, and proposed order) to the "Attorney General, or to the designated Assistant Attorney General, for approval in accordance with 18 USC 2516,"[184] Title III is inapplicable outside the United States. Therefore, neither the Attorney General (AG) nor any designated Assistant Attorney General (AAG) could authorize the conduct of an extraterritorial "common law Title III," at least not pursuant to 18 U.S.C. § 2516. Further, and as a practical matter, all *domestic* (if we are going to continue with this analogy) Title III requests are processed within the Justice Department's Criminal Division by the Office of Enforcement Operations (OEO).[185] Under Title III procedure, once the Director, OEO, is satisfied with the adequacy of the request package, it will be forwarded under the remarks of the OEO Director to an AAG,[186] who will determine whether the request should be made to judicial authority. It is exceedingly rare that the AG as opposed to an AAG would pass upon the bona fides of a Title III request.

Assuming AAG authorization is provided, a Justice Department attorney would make application for the intercept order from a court

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[180] *Id.* at para. 2-2b(1)(a); ***compare*** 18 U.S.C. § 2518(3)(b) (1982).
[181] *Id.* at para. 2-2b(1)(b); ***compare*** 18 U.S.C.S. § 2518(3)(d) (Supp. 1989).
[182] *Id.* at para. 2-2b(1)(c); ***compare*** 18 U.S.C.S. § 2518(3)(c) (1979 & Supp. 1989).
[183] *Id.* at para. 2-2b(2), which incorporates para. 2-1c.
[184] *Id.* at para. 2-lc.
[185] USAM, *supra* note 167, at para. 9-7.140.
[186] *Id.* at paras. 9-7.110 and 9-7.910; Jan. 19, 1981 Attorney General Order No. 931-81, "Special Designation of Assistant Attorneys' General to Authorize Applications for Court Offers and to Approve Emergency Interceptions of Wire and Oral Communications Under Chapter 119, Title 18, United States Code."

of competent jurisdiction, "assisted, if required, by an appropriate military lawyer."[187] Assuming further that the court petitioned enters the interception order, the military law enforcement entity conducting the intercept "shall consult with [the Criminal Law Division, Office of The Judge Advocate General] for advice on the requirements of 18 U.S.C. 2510-2520 [all of Title III], and shall provide such information to that office as is needed to demonstrate compliance."[188]

The Army Regulation makes provision for emergency intercepts, but provides no definitive instruction. It merely specifies who is to be contacted should such a situation occur and fails to provide any substantive procedural explanation about how to secure approval.[189]

C. JURISDICTIONAL CONCERNS

The regulatory provisions discussed above, which treat overseas "Title III's," assume there exists an American court sitting inside the United States with the power to issue an order permitting the conduct of eavesdrop and wiretap operations on foreign soil directed at American civilians and foreign nationals. This is a rather incredible assumption.

It is questionable whether such jurisdiction exists. Three years ago the USACIDC conducted a warrantless, extraterritorial wiretap of foreign national DOD employees in the Far East. Prior to commencement of the intercept, local host nation prosecutorial concurrence was secured. Believing that no U.S. court would have jurisdiction over the matter, the OSJA, USACIDC, request through the SAGC to the DODGC (which was approved) specifically stated, "It is the understanding of this office that should approval for this operation be granted by both the AGC and the General Counsel of the Department of Defense, no judicial authorization will be granted."

To state the obvious, there are no federal district court judges who sit outside the United States. On top of this and as already noted,

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[187] AR 190-53, para. 2-1(d).

[188] *Id.* at para. 2-1(e).

[189] *Id.* at para. 2-3, "Emergency Nonconsensual Interception in the United States and Abroad," merely indicates that if time constraints preclude obtaining an order from a court of competent jurisdiction contact should be made with "the DOD General Counsel who shall determine whether to seek the authorization of the Attorney General for an emergency nonconsensual interception in accordance with the procedures of 18 U.S.C 2518(7)."

Title III is inapplicable outside the United States.[190] How will a federal district court sitting in the United States issue a nonconsensual ELSUR order, when the nonconsensual ELSUR statute does not apply to ELSUR conducted outside the United States? Likewise, Rule 41 of the Federal Rules of Criminal Procedure, "Search and Seizure," does not apply to searches conducted outside the U.S. because, by the rule's terms, a search warrant may issue only "within the district wherein the property . . . is located."[191] It should be apparent that a U.S. federal district judge cannot issue a warrant or an order based upon and using as authority an Army Regulation or a DOD Directive. Such a warrant or order must have either a constitutional, statutory, or proper regulatory basis (an example of the last would be the Federal Rules of Criminal Procedure). If neither Title III nor Rule 41 applies outside the U.S., 1) is a court order still required or even possible, and, if so; 2) what authority would such an order be based upon; 3) what court would issue it; and 4) against what offenses could the overseas nonconsensual interception of wire, oral, and electronic communications (of people not subject to the UCMJ) be targeted?

The law in the area of overseas ELSUR is muddied and no studied attempt to clarify matters, to the author's knowledge, has been made since the Army was severely castigated in *Berlin Democratic Club v. Rumsfeld* for, not surprisingly, conducting ELSUR against civilians overseas. It appears certain that a court order would be required to target *Americans* overseas because the Bill of Rights, including the fourth amendment, applies to U.S. police activity conducted against U.S. citizens outside the country.[192] However, and except for nonconsensual electronic surveillance targeting U.S. soldiers, it is not all that certain what particular court could issue the order, or upon what authority it would be based, or whether an order would be required if foreign nationals, as opposed to U.S. citizens, were targeted.[193] Could *any* federal district court authorize a nonconsensual ELSUR operation to be conducted outside the U.S.? Is the general venue provision for *trials*, 18 U.S.C. § 3238, applicable? Would the

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[190] *Berlin Democratic Club*, 410 F. Supp. at 157 n.6 and cases cited therein; *see generally* Cam, *supra* note 10, at § 3.9.

[191] Fed. R. Crim. P. 41(a). *See also* United States v. Conroy, 589 F.2d 1258, 1268 note 15 (2d Cir. 1979).

[192] United States v. Toscanino, 500 F.2d 267, 279-80 (2d Cir. 1974).

[193] There had been recent authority, until Supreme Court reversal, supporting the view that evidence taken by U.S. law enforcement personnel from the residence of a foreign national in a foreign land is not admissible in federal court unless the seizure was pursuant to a warrant issued by a U.S. District Court. United States v. Verdugo-Urquidez, 856 F.2d 1214 (9th Cir. 1988), *rev'd*, 110 S. Ct. 1056 (1990).

outcome be different if none of the criminal acts took place in the U.S.? Importantly and most interesting, is the fourth amendment without more (i.e., independently of Rule 41) a sufficient basis upon which to issue a warrant, or is some implementing legislation or amendment to Rule 41 required?

Berlin Democratic Club resulted from the Army's conduct of warrantless ELSUR overseas against U.S. citizens and U.S. organizations. Conceding that neither Title III nor Rule 41 would apply, and conceding that there were no U.S. courts in Europe, Chief Judge Jones nevertheless ruled that, "absent exigent circumstances, prior judicial authorization in the form of a warrant based on probable cause is required for electronic surveillance by the Army of American citizens . . . located overseas."[194] He further opined that the fourth amendment by itself provided sufficient basis for the issuance of an ELSUR warrant in such a circumstance: "Rule 41(a) cannot limit or restrict the dictates of the Constitution [of] the United States. . . . . The court's authority over federal officials is sufficient to require an official to present for approval in the United States a warrant for a wiretap overseas."[195] Although Chief Judge Jones may have believed he had authority to issue an ELSUR order targeting Americans overseas based solely upon the fourth amendment, there are over ninety other federal judicial districts, and his views may not be universally shared. To carry his logic a bit further, one would have to conclude that a federal district judge sitting in Connecticut has the power, despite the clear wording of Rule 41 to the contrary, to issue a search warrant with respect to evidentiary items to be seized in Alaska.

Although it cited the *Berlin Democratic Club* opinion and even quoted it, the Second Circuit recently has nevertheless felt compelled to suggest that "[t]he U.S. Attorney may wish to draw to the attention of Congress that, apparently, it has never given authority to any magistrate to issue warrants outside the confines of a judicial district."[196] This is clearly some indication by appellate judiciary that a federal district court does not have authority based solely upon

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[194] *Berlin Democratic Club*, 410 F. **Supp.** at 159.
[195] *Id.* at 160; *see also Toscanino*, 500 F.2d at 280.
[196] *Conroy*, 589 F.2d at 1268 n.15.

the fourth amendment to issue warrants with respect to searches conducted outside the judicial district.[197]

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[197] *Compare* § 106 of the ECPA, found at 18 U.S.C.S § 2518(3) (Supp. 1989). ECPA amended § 2518(3) to permit federal district courts to issue orders approving the non-consensual interception of wire, oral, or electronic communications *"outside that jurisdiction* [emphasis added] but within the United States in the case of a mobile interception device." The requirement to seek a court order from a U.S. Court with respect to ELSUR targeting foreign nationals or American civilians and conducted overseas is contained within AR 190-53, as a consequence of the settlement reached with the plaintiffs in *Berlin Democratic Club*. In that agreement, the Army impliedly recognized that a U.S. court would probably not have the power to issue such a warrant (see *infra Berlin Democratic Club* agreement numbered paras. 1a(4) and 1(b)(3)), Joint Motion and Stipulation for Dismissal filed Apr. 4, 1980. The Agreement with respect to ELSUR provides as follows:

> The parties to this motion have determined to settle this action without trial or further adjudication of any issue of fact or law, and without in any manner indicating by the settlement that any party in this lawsuit admits any issue of fact or law. It is agreed as follows:
>
> *THE AGREEMENT*
>
> 1. *Electronic Surveillance*
>
> a. The Army shall within 180 days of the Court's approval of this Agreement amend its regulations governing electronic surveillance activities directed against United States persons located outside the United States to incorporate the judicial warrant requirement described in the March 17, 1976, Memorandum and Order in this case, reported at 410 F. Supp. 144(1976), as amplified by this Agreement. The parties to this motion agree that the facts of the case which were presented to the Court did not involve United States citizens who were agents of foreign powers or who were in possession of foreign intelligence information.
>
> (1) The warrant requirement shall be applied to requests or suggestions to foreign governments to conduct electronic surveillance on behalf of the Army as well as to surveillance conducted by the Army.
>
> (2) The Army shall seek a warrant only when there is probable cause to believe that an individual is committing, has committed, or is about to commit an act that, if done in the United States, would be an offense enumerated in 18 U.S.C. § 2516, and only when the requirements of 18 U.S.C. § 2318(3)(b)-(d) are satisfied. The application for the warrant shall include the matters enumerated in 18 U.S.C. § 2518(1)(b)-(f) and a pledge to minimize the interception of U.S. person communications unrelated to the purpose of the surveillance. The period of the surveillance will extend no longer than necessary to achieve the objective of the surveillance, but in no event longer than ninety (90) days. Extensions of an authorization shall be handled in the same manner as original applications.
>
> (3) When there are grounds on which a warrant could be sought under sub-paragraph (2), and insufficient time to obtain a warrant, the Army may engage in electronic surveillance if an application for a warrant is made in accordance with sub-paragraph (2) within 72 hours after the surveillance has begun. In the absence of a warrant, such surveillance shall end when the communications sought are obtained or when the application for the warrant is denied, whichever is earlier.
>
> (4) The Army may engage in electronic surveillance without a warrant whenever an application for a warrant is made in good faith to an appropriate court and, despite the Army's assertions to the contrary, is denied for lack of jurisdiction.
>
> (b) At any time within five years from the date of this Agreement, counsel for the plaintiffs may obtain from the Army, upon written request to the Army General Counsel, the following information:
>
> (1) The number of electronic surveillances conducted or requested by the Army against United States persons outside the United States since the date of

Assuming, arguendo, that a U.S. federal district court would be willing to issue a nonconsensual ELSUR order permitting the targeting of Americans outside the U.S., how would the intercept order directing foreign telephone company cooperation be enforced? Would foreign national governments permit U.S. law enforcement personnel to conduct successive break-ins on their soil in order to install, maintain, and remove bugging equipment? Would the intercept order have to place any sort of limitation upon the type of offenses that could be investigated using ELSUR? Perhaps so. Perhaps only those U.S. crimes that are clearly extraterritorial in nature could be pursued electronically, a list of offenses which would be considerably different and probably much shorter from that appearing at 18 U.S.C. § 2516(1).

Are *overseas* foreign nationals entitled to the protection of the U.S. Constitution with respect to U.S. law enforcement operations directed against them *outside* the United States? An initial, perhaps sane visceral response is, "no." The issue, had been far from clear. In *Toscanino* the Second Circuit had suggested that foreign nationals were entitled to such protection.[198] The Supreme Court has decided just this year that some protections provided in the Bill of Rights, at least with respect to the fourth amendment, are not enjoyed outside the United States by foreign nationals.[199] The question remains, however, whether this American constitutional benefit will accrue (to the extent such benefits now exist) if any evidence obtained is not intended for presentation before an American tribunal.

VI. PEN REGISTERS/TRAP AND TRACE DEVICES

A pen register (sometimes also referred to as a dialed number recorder (DNR) or a touch tone decoder) is a device that looks

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this agreement;

(2) The number of surveillances described in (1) for which judicial warrants were obtained or sought;

(3) Of the surveillances enumerated in (1) for which judicial warrants were not obtained, the number for which warrants were sought but denied for lack of jurisdiction, along with an indication of the courts from which the warrants were sought; and

(4) Copies of any changes to any Army Regulations governing electronic surveillance activities against United States persons located outside the United States.

[198] *Toscanino*, 500 F.2d at 280; *contra*, *Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988), *rev'd*, 110 S. Ct. 1056 (1990); and Matta-Ballesteros v. Henman, 896 F.2d 255 (7th Cir. 1990).

[199] *See* United States v. Verdugo-Urquidez, 110 S. Ct. 1056 (1990).

something like an oversized calculator; it is attached to the same "line," albeit probably some distance away, as the target phone. The pen register may even be set up at a USACIDC office or at a leased room/apartment close to the target instrument. In this fashion, after the agents determine from the pen register who the suspect just called, they can put a tail on the caller or, if the caller goes nowhere, they will be in a position to see who might arrive in response to the call just registered.

As numbers are dialed from the target phone, the pen register prints out on calculator-like paper this information: the time the phone receiver is lifted off the cradle, i.e., when it goes "off hook"; all numbers dialed, which would include all dialing errors (e.g., wrong numbers); and the time the target phone is hung up (i.e., when the phone goes back "on hook").

A pen register can also suggest that the suspect received an incoming call. If the paper tape reveals that the receiver went off hook at 0800:00, no numbers were dialed, and that it went back on hook at 0810:25, although it is possible that the receiver simply was knocked off its cradle and was not replaced until 10 minutes and 25 seconds later, the probable explanation is that an incoming call was received. If the suspect's conspirators were under surveillance during the time when one of them was seen to make a 10 minute call from a pay phone at 0800:00, it is pretty good odds that the conspirator called the registered phone. The more sophisticated pen registers, such as the ones in the USACIDC inventory, are joined with a small computer, which can be programmed to emit an audio tone to the monitoring agents every time the target phone makes calls to numbers of particular investigative interest.

The pen register has a statutory definition as well: "a device which records or decodes electronic or other impulses which identify the numbers dialed or otherwise transmitted on the telephone line to which it is attached."[200] Pen register data is preferable to toll records

[200] 18 U.S.C.S § 3127(3) (Supp. 1989).

(long distance telephone bills)[201] for several reasons: 1) Today, with the break up of AT&T and the concomitant birth of a plethora of long distance companies, the investigator can no longer assume that a grand jury or administrative subpoena to the local telephone company will catch all or any long distance calls made from the target phone.[202] Assuming you guess correctly about the suspect's principal long distance carrier, consider also that the suspect might a) use more than one long distance communications carrier and make a number of long distance calls by first dialing a local number to access Sprint, MCI, etc.; or b) that call forwarding through a local number might be used. 2) Toll records only reflect long distance or "toll" calls; your suspect might conduct his criminal enterprise within the same billing area. As an example, calls made between Washington, D.C., suburban Maryland, and suburban Virginia exchanges are all in the same local billing area.

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[201] 18 U.S.C.S. § 2703(c) and (d) (Supp. 1989) now stipulates that government entities may secure toll records and subscriber information only by obtaining an administrative subpoena (e.g., one issued at USACIDC request by the DODIG), grand jury subpoena, warrant, court order (pursuant to 18 U.S.C.S. § 2703(d) (Supp. 1989)) or by customer consent. Subscriber information reveals who is the listed subscriber to a particular phone number. Subscriber information is needed, of course, if the targeted telephone number is unlisted. If USACIDC agents need toll records or subscriber information, a DODIG subpoena should be considered. The region judge advocate or (in his absence) the OSJA, HQUSACIDC, can assist with the preparation of the DODIG subpoena request. ***See generally*** Message, HQ, Dep't of Army, DAJA-CL, 3013302 Nov 89, subject: Pretrial Subpoena of Witnesses and Documents.

Other investigative tools that may be employed to ferret out the long distance carriers used by the target include a garbage search (at least with respect to trash placed at curbside, California v. Greenwood, 108 S. Ct. 1625 (1988); look for discarded phone bills) and a mail cover. The latter may be employed for up to thirty (30) days at a time. 39 C.F.R. § 233.3 (1988); ***see generally*** United States v. Choate, 576 F.2d 165 (9th Cir.), ***cert. denied,*** 439 U.S. 953 (1978). A mail cover is defined as

> the process by which a record is made of any data appearing on the outside cover of any class of mail matter, including checking the ***contents*** of any second-, third-, or fourth-class mail matter as now sanctioned by law, in order to obtain information in the interest of (i) protecting the national security, (ii) locating a fugitive, or (iii) obtaining evidence of commission or attempted commission of a crime.

39 C.F.R. § 233.3(c)(1) (1988) (emphasis added). A "crime" for the purpose of the provision just quoted is a felony or any attempted felony, 39 C.F.R. § 233.3(c)(3) (1988).

[202] It is often difficult to work with raw toll record or pen registration data, especially with regard to unlisted subscribers. As already suggested, although subscriber information can be obtained by subpoena, warrant, etc.—even for such unlisted subscribers—this takes time. An excellent alternative for ***listed*** subscribers is a "criss-cross" or reverse phone book which is arranged by phone—lowest number first, largest last. Since these commercially published books are usually limited to the number of exchanges (i.e., the 3 digit prefix before the 4 digit suffix) they will carry, more then one reverse phone book may be required. Local police and libraries will probably carry these publications. As an example, within the Washington, D.C., area a "criss-cross" directory is published by Haines and Co., Inc., Forestville, MD. As of January 1989, they charge $151.00 for a D.C. directory and $197.00 for a Virginia book.

Pen register data is very useful to show criminal associations and often is used, along with toll record data, to substantially underpin affidavits in support of Title III orders, particularly with regard to prospective wire intercepts. A wiretap application will often lack probable cause absent coherent, meaningfully arranged, or sorted pen register data. When such an application is prepared, often the pen register and toll record information will have been computer sorted by the investigative agency in three ways to assist the attorney who is drafting the Title 111application, affidavit, and order: chronologically; by telephone number (lowest to highest, e.g., (000) 000-0000 to (999) 999-9999); and alphabetically (by available phone address/ subscriber information).

A trap and trace is the conceptual reverse of the pen register. It will document the numbers from which incoming calls originate. Statutorily, a trap and trace is defined to mean ''adevice which captures the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communications was transmitted.''[203] This technique is particularly useful during bomb threat, obscene phone call, extortion, hostage taking/kidnapping, and similar investigations.

Until the advent of the Electronic Communications Privacy Act of 1986(ECPA),[204] the USACIDC was not statutorily required to obtain a court order from a federal court prior to the initiation of nonconsensual pen register or trap and trace operations. These activities were certainly not subject to fourth amendment restrictions.[205] The USACIDC was then (and still is) regulatorily required to comply with Chapter 3, AR 190-53, with regard to registering; inasmuch as Chapter 4, AR 190-53 applies only to *consensual* tracing, there is within the Army a regulatory void with respect to nonconsensual trap and trace activity. This regulatory vacuum is probably little more than of passing intellectual interest inasmuch as the USACIDC, to the author's knowledge, has never conducted a nonconsensual trap and trace operation.

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[203] 18 U.S.C.S. § 3127(4) (Supp. 1989). It is not precise to call a trap and trace (or "lockout" as it is sometimes called) a "device" because today, with the variety of switching apparatuses employed by the diverse telephone companies, it is more apt to refer to it as a "procedure." More likely than not, the "procedure" will involve programming a telephone company computer to identify or tag all incoming codes of investigative interest.

[204] *See supra* note 5.

[205] Smith v. Maryland, 442 U.S. 735 (1979).

The approval process within the Department of the Army for domestic, nonconsensual registering operations is the same as that followed for domestic *consensual* wire and oral intercepts.[206] If the operation is to be run outside the United States, the pen register request should also specify whether its conduct will be consistent with either the "relevant Status of Forces Agreement or the applicable domestic law of the host nation."[207] Application to the SAGC (through the OSJA, HQUSACIDC)for permission to conduct registering must contain the same information as must a request to conduct a consensual intercept—with one important exception: a pen register request must include information sufficient to conclude "that there is probable cause to believe that the operation will produce evidence of a crime."[208] This regulatory, unamended "probable cause" requirement has been a *non sequitur* since *Smith* v. *Maryland*[209] was decided a decade ago; accordingly, it is treated as such.

Once approval to conduct a nonconsensual pen register or trap and trace within the United States has been received from the SAGC, an application must be made to a federal court (the term "federal court" here includes a federal magistrate).[210] It is to include the iden-

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[206]"Pen register operations are approved by the same authorities and in the same manner, subject to the same restrictions, as consensual interceptions . . . . " AR 190-53, para. 3-2.

[207]*Id.*

[208]*Id.* at para. 3-2b.

[209]*See supra* note 22 and accompanying text.

[210]The Federal pen register/trap and trace statute, 18 U.S.C.S. Chapter 206 (Supp. 1989), specifically authorizes magistrates to act upon applications for these registering and tracing "devices," 18 U.S.C.S. § 3127(2)(A) (Supp. 1989).

It is possible that there now exists a way to bypass this statutorily mandated authorization requirement. Some commercial telephone companies (including the Bell Atlantic affiliate, C&P Telephone) have begun to market trap and trace services (sometimes also referred to as "automatic number identification" (ANI)) to their business and residential customers for between $6.50-8.50 per month. For example, in the Washington, D.C., area, C&P offers such a service, which it names "Caller ID." A C&P sales brochure recites, "Caller ID lets you view the telephone number of an incoming call on a customer provided display unit [purchased independently at a cost of roughly $20-80] so you can identify who is calling before you answer the phone." The advent of this service has spawned lively debate. Service proponents claim that customers will now be able to screen out unwanted harassing and junk calls. Concerns have been raised by some, such as providers of hotline services, that would-be callers will now be dissuaded from seeking hotline help for fear their identities will become known and, as a consequence, that the confidentiality of their conversations will be ruptured. Customers paying for unlisted telephone numbers feel cheated. Some law enforcement officials are afraid that they will no longer be able to safeguard the secrecy of undercover telephone lines.

"On both sides of the debate people carry the banner of privacy. Proponents feel that they have the right to know the numbers of people who call them; opponents say that to safeguard their own numbers in an age of telemarketing and computer data bases, the service must be blocked." Washington Post, Dec. 5, 1989, at B-1, col. 2. "The potential for abuse, however, feeds the debate over telephones and privacy

tities of both the government attorney making the application and the law enforcement agency conducting the investigation; further, the application must contain the government attorney's certification under oath "that the information likely to be obtained is relevant to an ongoing criminal investigation."[211] After these rather bare-boned representations, the court *must* enter an order permitting the registering or tracing;[212] such orders, including extensions, permit operations for up *to* sixty days.[213] This statutory authorization period for nonconsensual registering and tracing operations is to be contrasted with the abbreviated thirty day approval limit that can be granted at any one time by the SAGC.[214]

A court order to conduct domestic registering or tracing was neither constitutionally nor statutorily required prior to the enactment of the ECPA. Court orders became statutorily required (despite the USACIDC's expressed opposition to this feature of the ECPA

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rights. At the heart of it is this question: Does a public utility—the phone company—have the right to release phone numbers, particularly unlisted ones, to individuals and institutions willing to pay a fee for the information?" Wall Street Journal, Nov. 29, 1989, at 1.

Janlori Goldman, a staff attorney for the American Civil Liberties Union (ACLU) project on privacy and technology, suggests that "Caller ID" service violates the ECPA. J. Goldman, Memorandum Asking "Is the Use of Automatic Number Identification ('Caller ID') Covered by the Electronic Communications Privacy Act (ECPA)?" (Oct. 13, 1984). This view is shared by the American Law Division (ALD), Congressional Research Service, Library of Congress. Charles Doyle, an ALD Senior Specialist, recently wrote the House Committee on the Judiciary, which had questioned whether Caller ID was contrary to the ECPA. Said Mr. Doyle: "It appears to be. The language of the Act prohibits installation and use." Elaborating in his concluding remarks, Mr. Doyle commented that

> use of telephone equipment which displays a name associated with the number of the instrument used for incoming calls appears to be prohibited by the language of 18 U.S.C. 3121 enacted as part of the Electronic Communications Privacy Act of 1986. The Act's legislative history fails to refute the plain meaning of the Act's language and may be read to confirm that Congress intended the Act's proscriptions to apply to such cases.

C. Doyle, Memorandum Concerning "Caller Identification Telephone Equipment and the Electronic Communications Privacy Act" (Oct. 18, 1989).

Proponents are most likely to claim that such service is consistent with 18 U.S.C.S. § 3121(b) (Supp. 1989), which states that the court order requirement set out in 18 U.S.C.S. § 3121(a) (Supp. 1989) "does not apply with respect to the use of . . . a trap and trace device by a *provider* of such . . . service . . . where the consent of the *user* of that service has been obtained" (emphases added). The difficulty with this reliance, as Ms. Goldman and Mr. Doyle correctly point out, is that although there is user consent with "Caller ID," the user and *not* the provider (telephone company) actually utilizes the service.

[211] 18 U.S.C.S. § 3122(b) (Supp. 1989).

[212] "Upon an application made . . . the court *shall* enter an ex parte order authorizing the installation and use of a pen register or a trap and trace device within the jurisdiction of the court . . . ." 18 U.S.C.S. § 3123(a) (Supp. 1989) (emphasis added).

[213] 18 U.S.C.S. § 3123(c) (Supp. 1989).

[214] AR 190-53, paras. 3-2 and 2-5b(1).

legislation) for registering and tracing operations because, as a matter of realpolitik, this type of ELSUR with Department of Justice (DOJ) participation was already being conducted, consistent with long standing and voluntarily self-imposed DOJ policy, with court approval. This DOJ practice had come about primarily because of telephone company reluctance, especially by the Bell System, to assist the government without a court order. Bell believed that without such an order, it would not be adequately protected from possible suits by disgruntled customers. As the result of discussions between the Bell legal staff and the DOJ Criminal Division,[215] the Assistant Attorney General, Criminal Division, issued a memorandum to all U.S. Attorneys and Strike Force Chiefs directing that

> no pen register shall be installed by any *federal* law enforcement agency except pursuant to an order issued by a Federal District Court. Such an order may be obtained pursuant to Rule 57(b) F.R.Cr.P. and as an adjunct thereto an order pursuant to the All Writs Act may be obtained directing the cooperation of the concerned telephone company . . . In no case should the duration of any order [excluding thirty-day extensions] exceed thirty days . . . .[216]

Therefore, when that portion of the proposed ECPA legislation concerning pen register as well as trap and trace operations was surfaced for comment during congressional consideration, the Justice Department interposed no objection because the suggested pen register/trap and trace statutory language in effect did little more

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[215]The author was present during these negotiations. Participants besides the Bell legal staff were Philip Wilens, Director, Office of Enforcement Operations, Criminal Division; and Irvin B. Nathan, Deputy Assistant Attorney General, Criminal Division.

[216]Memorandum from Philip B. Heyman, Assistant Attorney General, Criminal Division, to all U.S. Attorneys and Strike Force Chiefs, subject: Pen Registers (Dec. 18, 1979)(emphasis added). The Bell System had found this approach acceptable. James A. De Bois, Associate General Counsel, AT&T, wrote Nathan concerning the Rule 57(b)/All Writs Act approach, on December 3, 1979, commenting, "[W]e shall recommend to our Operating Telephone Companies of the Bell System that they accept such pen register orders. . . Thereunder . . necessary information, facilities, and technical assistance shall be provided . . when such a court order directs the Telephone Company pursuant to All Writs Act, 28 U.S.C. § 1651(a), to render assistance."

This policy was later incorporated within the U.S. Attorneys' Manual and overtaken, of course, by the ECPA. *See* USAM, *supra* note 167, at § 9-7.014, which offers pen register application and order formats; *see also id.* § 9-7.925, "Application for Pen Register," and *id.* § 9-7.926, "Order for Applying for Pen Registrar." *See also* USAM provisions relating to trap and trace operations at § 9-7.231, "Trap and Trace Guidelines," § 9-7.927, "Form Trap and Trace Applications," and § 9-7.928, "Form Trap and Trace Order."

than codify DOJ's existing practice.[217] Thus, whenever the USACIDC wishes to conduct nonconsensual,[218] domestic pen register or trap and trace operations, a pro forma statutorily mandated order must be obtained from a federal district court by a Justice Department attorney.

As discussed above, both consensual and nonconsensual domestic and extraterritorial pen register operations require the approval of the SAGC. After concurrence is received from "judge advocate personnel," consensual domestic and extraterritorial trap and trace operations do not need SAGC authorization and may be approved by either the "local military facility commander" or by the Commander, USACIDC. Proposed off-post, consensual tracing operations "shall" be coordinated with "local civilian or host country authorities when appropriate." No trap and trace operations may be conducted without the antecedent approval of the appropriate USACIDC region commander.[219]

As suggested earlier, AR 190-53 simply does not address the conduct of nonconsensual tracing operations. Common sense, however, would seem to call for some judge advocate legal review prior to requesting DOJ (or district attorney) application to a federal district or state court (with respect to domestic, nonconsensual tracing operations) and before seeking local host nation prosecutorial approval and assistance (with respect to overseas, nonconsensual tracing operations). As a practical matter, it will probably be impossible to obtain telephone company assistance without the foreign prosecutorial cooperation.

VII. AFTER ACTION REPORTS

At the conclusion of either consensual, nonconsensual, or pen register[220] operations, the performing USACIDC field office must

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[217] The Criminal Division's Office of Enforcement Operations remarked in its December 15, 1986, Analysis of the Electronic Communications Privacy Act of 1986, Public Law No. 99-508, at p.5, that "[b]y and large . . . Title [Title III, ECPA, dealing with pen registers as well as trap and trace devices] . . . merely codifies existing Department policy and practices on pen registers and trap and trace devices. 18 U.S.C. §§ 3121-3125." Parenthetically, the USACIDC objected to the codification of this policy.

[218] Consensual Operations are specifically not covered by Title III of ECPA, 18 U.S.C.S. § 3121(b)(3) (Supp. 1982): " . . . [N]o person may install or use a pen registration or a trap and trace device without first obtaining a court order . . . [except] where the consent of the user of that service has been obtained."

[219] AR 190-53, para. 4-2.

[220] Pen registers; *see gewully* AR 190-53, ch.3.

prepare an after-action report[221] through (usually) the region judge advocate to the OSJA, HQUSACIDC, where results from all five USACIDC regions are compiled and become the consolidated USACIDC quarterly TLE report. This report is required by AR 190-53.[222] Exactly what must be set forth in the field after-action reports funneled to the OSJA is set forth with some specificity at Appendix A, AR 190-53. Additionally, the USACIDC requires its field elements to include in these reports identifying data with respect to each "reasonably identifiable person intercepted," to include name, citizenship, social security number, as well as the date and place of birth.[223] Also, the field must provide the telephone numbers "involved in the interception." Presumably, this means both the originating and receiving numbers; practically speaking, however, unless both a pen register and trap and trace devices were operational during the intercept, only one set of numbers may be available, i.e., originating *or* receiving, but not both.[224] Finally, the field element must include the interception location address[225] and the "inclusive dates of the interception."[226] USACIDC agents consistently misinterpret this last provision to require a recitation of the dates during which interception was *authorized* instead of the dates when intercepts were actually *conducted.*

The information that the USACIDC requires in addition to that specified in Appendix A, AR 190-53, is necessary in case there is ever a future inquiry regarding whether an intercept took place and whether a named person was ever bugged or tapped.[227] It is certainly not uncommon for suspects selected for interception not to be recorded (e.g., the operation was compromised and the "bad guys" never showed up). Conversely, people not targeted are often in-

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[221]USACIDC Supp., para. 1-6i(3), provides that USACIDC region commanders will, "[w]ithin five (5) working days after completion of an intercept operation, ensure that the Commander, USACIDC, ATTN: CIJA-ZA [i.e., the Staff Judge Advocate's Office] is provided in writing with that appropriate factual information detailed in appendix A and paragraph 6-2 of [AR 190-53]."

[222]AR 190-53, para. 7-2: "USACIDC . . . will provide OACSI, HQDA (DAMI-CIC) [Office of the Deputy Chief of Staff for Intelligence] a quarterly report . . . not later than the 8th day of the month following the quarter indicated." The quarters conclude in March, June, September, and December, and the reports to DAMI-CIC will reflect "all interceptions of wire and oral communications, pen register operations and unsuccessful applications for nonconsensual interceptions conducted by the Army in the United States and abroad." *Id.* at para. 7-1a.

[223]*Id.* at para. 6-2a(1).

[224]*Id.* at para. 6-2a(2).

[225]*Id.* at para. 6-2a(4).

[226]*Id.* at para. 6-2a(5).

[227]As, for example, pursuant to 18 U.S.C. § 3504 (1982).

tercepted (e.g., the targeted "bad guy" unexpectedly takes the wired source into a bar which causes a hundred customers to be incidentally bugged).

Although the OSJA, USACIDC, religiously forwards its consolidated TLE after-action reports to the Army's Office of the Deputy Chief of Staff for Intelligence each quarter, that office has on more than one occasion advised that they do not want the reports, do not use them, and do not forward the compilations to anyone.[228] This might at some stage cause the Army some embarrassment inasmuch as the Attorney General—as long ago as November 7, 1983—issued a memorandum to the Heads and Inspectors General of Executive Departments and Agencies, in which he directed that each department and agency head *"shall* [emphasis added] make quarterly reports summarizing the results of [consensual oral intercepts conducted within the United States] . . . to the Office of Enforcement Operations in the Criminal Division."[229] Because the USACIDC quarterly TLE reports never leave the offices of the Deputy Chief of Staff for Intelligence, it would be fair to conclude that the data therein are not reported to the Attorney General as he has directed.

VIII. VIDEO SURVEILLANCE

The USACIDC has a number of concealable video cameras. Inasmuch as video-only cameras do not acquire the contents of conversations, they are outside the pale of Title III regulation.[230] Coincidentally, video-only surveillance is not governed by AR 190-53 either. Although such interceptions may not be statutorily controlled, members of the law enforcement community and their legal advisers

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[228] The OSJA, HQUSACIDC, has written the proponent urging that this AR 190-53 provision be changed.

[229] The Attorney General further requires that this quarterly report "contain the following information broken down by offense or reason for interception: the number of requests for authorization, the number of emergency authorizations, the number of times that the interceptions provided information which corroborated or assisted in corroborating the allegation or suspicion, and the number of authorizations not used." Section VI, Memorandum to the Heads and Inspectors General of Executive Departments and Agencies, subject: Procedures for Lawful, Warrantless Interceptions of Verbal Communications, November 7, 1983.

[230] *See generally* Carr, *supra* note 10, at § 3.8:

> Title III regulates only the interception of wire and oral communications. Consequently, use of video equipment is not covered by the statute where only a video record is created, used, or disclosed. If, however, law enforcement officers use equipment which records sounds as well as sights so that spoken communication can be [nonconsensually] overheard or recorded, Title III will be applicable with reference to the audio portion of the videotape.

See also Fishman, *supra* note 10, at § 415.

must be aware that there may well be fourth amendment implications depending upon where the camera is to be located (upon a pole situated along an interstate highway v. inside a private dwelling) and the method by which the camera is to be installed (non-trespassory v. break-in). Some courts have gone beyond Rule 41 of the Federal Rules of Criminal Procedure to fashion "common law Title III" requirements appropriately tailored to video surveillance. *United States v. Cuevas-Sanchez*[231] is instructive in this regard. Following the lead of both the Second[232] and Seventh[233] Circuits, the Fifth Circuit in *Cuevas* ruled that although Title III was inapplicable to nonconsensual, video-only surveillance and therefore the statute's "technical requirements" could not be adopted "verbatim," Title III should and was to be used "as a guide for the constitutional standard."[234]

Cuevas was believed to be a drug dealer. In early 1986 the U.S. Attorney for the Western District of Texas sought and received authorization from a federal district court to surreptitiously mount a concealed TV camera on a power company pole, which, once installed, provided sufficient clearance over a ten foot high fence to permit law enforcement observation of what transpired in Cuevas's yard. The government's application was based upon an agent's "extensive" affidavit, was authorized by the Director of the DOJ Criminal Division's Office of Enforcement Operations, and recited "that conventional law enforcement techniques, although attempted, had failed."[235] The court order directed "the police to minimize observation of innocent conduct and to discontinue the surveillance when none of the suspected participants were on the premises."[236]

The video surveillance was successful, and as a direct result Cuevas was stopped leaving his premises in a car stuffed with marijuana. Cuevas contended on appeal that Title III should have been followed in *all* particulars, and not used merely as a loose template. The Fifth Circuit disagreed and unequivocally bestowed its imprimatur upon the nonconsensual video surveillance standards (borrowed from Title 111) that had previously been fashioned and adopted by the Seventh Circuit:

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[231] 821 F.2d 248 (5th Cir. 1987).
[232] United States v. Biasucci, 786 F.2d 504 (2d. Cir), *cert. denied*, 107 S. Ct. 104 (1986).
[233] United States v. Torres, 751 F.2d 875 (7th Cir. 1984), cert. *denied sub nom.* Rodriguez v. United States, 470 U.S. 1087 (1985).
[234] *Cuevas*, 821 F.2d at 251.
[235] *Id.* at 249.
[236] *Id.* at 250.

(1) the judge issuing the warrant must find that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous," 18 U.S.C. 2518(8)(c); (2) the warrant must contain "a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates," *id.* § 2518(4)(c); (3) the warrant must not allow the period of interception to be "longer than is necessary to achieve the objective of the authorization, []or in any event longer than thirty days" (though extensions are possible), *id.* § 2518(5); and (4) the warrant must require that the interception "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under [Title III],'' *id.*[237]

All nonconsensual video surveillance situations, to include those "gray area" instances where the intercept target might argue that there is a reasonable expectation of privacy and those situations where the government could advance an implied consent theory (e.g., entry on to a military installation), should always be scrutinized for potential fourth amendment and Military Rule of Evidence 315[238] implications. In an abundance of caution, a warrant/authorization should always be considered.[239]

IX. TRACKING DEVICES

The USACIDC has some tracking devices (sometimes also referred to as transponders) that await imaginative investigative use. Their employment may well involve fourth amendment and MRE 315 considerations, depending upon the manner in which they are to be installed and used. An extensive discussion of these devices is outside the scope of this article, but suffice it to say that their utilization is not governed by AR 190-53. The ECPA mentions them but briefly, to provide a working definition[240] and to permit federal district courts

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[237] *Id.* at 252 (quoting *Biasucci*, 786 F.2d at 510.

[238] MRE 316, "Probable Cause Searches."

[239] An excellent two part summarized analysis of the current state of video surveillance law appears in the January and February 1989 *FBI Law Enforcement Bulletin* entitled, "Lights, Camera, Action[-]Video Surveillance and the Fourth Amendment,'' by Special Agent Robert A. Fiatal. Part one is at page 23 of the January 1989 issue, and part two is at page 26 of the February 1989 issue.

[240] A "tracking" device may also be loosely referred to as a "beeper." (The term "beeper" may also be heard to mean a *pager*. To avoid any confusion it is preferabie to omit reference to beepers and to simply use the terms "tracking device" and "pager.") A tracking device "means an electronic or mechanical device which permits the tracking of the movement of a person or object." 18 U.S.C.S. § 3117(b) (Supp. 1989).

to authorize their use *outside* the district if the electronics originally had been installed while *inside* the district.[241]

There are two seminal Supreme Court opinions in this area of electronic surveillance law, *United States* v. *Knotts*[242] and *United States* v. *Karo*.[243] The former concluded that use of a tracking device "to follow a drum of chloroform being driven on public roads does not constitute a search,"[244] and the latter held that there was no search within the meaning of the fourth amendment when "law enforcement officials [installed] a beeper into a container of chemicals with the consent of the seller but without the knowledge of the purchaser." The court continued that a search requiring a warrant occurs, however, when this same beeper is monitored "after the container has come to rest in a location where a person enjoys fourth amendment protection."[245]

Therefore, tracking device fourth amendment analysis must examine the following: 1) the manner in which the transponder is to be installed (is there consent of a person with proper, possessory rights to the item to or in which the device is to be affixed or installed?), and the nature and degree of trespass, if any, required for installation; and 2) how the monitoring of the tracking device is to be conducted (will monitoring take place only while the item, car, plane, etc., is in an area accessible to the general public or will electronic surveillance continue when the tracked item transmits from a private location?). As with the conduct of video surveillance, if there is doubt about the possible application of the fourth amendment, one cannot go wrong to seek a warrant—for both the manner of installation and monitoring.[246]

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[241] 18 U.S.C.S. § 3117(c) (Supp. 1989); this gets around the Fed. R. Crim. P. 41 problem discussed earlier. Recall that Rule 41 permits a federal court to authorize a fourth amendment intrusion only "within the district wherein the property or person sought is located."

[242] 460 U.S. 276 (1983).

[243] 104 S. Ct. 3296 (1984).

[244] *See also* Fishman, *supra* note 10, at § 381.

[245] To determine whether warrantless installation of and tracking by monitoring the beeper comply with the Fourth Amendment, courts have used a two-step analysis: first, to determine whether the attachment of the beeper on, or its installation in the monitored object . . . required a prior warrant; and second, to determine whether monitoring the signals and locating the "beeperized" object without a warrant violated the suspect's expectation of privacy.

Id.

[246] Carr, *supra* note 10, at para. 3.2(c)(2)(1).

X. PAGERS

Earlier this year a USACIDC office in the field accidentally discovered that while using its own commercially available pager[247] it serendipitously intercepted a drug-related pager message destined for someone else. The field office wondered whether they would legally be able to intercept by ***design*** more of these pager messages destined for someone else. The answer is, "no." Such an interception would violate Title III as amended by the ECPA.

Analyzing the question posed by the field element, it is important at the outset to recognize the different types of pagers now available. These differences are important because, depending upon the variety, they will be accorded different legal status and treatment:

> Pagers take on one of three basic forms: "tone only," "display" and "tone and voice pagers." The "tone only" device emits a "beep" or other signal to inform the user that a message is waiting, and where that message can be retrieved by the user's making a phone call to a predetermined number (usually an office or answering service). "Display" pagers are equipped with screens that can display visual messages, usually the telephone number of the person seeking to reach the person being paged. The party seeking to make contact with the user is instructed to provide a message, usually by pushing buttons of a touch-tone telephone; this message is stored by the paging company's computer until it can be transmitted to the user's pager, where the message can then be read directly by the user, obviating the need for the user to make a telephone call to retrieve the message. The most sophisticated type of pager is the "tone and voice" model. It can receive a spoken message that the paging company's computer has taken from the party seeking to contact the unit's user. After the beep tone is made, the device "repeats" the recorded message. This requires that a radio signal containing voice communications be sent from the paging company's base to the mobile unit.[248]

Intercepting the first, a "tone only" pager, results in no legal consequence. Title **18,** United States Code, section 2511(1)(a) provides

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[247] "Electronic pagers are radio activated devices through which a user is notified of another's attempt to contact the carrier of the portable paging unit." ECPA Legislative History, *supra* note 9, at 3563.

[248] *Id.* at 3564.

that "[e]xcept as otherwise specifically provided . . . any person who . . . intentionally intercepts or endeavors to intercept . . . any . . . electronic communication . . . shall be punished." For the purposes of this provision, "electronic communication" means "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature . . . but does not include . . . the radio portion of a cordless telephone . . . [or] any communication made through a tone-only paging device."[249] Succinctly, the attempted or intentional interception of any pager communication other than tone-only violates Title III as amended by the ECPA.[250]

XI. CONCLUSION

Because of both the breadth and depth of the subject, this article has been a rather abbreviated treatment of electronic surveillance and related investigative techniques. Hopefully, it will prove to be helpful and stimulate creative thinking on the parts of both law enforcement and their advising attorneys.

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[249] 18 U.S.C.S. § 2510(12)(A) and (c) (Supp. 1989).

[250] Radio communications transmitted over a system provided by a common carrier are not readily accessible to the general public with one exception. The exception is for tone-only paging systems. As a result of that exception, the interception of tone-only system transmissions will not be prohibited by this law. However, the unauthorized interception of a display paging system [and of a tone and voice system], which involves transmission . . . over the radio, carried by a common carrier, is illegal.

ECPA Legislative History, *supra* note 9, at 3569.

By Order of the Secretary of the Army:

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