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# Legislative Constraints on U.S. Arms Transfers

By

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## INTRODUCTION

Over the past decade, I have spent a considerable amount of time tracking and analyzing the activities of Congress with respect to U.S. military assistance. This effort has resulted in a series of annual reports of legislative activity which have been published in *The DISAM Journal*. In this present paper I wish to share with you some general and more long-term observations regarding the evolution of Congressional involvement in and control over military assistance during the past several years—observations which suggest what types of legislation may be expected to emerge from Congress in the future.

The paper begins by examining the Constitutional role and authority of Congress in its control of military assistance programs. It then examines the major constraint available to Congress in dealing with military assistance (or any other government program for that matter)—i.e., Congressional control of the government's purse strings through the annual appropriations process. The remainder of the paper focuses on a wide variety of other forms of Congressional constraints, dealing with various and specific issues of oversight, regulatory controls, and program limitations and prohibitions.

By way of foreshadowing my conclusions, let me suggest that the various statutory provisions which will be reviewed demonstrate a growing and expanding role of Congress in its control of military assistance—a role which has produced increasing levels of Congressional constraints on the Executive Branch in its implementation and administration of military assistance activities. I will have more to say in my closing comments regarding the significance of this trend for military assistance programs in the 1990s.

I should note at the outset that it may appear that my comments will reflect a negative portrayal of Congress. That is certainly not the intent, and I could well present numerous examples to illustrate Congressional actions which have been helpful and responsive to Executive Branch requirements. However, that is the subject of another paper, perhaps one to be presented at next year's symposium. Here today, the focus is on Congressional actions which constrain Executive Branch authority. Also, let me add that the views presented here are mine alone, and they do not necessarily represent the views of DISAM, DSAA, or DOD.

## CONGRESSIONAL AUTHORITY

Let me begin by briefly addressing an issue which often arises regarding the role of Congress in military assistance. It is frequently suggested that the dominant role of the President in executing U.S. foreign policy means that a similar Presidential dominance should prevail with respect to U.S. military assistance. Congress, however, and in particular the Senate, would never

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concede to the President the underlying assumption here—i.e., the claim that the President has the dominant role in U.S. foreign policy. The issue of supremacy in this area has never really been resolved, as the Constitution’s slim references to foreign policy—the making of treaties and the appointment of ambassadors—involves shared Presidential/Congressional authorities whereby the Senate must ratify such Presidential actions. The issue of dominance in foreign policy remains debatable, and rests in the realm of political scientists, where we will let it remain.

However, the more relevant issue for our purposes—that of Congressional authority with respect to military assistance—is beyond such academic debate. Specific provisions of the U.S. Constitution serve as the authorities for Congress’ role in authorizing, and regulating, military assistance grant and sales programs.

## FIGURE 1

### CONSTITUTIONAL AUTHORITIES FOR MILITARY ASSISTANCE

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*“The Congress shall have Power to regulate Commerce with foreign Nations . . . .” [Section 8, Article I]*

*“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States . . . .” [Section 3, Article IV]*

*“No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .” [Section 9, Article I]*

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As shown in Figure 1, the U.S. Constitution gives Congress the power to regulate international commerce, which by direct implication includes that commerce with foreign nations which involves U.S. defense articles, services, and training, i.e., military assistance. The Constitution further assigns Congress the power to regulate and dispose of U.S. government property, and is thereby related to the sale or grant of U.S. stocks of defense articles. These two authorities, together with Congress’ Constitutional authority to appropriate funds for government operations, clearly places the ultimate authority over the control of military assistance programs with the Congress. Thus, despite the frequently heard complaint that Congress is increasingly micro-managing military assistance programs, the Executive Branch must concede, if perhaps begrudgingly, that Congress nevertheless is acting within its fundamental Constitutional authority.

### FUNDING CONTROLS

Now, let us turn to the issue of funding. Congressional authority over the appropriations process represents the most obvious constraint which Congress can impose across-the-board on U.S. military assistance. During this symposium we have heard several observations regarding funding issues—i.e., the continued annual reductions in military assistance appropriations over the past several years, and the corresponding growth in Congressionally mandated funding—i.e., earmarks for selected countries. These actions have been the subject of continued criticism by senior executive department officials for the past several years. There is little to be added to what has already been discussed on these issues, except to provide some historical perspective and to highlight the impact of this major constraint on U.S. military assistance.

**TABLE 1**  
**CONGRESSIONAL FUNDING FOR**  
**MILITARY ASSISTANCE**  
(Dollars in Millions)

	<u>FY 1985</u>	<u>FY 1989</u>	<u>AMOUNT OF REDUCTIONS (FY 1985- FY 1989)</u>	<u>PERCENT OF REDUCTIONS (FY 1985- FY 1989)</u>
Foreign Military Sales Financing Program	\$4,939.5	\$4,272.75	\$666.75	14%
Military Assistance Program	805.1	467.00	338.10	42%
International Military Education and Training Program	56.2	47.40	8.80	16%
<b>TOTALS</b>	<b>\$5,800.8</b>	<b>\$4,787.15</b>	<b>\$1,013.65</b>	<b>18%</b>

The funding cuts of recent years may best be illustrated by comparing FY 1985 appropriations with those of the current year, FY 1989, as shown in Table 1. FY 1985 is appropriate as a base year for such a comparison inasmuch as it reflects the highest level of appropriations which Congress has provided for security assistance. The Reagan Administration enjoyed annual increases in security assistance funding from FY 1981 through FY 1985. Thereafter, the cuts began, with overall reductions annually through the current year. In the five years—1985 to 1989—military assistance programs were cut by a total of over \$1 billion dollars, (from \$5,800.8 million in FY85 to \$4,787.15 million in FY89). This represents an overall reduction of 18%. Percentage cuts in the individual programs vary, with the MAP Program experiencing the most sizeable percentage reduction (42%) during the period.

It should also be noted that these cuts are reported in “current year” dollars. If adjusted for inflation over the five-year period to reflect “constant year” dollars, the reductions would be far more sizeable and would reflect the true decline over the period in the purchasing power of the military assistance dollar.

These budget cuts for military assistance, of course, were reflective of a government-wide effort by Congress to reduce the nation’s rapidly growing annual budget deficits. Nevertheless, inasmuch as the total military assistance budget was less than \$6 billion in FY 1985 and represented less than 1% of the total U.S. budget, the \$1 billion-plus reduction from FY 1985 to FY 1989 had an inordinately negative effect on the program.

The impact of these reductions, together with the increases in earmarking, can be illustrated in several ways. One way of demonstrating this is to compare the number of countries provided FMS financing assistance in FY 1985 and then in FY 1989. This comparison is shown in Table 2 with respect to the Foreign Military Sales Financing Program (FMSFP).

**TABLE 2**  
**FMSFP COUNTRY FUNDING ALLOCATIONS**  
(Dollars in Millions)

FY 1985		FY 1989	
COUNTRY	FUNDING LEVEL	COUNTRY	FUNDING LEVEL
EGYPT	\$1,175.0*	BOTSWANA	\$ 5.0
ISRAEL	1,400.0*	CAMEROON	5.0
JORDAN	90.0	INDONESIA	32.5
LEBANON	5.0	KOREA	220.0
MOROCCO	3.0	MALAYSIA	4.0
OMAN	40.0	PHILIPPINES	15.0
PAKISTAN	325.0	THAILAND	95.0
TUNISIA	50.0*	COLOMBIA	8.0
GREECE	500.0	ECUADOR	4.0
PORTUGAL	55.0	EL SALVADOR	15.0
SPAIN	400.0	PERU	8.0
TURKEY	485.0	<b>TOTAL</b>	<b>\$4,939.5**</b>
		EGYPT	\$1,300.00*
		ISRAEL	1,800.00*
		JORDAN	10.00*
		MOROCCO	52.00*
		PAKISTAN	230.00*
		TUNISIA	30.00*
		GREECE	320.00*
		PORTUGAL	100.00
		TURKEY	430.75*
		<b>TOTAL</b>	<b>\$4,272.75***</b>

\* CONGRESSIONAL EARMARK

\*\* FY 1985 EARMARKS (3 COUNTRIES) = \$2,625.00 = 53%

\*\*\* FY 1989 EARMARKS (7 COUNTRIES) = \$4,162.75 = 97%

For example, in FY 1985, a total of 23 countries were recipients of FMS grants and loans. Only three countries—Israel, Egypt, and Tunisia—were earmarked by Congress that year; and the earmarks, (which totaled \$2,625 million), represented 53% of the FY 1985 appropriation (of \$4,939.5 million). By FY 1989, the FMS Financing appropriation had fallen by 14% (to \$4,272.75 million), and the earmarking had increased to cover seven countries, representing 97% of the FMS account; and in FY 1989 only nine countries, as compared to 23 in FY 1985, could be funded. In short, the financing pie had become substantially smaller, while the percentage of the pie dedicated to a relatively few selected countries had almost doubled. A similar illustration could be provided for the MAP program.

Another way to illustrate the constraint that the recent Congressional appropriations process has entailed, is to look at those countries for which funding has had to be terminated, or at best severely reduced, in the past two years. Table 3, which is based on a Defense Security Assistance Agency (DSAA) report, clearly reflects that impact on base rights countries and on countries in the Pacific, Latin America, and Africa.

A final example reflects a deliberate use of the appropriations process by the Congress to constrain Executive Branch objectives. This involves the annual allocation of military assistance funds to two countries—Greece and Turkey.

In the aftermath of the 1974 Turkish invasion of Cyprus and the subsequent Congressional embargo of arms transfers to Turkey, and in response to Congressional sympathies toward Greece, Congress since FY 1980 has insisted that military assistance (FMSFP and MAP) to Greece be provided at a level not less than 70% of that furnished to Turkey. Annual Congressional appropriations earmarks have assured that this funding formula—widely referred to as the “7-10” ratio—is maintained.

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**TABLE 3**  
**IMPACT OF FY 1988-FY 1989 MILITARY ASSISTANCE**  
**FUNDING REDUCTIONS**

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- SUBSTANTIAL FUNDING CUTS FOR BASE RIGHTS COUNTRIES
    - GREECE      • PORTUGAL      • SPAIN-TERMINATION
    - TURKEY      • PHILIPPINES
  
  - SUBSTANTIAL REDUCTIONS (R) AND TERMINATIONS (T) OF ALL ASSISTANCE
    - PACIFIC
      - FIJI (T)
    - LATIN AMERICA
      - BELIZE (T)
      - BOLIVIA (R)
      - COLOMBIA (R)
      - DOMINICAN REPUBLIC (T)
      - ECUADOR (R)
      - JAMAICA (R)
      - PERU (R)
      - URUGUAY (T)
    - AFRICA
      - BOTSWANA (T)
      - CAMEROON (T)
      - CENTRAL AFRICAN REPUBLIC (T)
      - GAMBIA (T)
      - GUINEA (T)
      - MAURITIUS (T)
      - MOZAMBIQUE (T)
      - TANZANIA (T)
      - ZAMBIA (T)
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For its part, the Executive Branch has consistently opposed this distribution ratio. Annual Administration budget requests have sought a greater proportion of available funding for Turkey, given Turkey's substantially greater requirements for modernizing its far larger military forces. But Congress, intent on maintaining a semblance of a balance of forces in the Mediterranean, has refused to budge from its position.

The consequence is reflected in Table 4 on the following page. Congress has continued to impose its funding formula; and since overall program funding levels have been falling annually, this has meant annual cuts in funding levels for each country between FY 1984 and FY 1988, with a marginal increase in FY 1989. Most significantly, there appears to be no overall programmatic logic to this allocation process, i.e., funds are furnished but are not always directly linked to existing military program requirements. The failure of Greece historically to employ all of its assistance funds (with over \$663 million dollars remaining unused at present) vividly illustrates the absence of such program requirements. Meanwhile, several important Turkish military requirements are not being met due to a lack of sufficient funding. Nevertheless, Congress has shown no interest in altering this formula, and the Executive Branch must continue to live with the frustration it bears.

In summary then, it is obvious that Congressional use of its appropriations authority has seriously impacted on the conduct of U.S. military assistance programs.

**TABLE 4**  
**MILITARY ASSISTANCE (FMSFP AND MAP)**  
**FUNDING FOR GREECE AND TURKEY:**  
**THE 7-10 RATIO**  
**(Dollars in Millions)**

	<u>GREECE</u>	<u>TURKEY</u>
FY 1983	\$280.000	\$400.000
FY 1984	\$500.000	\$720.000
FY 1985	\$500.000	\$700.000
FY 1986	\$430.650	\$615.208
FY 1987	\$343.000	\$490.000
FY 1988	\$343.000	\$490.000
FY 1989	\$350.000	\$500.000

### OTHER CONGRESSIONAL CONTROLS

Let us now review the wide variety of other types of controls Congress employs to regulate (i.e., constrain) military assistance. It is fashionable to speak today of Congressional "oversight" of executive branch programs. Unfortunately, such oversight, in reality, often amounts to a special version of the 3 "R's"—i.e., "reports, restraints, and restrictions." We will begin with the issue of Congressionally mandated reports.

### STATUTORY REPORTS

The *Security Assistance Management Manual (SAMM)*, DOD 5105.38-M, identifies 44 separate military assistance statutory reporting requirements for DOD. Many of these call for multiple reports to Congress throughout the year. These range from detailed notifications to Congress of prospective arms sales, notifications of defense articles furnished under emergency conditions, notifications involving waivers of non-recurring R&D and production costs, reports of security assistance surveys, reports on the military expenditures of foreign nations, etc.

Moreover, these DOD reporting requirements do not include the wide variety of military assistance-related reports which must be furnished to Congress by the Department of State. Nor do they include those numerous Congressional reporting requirements which have not been actually legislated but which appear as mandatory requirements in various reports of the authorization, appropriations, and other Congressional committees. All told, the Executive Branch is furnishing Congress approximately 350 or so separate reports annually—at a hefty cost in manpower and time which might be put to more productive use. (A question often arises as to just who actually is reading all of these reports. The question, by its very nature, must remain rhetorical.)

The FY 1990-91 House Foreign Assistance Authorization Bill (H.R. 2655), passed on 29 June 1989, proposes the elimination of several outdated or duplicative reporting requirements, and the streamlining of several others. For example, this bill would repeal a current statutory requirement [Sec 25(a) (4), AECA] for an annual report on the volume of international arms traffic—information which is readily available from other sources. Similarly, statutory requirements [Section 36, AECA] for quarterly reports regarding the cumulative dollar amounts of FMS credit sales, and projections of sales for the next quarter and the remainder of the fiscal year, would also

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be eliminated, since this information is also available from other required reports. As a final example, the House bill [Sec 25(a) (9), AECA] would delete an annual reporting requirement regarding progress in the modernization of the armed forces of South Korea—a requirement which dates back to the 1960s, and which is now considered obsolete.

If these and other House proposals are enacted, they would obviously be welcome. However, such action will only have a marginal impact on the overall DOD military assistance reporting burden. Moreover, if Congress continues to pass new program restrictions during every annual legislative cycle, as it has in the past, we can only expect to see a continuing increase in Executive Branch reporting requirements, as each new Congressional limitation or policy is generally accompanied by a new special reporting requirement.

For example, the very same House authorization bill for FY 1990-91 which I just cited in conjunction with proposed reductions in military assistance reporting requirements, would, in fact, add two additional such requirements. The first calls for a new annual “analysis of the economic benefits or disadvantages to the United States of sales and licensed commercial exports during the preceding fiscal year.” This same type of information would also be required to be included in every proposed new arms sales notification to Congress as required under Section 36(b), AECA. [Section 226, H.R. 2655.]

A second new reporting requirement which would be established by the House bill involves proposed arms sales, leases, and third country transfers to the Middle East. [Section 821(b), H.R. 2655.] In addition to the extensive information currently required to be included in all such notifications, for any such transfers of conventional arms to the Middle East the Executive Branch also would have to include a detailed justification of the following:

- the impact of the proposed transfer on regional stability and security;
- a specific assessment of the threat the proposed transfer is required to offset;
- the extent to which an actual military need exists for the proposed transfer;
- the extent to which the proposed transfer will stimulate a regional arms race;
- and the ability of the recipient country to operate, maintain, secure, and bear the cost of the proposed defense articles.

While there may be merit in these new reporting requirements, their enactment would clearly add to the present reporting burden of the Executive Branch. Regardless of the future fate of this proposed House legislation, one may confidently predict that whatever new legislation is enacted for FY 1990, it will undoubtedly include additional new reporting requirements, thereby increasing the current military assistance management reporting workload.

## **ADVANCE REPORTING OF PROPOSED ARMS SALES**

The various changes proposed to be added to the current requirements for advance Congressional notifications of U.S. arms transfers reflect a continuing expansion of these requirements and illustrate the growth of Congressional involvement in this area. It is of interest to note that prior to 1974 the President had authority to sell arms without any statutory requirements whatsoever to consult with or notify Congress before a prospective arms sales agreement was actually concluded. Until 1974, the Executive Branch was only required to report significant arms sales to Congress semiannually, which meant that Congress generally learned about such sales transactions only after they were negotiated and signed. The first actual advance notification requirement for proposed FMS cases was enacted in 1974. Within seven years, by 1981, the

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AECA had been expanded to include similar statutory reporting requirements for proposed direct commercial sales, third country transfers, and leases of defense articles/services.

This expansion of Congressional oversight was also accompanied by substantial increases in the amount of detailed data required to be included in the associated reports. All of these reporting provisions also include specific dollar value reporting thresholds, as well as specified but varied periods for Congressional review, and, of course, include the *kicker*, the authority for Congress to pass a joint resolution prohibiting a particular sale, transfer, or lease. Although such resolutions are subject to Presidential veto, Congress may nevertheless employ its Constitutional authority to override such a veto through the passage of a joint resolution by a two-thirds majority vote in both the House and Senate. Admittedly, this Congressional authority has never been successfully employed; however, its mere existence serves to constrain the Executive Branch in considering proposals for sales which are known to have substantial opposition in Congress.

In recent years, there has been a still further expansion of these sales-related reporting requirements. In 1985, Congress enacted a provision requiring supplemental reports of enhancements or upgrades of sensitive technology or weapons capabilities which occur after an original sales notification has been made, but prior to the delivery of the enhanced/upgraded defense equipment. [Section 36(b) (5), AECA.] Then, in 1987, Congressional concern over sales of Stinger missile systems led to a general banning of such sales in the Persian Gulf region (except for Bahrain), and the establishment of a new reporting requirement for any proposed Stinger sales to any country, regardless of the value of the sales. [Currently, Section 566, P.L. 100-461.] In 1988, Congress further expanded these requirements with a new reporting provision for all ground-to-air or air-to-ground missiles, or associated launchers, whereby all such proposed sales must be reported to Congress, again regardless of dollar value. [Section 28, AECA.] And now we have the additional requirements proposed by the House involving reports of economic benefits and special Middle East concerns, among others.

Two other related reporting requirements further illustrate the expansion of this form of Congressional oversight. Since 1978, the Administration has been required to furnish Congress with an annual report (i.e., the "Javits Report") identifying all projected and "most likely" major sales of U.S. defense equipment. [Section 25(A)(1), AECA.] Then, in 1987, after pressing a resistant Administration for several years to provide more specific projections on defense articles proposed to be acquired by countries funded by military assistance, Congress directed the preparation of an additional new report detailing such proposed U.S. funded acquisitions by individual country. [Currently, Section 523, P.L. 100-461.] This report is furnished as a classified annex to the annual *Congressional Presentation [Document] for Security Assistance*.

In sum, this particular area—proposed new arms transfers—has received considerable Congressional attention over the past 15 years, and such attention shows no signs of abating.

## **GENERAL, COUNTRY-SPECIFIC, AND MANAGEMENT CONSTRAINTS**

Now, let us turn to the variety of general, country-specific, and management-related constraints which Congress has also imposed on the conduct of military assistance. The category of general constraints involves broadly stated provisions of law involving political, economic, and social considerations. By way of illustration, the FAA of 1961 contains a repository of prohibitions on the provision of military assistance to, as examples: communist countries; countries which have, without proper compensation, nationalized, expropriated, or seized property owned by U.S. corporations or citizens; and countries whose governments "engage in a consistent pattern of gross violations of internationally recognized human rights." This latter restriction has led to country-specific provisions in law which currently prohibit military assistance to South Africa, Chile, Panama, and Haiti, and which also serves as the legal basis for President Bush's current executive order banning military assistance to China.

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Other general provisions of this type include: prohibitions on assistance to countries which violate the use, transfer, or security provisions associated with U.S. arms transfers [Section 505(d), FAA/61]; a cut-off of assistance to countries which are in arrears in excess of one year in payments to the U.S. of the principal or interest on U.S. assistance loans [the Alexander-Brooke Amendment, currently Section 518, P.L. 100-461]; and prohibitions on assistance to countries in violation of the nuclear non-proliferation provisions of the FAA/61—provisions which Congress has regularly applied to constrain programs for Argentina, Brazil, and Pakistan, among others [Sections 669 and 670, FAA/61].

In 1981, a rather unusual prohibition was enacted which denies assistance to any country “engaged in a consistent pattern of acts of intimidation or harassment directed against individuals in the U.S.” [Section 6, AECA.] This legislation was a response to reported Taiwanese-sponsored harassment of Chinese residing in the U.S. In recent years, similar Congressional concerns over racial, religious, and sexual discrimination, international terrorism, airport security, military coups, and narcotics trafficking have prompted additional substantial prohibitory legislation.

There is also a provision, first introduced in 1983, which would deny assistance to any country whose government consistently opposes U.S. foreign policy. [Currently Section 527, P.L. 100-461.] The legislation calls for an annual analysis of all United Nations members’ voting practices in the principal bodies of the U.N., comparing such voting to that of the United States. To date, however, Congress has not established any cut-off threshold—i.e., a minimal percentage level of voting coincidence with the U.S., below which a country’s assistance would be suspended or terminated. This reluctance to identify such a cut-off point appears to be due largely to two factors: first, such voting measurements are not always a truly accurate representation of a country’s overall support of U.S. foreign policy; and secondly, over the past several years several major recipients of U.S. assistance (e.g., Egypt, Indonesia, Pakistan, The Philippines, and Thailand) have consistently voted in the U.N. at levels below 20 percent of coincidence with U.S. votes.

A second and related set of prohibitions involve the denial of assistance to specific countries which are named in law as being in violation of some particular general provision, such as human rights, terrorism, etc. Such country-specific prohibitions vary from year to year, depending on which country is out of favor with the Congress at any particular time. Further, each such provision is generally accompanied by a wide variety of specific conditions which must be met by the prescribed country, and to which the President must certify to Congress as having been met, before the prohibition can be lifted. For example, the FY 1989 Foreign Assistance Appropriations Act (P.L. 100-461) contains such country-specific prohibitions on military assistance to Haiti, Liberia, Mozambique, and Panama; the same law also identifies nine countries for which both direct and indirect assistance is prohibited (i.e., Angola, Cambodia, Cuba, Iraq, Libya, the Socialist Republic of Vietnam, South Yemen, Iran, and Syria.) Additionally, P.L. 100-461 places various limitations on the use of military assistance funds for seven other countries (i.e., Burundi, El Salvador, Jamaica, Lebanon, Somalia, Sudan, and Uganda.)

Finally there are important management-related provisions—both restrictive and prohibitory—which directly constrain the Executive Branch in its conduct of military assistance. Some examples of the restrictive type include: a limit on the number of U.S. military personnel that may be assigned to a foreign country to perform security assistance management duties [Section 515(c), FAA/61]; a specified and restrictive listing of the types of duties such personnel may perform [Section 515(a), FAA/61]; and a related provision which mandates that such personnel shall keep all advisory and training assistance to “an absolute minimum” [Section 515(b), FAA/61]. In this connection it should be noted that these restrictions on military functions directly contributed to the substantial reduction in the overall strength of such permanently assigned overseas military personnel, from approximately 1500 in 1975 to just 528 at present.

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Other examples of restrictive-type provisions include: a requirement that sales of defense articles and services which could have an adverse effect on U.S. military combat readiness be kept at an absolute minimum [Section 21(i), AECA]; a provision directing the President to use restraint in selling defense articles and services, and restraint in providing associated assistance financing for such sales, to countries in Sub-Saharan Africa [Section 33, AECA]; and a statutory limit on the value of U.S. war reserve stockpiles in Korea and Thailand [Section 514, FAA/61]. This latter restriction compels the Administration to seek a formal legislative amendment from Congress whenever it is determined that a need exists to expand these stockpiles.

In addition, there are a number of provisions which simply prohibit specific management actions. For example, there is a prohibition on the use of U.S. assistance funds to procure offshore manufactured defense items [Section 42(c), AECA]. Also, there is a prohibition on the provision of police training or advice, albeit with several exemptions enacted in recent years for narcotics control training, maritime law enforcement, and the Eastern Caribbean countries [Section 660, FAA/61]. And, finally, there is a provision prohibiting U.S. personnel who are providing defense services abroad from performing any duties of a combatant nature, including any duties related to training and advising that may engage such U.S. personnel in combat activities in connection with the performance of those defense services [Section 21(c) (1), AECA]. Congress has stipulated that such training and advisory assistance, when required, shall be provided by other U.S. military personnel not assigned under Section 515 of the FAA/61, and, "who are detailed for limited periods to perform specific tasks" [Section 515(b), FAA/61].

As noted, these statutory constraints have evolved over time, involving general, country-specific, and administrative/management-related functions. The body of constraints continues to grow, and in recent years a fairly new category has begun to emerge, i.e., prohibitions on specific weapons sales. We have already discussed the 1987 prohibition placed on the sale of Stinger missile systems to countries in the Persian Gulf, and the special reporting requirements for proposed Stinger sales to any other country. A similar weapons-related prohibition first went into effect also in 1987 involving what are known as Depleted Uranium Anti-tank Shells. This statutory prohibition, as amended in 1988, precludes the sale of M-833 anti-tank shells—or any other comparable anti-tank shells containing a depleted uranium (DU) penetrating component—from being sold to any country other than a NATO member country, or Australia, Japan, Israel, Egypt, Korea, or Pakistan. The DU round is the standard kinetic energy round of the American tank. Our denial of such sales essentially means countries must turn to other suppliers for an equivalent tungsten round, and then, perhaps, for other military equipment.

There are numerous other provisions that could be cited to identify the growth in such Congressional constraints. But our time is limited. Let me add just one more, this one involving the International Military Education and Training (IMET) Program.

For several years, the House Appropriations Committee annually expressed its concern to the Executive Branch over the provision of IMET grant funding to countries which the Committee believed were capable of using their own national funds to purchase U.S. military training. In 1988, the Senate Appropriations Committee added its concern, and it proposed that no IMET funds whatsoever be made available to such countries. The Administration strongly opposed such a prohibition, arguing that unless grants were furnished, many such countries would not participate in U.S. military training programs, and the professional military-to-military relationships engendered by such programs would be seriously diminished.

Extended consideration of this issue in the Appropriations Conference Committee resulted in a compromise. The resultant FY 1989 Foreign Assistance Appropriations Act did establish a prohibition on the furnishing of IMET grants to any country with an annual per capita GNP exceeding \$2,349.00 [Title III, P.L. 100-461]. However, as a concession to the Executive

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Branch, Congress authorized IMET funds to be provided to such countries if they agreed to pay for the travel and living allowances (TLA) of their students. This provision thereby restricts IMET funding to only tuition costs for the students of such countries, whereas other countries below the GNP threshold may use IMET monies for TLA as well as tuition. An analysis by the Department of State indicated that in FY 1989 this new provision would impact on some 20 countries which would be required to use their own funds if they wished to employ their IMET grants.

## CONCLUSION

Having reviewed in summary fashion, a wide array of legislative constraints on military assistance, what may we conclude? First, in all of the examples discussed, Congress has clearly exercised its authority within the scope of its Constitutional prerogatives. Thus, there is no judicial remedy which is available to the Executive Branch to challenge Congressional authority. Moreover, it would seem to be highly inappropriate—and largely ineffective—to issue any such direct challenge to Congress on these issues.

Secondly, there seems to be no doubt as to the cumulative effect of these various legislative constraints. Congress has taken upon itself a variety of management functions—functions which, under other circumstances, perhaps involving less controversial programs, would fall under the responsibility of an Executive Branch agency. Through its extensive earmarking of military assistance funds, its elaborate array of special reporting requirements, and its passage of what seems to be an ever-increasing set of program limitations and prohibitions, Congress has been sending the Executive Branch a number of important signals.

The principal signal seems to be obvious: Congress considers foreign assistance, and particularly military assistance, as a probably wasteful and possibly dangerous business, and thus regulates it more heavily than its limited funding levels would otherwise warrant. Law and funding represent the only real way for Congress to control U.S. foreign policy.

A second signal is related to the issue of earmarked funding. The continuing high levels of earmarking for military assistance imply that for whatever reason—political, economic, and perhaps strategic—Congress will assure that certain selected countries are funded at levels the Congress—not the Executive Branch—determines are required. Thus, the Administration, with only a minuscule level of funds to allocate on a discretionary basis, has been preempted from a primary source of normal government management authority, and forced to curtail and dilute its worldwide military assistance efforts. Executive Branch entreaties to the Congress regarding the consequences of these funding limitations have failed to have a positive effect. Rather, as we have seen, funding has continued to fall, and earmarking has continued to increase, and the two are closely connected.

A House Foreign Affairs Committee Task Force, which spent a year examining all U.S. foreign assistance programs, strongly recommended in February of this year that Congress “reduce, if not eliminate earmarking” of military assistance appropriations. Yet, when the Committee voted out its proposed authorization bill in June, it contained a combination of earmarks and ceilings exceeding 87% of proposed funding for the FY 1990 FMS Financing Program. It should be noted that the Committee did propose setting aside 2% of the FMSFP appropriation as a “reserve” to “allow the Executive Branch greater flexibility” in meeting both the needs of non-earmarked countries and to also respond to unforeseen emergencies. Unfortunately, it is difficult to understand how such a limited reserve can achieve these stated objectives. Based on the Committee’s recommended FMSFP funding authorization for FY 1990 of \$4,968.932 million, a two percent reserve would amount to only \$99.379 million, which is \$10.621 million less than the FMSFP funding currently available in FY 1989 for non-earmarked countries.

Thus, looking into the crystal ball of the 1990’s, it is fair to presume that earmarking will remain an institutional constraining feature of military assistance appropriations. The only

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likelihood of any increased funding would be as a response to the emergence of some major crisis, such as the current emphasis on combatting drug trafficking.

A final Congressional signal, as transmitted by the plethora of required reports, might be to suggest that Congress is primarily interested in learning as much as it can about U.S. military assistance programs. On the other hand, as these requirements have continued to expand, and as Congressional testimony amply reveals, the real signal Congress seems to be sending out is that it lacks confidence that the Executive Branch will properly carry out the mandate given to it by Congress, and that such reports are a means of assuring that an Administration does not stray from the path designed by Congress.

Let me conclude by suggesting that there really seems to be no way to manage these problems—let alone resolve them—other than to continue to work within the structure of constraints established by Congress. Yet, it might be possible to alleviate some of the associated problems. In this view, it is essential that the Executive Branch work closely with Congress to try to derail potentially damaging constraining legislation from ever being enacted; and, if enacted, to attempt to have it rescinded, as well as to try to rescind current selected constraints which are unnecessarily harmful or obstructive. Care will be essential in determining which particular constraints to so target for such action, inasmuch as the Executive Branch has a limited amount of political currency to expend in this effort. A carefully prioritized selection, joined with a well conceived and jointly organized DOD-State Department liaison effort with the relevant Congressional Committees, and especially the Committee staffers, might prove somewhat fruitful. The Administration, of course, will have to convince Congress of its commitment and ability to control military assistance and to serve common purposes. The task admittedly will be difficult, but I believe the present situation warrants that such an effort be made.