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BY THE COMPTROLLER GENERAL

Report To Senator Edward Zorinsky

OF THE UNITED STATES

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## Applicability Of Certain U.S. Laws That Pertain To U.S. Military Involvement In El Salvador

Section 21(c)(2) of the Arms Export Control Act requires the President to submit a report to the Congress within 48 hours of the existence or a change in status of significant hostilities or terrorist acts which may endanger American lives or property. Despite U.S. Government property losses, the possible endangering of U.S. personnel, and the use of substantial emergency funds by the President in response to the Ilopango air base raid, no report was filed. GAO believes a report should have been filed.

DOD determined that the deployment of mobile training teams to El Salvador in 1981 did not require a report to the Congress under the War Powers Resolution. This determination was based on certain representations. The facts GAO developed contradict some of these representations.



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COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON D.C. 20548

B-207901

The Honorable Edward Zorinsky  
United States Senate

Subject: Applicability Of Certain U.S. Laws That  
Pertain To U.S. Military Involvement In  
El Salvador (GAO/ID-82-53)

Dear Senator Zorinsky:

In response to your request of March 24, 1982, we examined various aspects of the impact of increasing military aid to and U.S. involvement in El Salvador. This letter reports the facts relevant to the applicability of certain sections of the Arms Export Control Act and the War Powers Resolution as they relate to the security assistance program in El Salvador and also the facts pertinent to the application of a section of the Uniformed Services Pay Act of 1963 as it relates to the payment of hostile fire pay (HFP).

HOSTILE FIRE PAY

Under DOD regulations issued pursuant to section 9 of the Uniformed Services Pay Act of 1963, military personnel are entitled to HFP of \$65 a month per person for those months in which they participated in a hostile encounter, in the case of land forces, or were in its immediate vicinity and were placed in danger of being wounded, injured, or killed. The regulations also provide for a hostile fire area designation by which all military personnel are paid HFP for being in the designated area.

A request to designate El Salvador as a hostile fire area was approved in early 1981 and then reversed to avoid the impression that the United States had combat forces in El Salvador. However, we found that HFP has been paid to most of the U.S. Army personnel in El Salvador on an individual monthly certified basis. The overall extent and continuous nature of these payments indicates that DOD virtually treats El Salvador as a hostile fire area.

FAILURE TO FILE SECTION 21(c)(2)REPORT

Section 21(c)(2) of the Arms Export Control Act, requires the President to submit a report within 48 hours of the existence or a change in status of significant hostilities or terrorist acts

which may endanger American lives or property. One reason, and apparently the major reason, why DOD officials reversed the decision to designate El Salvador as a hostile fire area was to preclude giving the impression of triggering the requirements of section 21(c).

More important, with respect to section 21(c)(2) compliance, was the guerrilla's January 27, 1982, raid on Ilopango, the main Salvadoran air force base located on the outskirts of the capital. Among the aircraft destroyed or damaged were four U.S. Army helicopters leased to the Salvadoran Government. Additionally, there were U.S. trainers deployed to the base. In response to these hostilities, the President ordered the largest use of emergency funds ever authorized under section 506(a) of the Foreign Assistance Act of 1961, as amended, almost twice the total of the amounts previously authorized pursuant to this section. Despite these property losses and the possible endangering of U.S. personnel, and despite the historically unparalleled use of emergency funds, no report was filed. We believe that a report should have been filed.

#### THE WAR POWERS RESOLUTION

The DOD determination that the War Powers Resolution did not require a report to Congress concerning deployment to El Salvador in 1981 of U.S. mobile training teams was based in part on a representation that military personnel in El Salvador would not receive HFP. It was based in part also on a representation that such personnel were not expected to be exposed to areas of military operations. The facts we developed contradict those representations.

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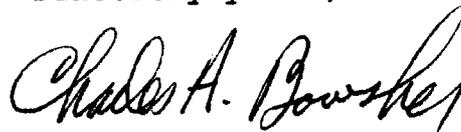
The data was developed from records of the Departments of State, Defense and the military services, and from information provided by officials of these agencies. Due to differences in the methods of recording HFP and the timing of HFP claims and payments, we were unable to verify HFP payments for all military people assigned to El Salvador. Instead, we selected and verified HFP payments for three periods we believe to be representative of and pertinent to the overall payment situation. As requested by your office, we did not obtain comments from the Departments of Defense and State on the contents of this report. This review was performed in accordance with our current "Standards for Audit of Governmental Organizations, Programs, Activities, and Functions."

B-207901

Unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time, we will send copies to the Chairmen, Senate Foreign Relations Committee, House Foreign Affairs Committee, House and Senate Committees on Appropriations, House Committee on Government Operations, Senate Committee on Governmental Affairs; the Director, Office of Management and Budget; the Secretaries of State and Defense; the Director, Defense Security Assistance Agency; and other interested parties.

If we can be of further assistance in this matter, please let us know.

Sincerely yours,

A handwritten signature in cursive script that reads "Charles A. Bowsher".

Comptroller General  
of the United States



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### ABBREVIATIONS

AECA	Arms Export Control Act
CY	Calendar Year
DOD	Department of Defense
DODPM	DOD Military Pay and Allowances Entitlements Manual
DSAA	Defense Security Assistance Agency
HFP	Hostile Fire Pay
MIA	Missing in Action
MILGROUP	U.S. Military Group El Salvador
MTT	Mobile Training Team



APPLICABILITY OF CERTAIN U.S. LAWS THAT PERTAIN TO  
U.S. MILITARY INVOLVEMENT IN EL SALVADOR

After a lapse of several years, the United States resumed military training for El Salvador in 1980 and arms transfers to that country on January 16, 1981, stating that this was done to enable El Salvador to counter a Communist-armed guerrilla offensive. Subsequently, military aid to El Salvador soared to at least \$81 million in fiscal year 1982.

As the war between Salvadoran government and guerrilla forces has escalated, questions have arisen concerning the applicability of several U.S. laws to U.S. involvement in El Salvador. Specifically, we reviewed the deployment of U.S. military personnel in, and the providing of military equipment, training, and services to El Salvador with reference to section 21(c) of the Arms Export Control Act (AECA) and the War Powers Resolution. We also looked at section 9 of the Uniformed Services Pay Act of 1963, relating to hostile fire pay (HFP) and its implementing regulations.

REQUEST TO DESIGNATE EL SALVADOR AS A HOSTILE  
FIRE AREA

On August 6, 1980, the Commander of the U.S. Military Group El Salvador (MILGROUP) formally requested that El Salvador be designated a hostile fire area and that this designation be made retroactive.

At the time of the request, HFP was authorized in El Salvador only on an individual basis for each month in which a military member was certified to have been subject to hostile action. The request was to permit payment of HFP to all military personnel present for duty in El Salvador, without the need for individual certifications that each military member had been exposed to hostilities.

Referring to the "climate and hostilities existing in this country," the proposed designation of El Salvador as a hostile fire area was based on a number of violent incidents against U.S. military personnel and Embassy property which had occurred in El Salvador and especially in the capital of San Salvador during the previous year. Senior Air Force and Marine Corps/Navy section representatives and the Defense Attache concurred in the request.

Legal basis for HFP

Statutory authority for HFP is derived from 37 U.S.C. §310 (1976), which was added by section 9 of the Uniformed Services Pay Act of 1963, approved October 2, 1963, Public Law 88-132, 77 Stat. 210, 216. That section, as amended, provides that except

in time of war declared by the Congress, a military member may be paid an additional \$65 a month for any month in which he

"(1) was subject to hostile fire or explosion of hostile mines;

(2) was on duty in an area in which he was in imminent danger of being exposed to hostile fire or explosion of hostile mines and in which, during the period he was on duty in that area, other members of the uniformed services were subject to hostile fire or explosion of hostile mines; or

(3) was killed, injured, or wounded by hostile fire, explosion of a hostile mine, or any other hostile action."

Unlike the Korean War, in which there was a clearly distinguishable line of demarcation between friendly and enemy forces, the Vietnam War presented a possibility of exposure to hostile fire in almost any area or location in Vietnam. This provision was enacted in recognition that U.S. armed forces in Vietnam or elsewhere should be entitled to special pay when exposed to possible hostile activity, even if not actively engaged in combat (B-168403, Mar. 3, 1975). Under Department of Defense (DOD) regulations, Vietnam, Cambodia, and Iran are designated hostile fire areas.

The DOD Military Pay and Allowances Entitlements Manual (DODPM) at Part I, Chapter 10, table 1-10-1, provides that any military member assigned to a designated hostile fire area may receive HFP for each month he is present in that area, without regard to his personal exposure to hostile fire. In contrast, a military member in a country or region not designated a hostile fire area may receive HFP only for those months in which he participated in a hostile encounter while on duty or on board the same vessel or aircraft which was the subject of hostile fire, or in the case of land forces, was assigned to the same military unit and was performing duty with the unit at the time of the hostile action. The regulations state:

"In case of land forces, only those of the unit (patrol, squad, platoon or larger unit) which are in the immediate vicinity of the trajectory or point of impact or explosion of hostile ordnance and are placed in danger of being wounded, injured, or killed from such causes are entitled to payment."

The above provision, although restrictive, actually considerably broadened the language which had preceded it. DOD Directive 1340.6 had provided at one time that HFP, outside the areas designated, could not be paid to any military member who, although fired at, was not hit.

On June 8, 1967, the USS Liberty was attacked by Israeli forces and sustained over 800 hits from hostile fire and one torpedo explosion. The attack left 34 dead and 170 injured out of a total crew of 296. DOD determined that, since the hostile action took place outside of Vietnam (the only hostile fire area then designated), HFP could be paid only to those military personnel who were killed, wounded, or injured.

In response to internal and congressional pressures to broaden the directive, DOD's Office of General Counsel was asked whether the directive could be modified to extend entitlement, outside of designated areas, to the following situations:

- "1. To all members of a group, such as an infantry squad, when only one member may be killed or wounded by hostile fire. (Example: Korea outside presently designated area.)
- "2. To all members of a ship, when only one may be killed or wounded by hostile fire. (Example: USS Pueblo.)
- "3. To all military occupants of an airplane when only one may be wounded or killed by hostile fire.
- "4. In case 1, 2, and 3 above when a hostile act occurs (fired-at, mine explosion, etc.) but no one is wounded or killed."

In May 1968, DOD's Office of General Counsel concluded that the directive could be modified as proposed. On June 20, 1969, the DODPM--into which directive 1340.6 had been incorporated--was revised to be substantially similar to present regulations. The revision was retroactive to August 1, 1968.

The regulations also permit that certain geographical areas be designated hostile fire areas. At the present time, Vietnam, Cambodia, and Iran are so designated. Within a designated area, every military member assigned permanently or for more than 6 days in any month is entitled to receive HFP for that month regardless of whether or not that member was actually exposed to hostile action. In designating a country or region as a hostile fire area, the Secretary of Defense or his designee must determine, in accordance with 37 U.S.C. §310(a), that all military personnel present

in the area are subject to hostile fire or are in imminent danger of being so exposed.

#### Initial approval of the request

The request to designate El Salvador a hostile fire area was forwarded to the U.S. Southern Command in Panama and the 193rd Infantry Brigade in Panama. Each concurred in the request (August 26, 1980, and September 11, 1980, respectively) which was then forwarded to the Army Personnel Center. On October 24, 1980, the Acting Assistant Secretary of the Army for Manpower and Reserve Affairs recommended to the Assistant Secretary of Defense (Manpower, Reserve Affairs and Logistics) that El Salvador be designated a hostile fire area. In justifying the request, he said that the Army had reviewed and verified the situation depicted in the MILGROUP Commander's letter. "In view of the intensity of the hostilities and the fact that all military members in El Salvador are potentially subject to the hazardous conditions there," the Army believed that approval of MILGROUP Commander's request was warranted.

In a January 16, 1981, memorandum, the Deputy Assistant Secretary for Military Personnel Policy advised his service counterparts that a review of recent past and current circumstances indicated designating El Salvador as a hostile fire area was warranted. Accordingly, he designated it as such, effective October 1, 1979, the month in which two Marine Corps guards were shot at and wounded during a mob attack on the U.S. Embassy in San Salvador. Military Personnel Policy officials said the designation was made solely for administrative reasons, simplifying payment of HFP, and the policy aspects of the decision were never considered.

#### Reversal of the decision

While El Salvador had been designated by memorandum to be a hostile fire area, payment could not take place until the DODPM and the respective service implementing regulations were amended to reflect this change. In coordinating the implementation of this change, Assistant Secretary of Defense for International Security Affairs (ISA) officials objected for policy reasons to the designation of El Salvador as a hostile fire area.

ISA officials requested that the designation be withheld. Noting that section 21(c) of the AECA (22 U.S.C. §2761(c)) prohibited U.S. personnel performing defense services sold under the AECA from engaging in "any duties of a combatant nature" and, further, required congressional notification "within 48 hours after the outbreak of significant hostilities involving a country in which United States personnel are performing defense services," ISA wished to preclude giving the impression that the United States had combat forces stationed in El Salvador. The applicability of section 21(c)(2) to the proposed designation of El Salvador as a hostile fire area will be discussed later.

As a result of the ISA objection and the circumstances surrounding it, the Deputy Assistant Secretary on April 20, 1981, reversed his decision stating:

"During the process of implementing this designation for special pay purposes, we were made aware of other considerations that mitigated against this action. Accordingly, the Department of Defense Pay and Allowances Entitlements Manual (DODOP) will not be revised to reflect El Salvador as a Hostile Fire Area \* \* \*."

\* \* \* \* \*

"All concerned should be reminded that special pay for duty subject to hostile fire may continue to be paid in accordance with the administrative regulations of the respective Services, under the conditions prescribed in the DODPM \* \* \*."

HFP for El Salvador

Although El Salvador has not been designated a hostile fire area, the Army has, by the level and extent of HFP payments authorized, acted as if it virtually were. Based on our review of various pay records, it appears that most military personnel in El Salvador were receiving HFP most of the time.

For calendar years (CY) 1980 and 1981, HFP statistics worldwide and for El Salvador were as follows.

<u>Service</u>	<u>CY 1980</u>		<u>El Salvador amounts</u>	
	<u>World wide amounts</u>		<u>People a/</u>	<u>Dollars</u>
			<u>People a/</u>	<u>Dollars</u>
Army	29	6,173	11	2,665
Air Force	20 <u>b/</u>	12,537	0	0
Navy	6 <u>c/</u>	4,225	0	0
Marines	<u>23</u>	<u>5,200</u>	<u>* d/</u>	<u>* d/</u>
TOTAL	<u>78</u>	<u>28,135</u>	<u>11+</u>	<u>2,665+</u>

a/Received HFP for one or more months during the year.  
 b/All for missing in action in Southeast Asia (MIA).  
 c/Three are MIAs and three are Iran related.  
 d/Specific HFP data not available.

CY 1981

<u>Service</u>	<u>World wide amounts</u>		<u>El Salvador Amounts</u>	
	<u>People a/</u>	<u>Dollars</u>	<u>People a/</u>	<u>Dollars</u>
Army	129 b/	37,099	115	28,454
Air Force	11	7,410	0	0
Navy	4	975	0	0
Marines	<u>23</u>	<u>3,055</u>	<u>6</u>	<u>* c/</u>
TOTAL	<u>167</u>	<u>48,539</u>	<u>121</u>	<u>28,454+</u>

a/Received HFP for one or more months.

b/Nine are Iran related and include back pay.

c/Specific HFP data not available.

Not only are the majority of HFP payments being made for El Salvador and particularly, for Army-related claims in El Salvador, but they generally are for continuous periods of time (the length of time of service in El Salvador), rather than for isolated months corresponding to specific incidents.

For example, our review of the four Army personnel assigned to the MILGROUP as of March 1982 showed that, as a group, they collected HFP for 60 percent of their total time spent in El Salvador. This statistic would be 100 percent except for one member of the MILGROUP as shown below.

<u>Individual</u>	<u>Month arrived in El Salvador</u>	<u>Months paid HFP</u>	<u>Months in El Salvador</u>	<u>Months paid HFP to months in El Salvador</u>
#1	January 1982	3	3	100%
#2	August 1981 <u>a/</u>	7	7	100%
#3	June 1981	1	9	11%
#4	March 1982	1	1	100%

a/Was not in El Salvador sufficient time to qualify for HFP for August 1981.

We also reviewed the records 1/ of 38 Army personnel on temporary assignments to El Salvador during the second half of calendar year 1981. For this period, we found that HFP was paid for 97 of the 123 total person months 2/ during which personnel could have been eligible to receive the pay, or 79 percent. Furthermore, 22 of the 38 individuals or 58 percent received HFP for every month they were in El Salvador. In another six cases, or 16 percent, the individuals received HFP the majority of their time in El Salvador. None of the 10 remaining individuals, or 26 percent, received HFP.

Typically, each Army member submits and has approved a certification of entitlement to HFP for each month that member is in country. Such a certification follows:

#### STATEMENT

I certify that while assigned to the USMILGP San Salvador, El Salvador, under Orders \_\_\_\_\_, dated, \_\_\_\_\_, I was subjected to hostile fire as defined in Rule 5, DLT 1-10-1, DODPM, during the month of \_\_\_\_\_ 1982.

(Signature, name, rank, and serial number of military member)

#### APPROVAL

The above named individual has met the criteria for Hostile Fire Pay during the month of \_\_\_\_\_ 1982, when he was subjected to small arms fire or he was close enough to the trajectory, point of impact of explosion of hostile ordance so that he was in danger of being wounded, injured or killed.

(Signature, name, and rank of approving officer)

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1/Records where complete data was available.

2/For purposes of our analysis, a person month is one person in El Salvador for sufficient time to be eligible to qualify on a time basis for HFP for that month. For example, a two person team in El Salvador from mid-January to mid-May would be ten person months. If they received eight months of HFP between them, regardless of the sequence of months in which they earned the HFP, they would have received HFP 80 percent of the total person months.

No mention of any specific incident of exposure to hostile fire appears on the certification document, nor is any additional written support provided to either the officer approving the claim for HFP or the finance officer who certifies payment.

Our data on Air Force and Navy HFP is incomplete at this time. However, given the very small number of people involved compared to the Army and the preliminary results of what data we do have, we do not believe that the exclusion of this data significantly alters the results of our analysis.

DOD regulations, it may be recalled, require that hostile fire pay in non-designated areas be paid only to those land-based personnel who are assigned to a military unit subject to hostile fire and who are in the immediate vicinity of the hostile fire and are thus placed in danger of being wounded, injured, or killed. The entitlement determination must be made for each month in which a military member claims HFP. Thus, a member receiving HFP for 10 continuous months must have been subject, at least once each month, to a violent incident in which he either was fired upon or was in such immediate vicinity of the hostile fire that he was in danger of being hit. However, no mention of any specific incident of hostile action appears on the monthly certification documents, nor are we aware that any additional support was provided to the officer approving payment of HFP.

The certifications attest to most U.S. personnel receiving HFP for continuous periods of time corresponding to their entire length of time in-country for hostile incidents against them; otherwise the personnel would be receiving HFP in contravention of DOD's regulations. Therefore military personnel (generally Army) are being paid HFP virtually as if El Salvador were a designated hostile fire area.

DOD has not made a determination that all military personnel in El Salvador, wherever located, are in imminent danger of being hit by hostile fire. It is that determination, required if DOD were to decide to declare El Salvador a hostile fire area, that ISA officials feared might give the impression of triggering section 21(c) of the AECA.

#### SECTION 21(c) OF THE AECA

Prior to December 1980, section 21(c) of the AECA prohibited personnel performing defense services sold under the Act from performing "any duties of a combatant nature, including any duties related to training, advising, or otherwise providing assistance regarding combat activities" abroad.

The Carter administration sought to delete the phrase concerning training or advising, arguing that should there be an attack against a friendly country where U.S. defense services were being provided, these personnel would have to stop their activities "thus leaving the U.S. ally without any U.S.-provided

training, or other defense support." The Senate Foreign Relations Committee report (S. Rep. No. 96-732 at 20 (1980)) rejected that proposal as "creating too broad an opportunity for the possible accidental involvement of United States personnel in combat." Instead, the Committee drafted legislation which prohibited those training, advising, or other security assistance functions that may engage U.S. military personnel in combat.

The conference committee report (H.R. Rep. No. 96-1471 (1980)), published the following to serve as a guideline in determining activities permitted and prohibited under section 21(c):

#### Activities permitted

Continue to help organize and train ground force units, including training for combat, in support areas.

Continue to help organize and train air force units, including training for combat; continue to help repair and maintain combat equipment; assist in operation and maintenance of airfield facilities, such as hydrant refueling systems and munitions storage and repair facilities.

Continue to help organize and operate vehicle repair and maintenance activities in support areas.

Continue to help train personnel in use of highly technical equipment in support areas.

Continue to provide advice on military strategy and doctrine at headquarters above unit level.

#### Activities barred

No trainers, advisers, or other personnel with units engaged in combat.

No flight line activities with combat units, such as arming or fueling aircraft for combat sorties.

No personnel with or delivering equipment to units engaged in combat.

No personnel with units engaged in combat.

In addition, the Senate Foreign Relations Committee, noting that it initially would be up to the President to decide which duties "may" engage U.S. personnel in combat, added a reporting requirement so that the Congress might share in that decision. Designated section 21(c)(2) and enacted by section 102 of the International Security and Development Cooperation Act of 1980 (Public Law 96-533, Dec. 16, 1980, 94 Stat. 3132), the provision stated:

"(2) Within 48 hours after the outbreak of significant hostilities involving a country in which United States personnel are performing defense services pursuant to this Act or the Foreign Assistance Act of 1961, the President shall transmit to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth --

"(A) the identity of such country and a description of such hostilities; and

"(B) the number of members of the United States Armed Forces and the number of United States civilian personnel performing defense services related to such hostilities in such country, their location, the precise nature of their activities, and the likelihood of their becoming engaged in or endangered by hostilities."

About one month after this provision was enacted into law, President Carter determined under section 506(a) <sup>1/</sup> of the Foreign Assistance Act that immediate assistance to El Salvador in the amount of \$5 million was needed because of an unforeseen emergency. That emergency was the so-called "final offensive" by Farabundi Marti Liberation Front guerrilla forces against the El Salvadoran Government. U.S. civilian and military personnel were present in El Salvador at the time and some defense services were being performed. Nevertheless, President Carter failed to send a report to the Congress. In a legal memorandum prepared by DOD's Office of General Counsel in February 1981, it was conceded that the President did not comply with section 21(c)(2):

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<sup>1/</sup>Section 506(a) of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. §2318(a)), allows the President under certain conditions to provide defense articles, services, and training from the stocks of the Defense Department.

"The language of that determination together with its justification--widespread guerrilla attacks which were depleting the military resources of El Salvador suggested a situation in which a report would be required. A report was not filed, but that precedent should be considered oversight rather than standard setting."

Four days after President Carter's section 506(a) determination, President Reagan was inaugurated. The Reagan administration's position was that it was not required to submit a report to the Congress with respect to section 21(c)(2) since the "outbreak of significant hostilities" and the 48-hour period thereafter did not occur during its administration. Moreover, the administration reasoned that a mere continuation of hostilities would not trigger the section 21(c)(2) reporting requirement since that would not constitute an "outbreak" of hostilities.

At Senate Foreign Relations Committee hearings held in May 1981, Senator Glenn stated the following in proposing to amend section 21(c)(2)

"It seems preposterous to me that the administration did not make this report, especially when the casualty rate is somewhere over 70 a day, when in the last year there were over 12,000 people killed, when 4 American churchwomen were killed there, when our Embassy was shot up 5 times in 4 weeks, when our very reason for being there is to train people for a combat role to help control the situation in their own country. Yet, at the same time the administration maintains that this does not need to be reported to the Senate under current law."

\* \* \* \* \*

"I feel both this administration and the last failed in their obligation to live up to the law to report the El Salvador situation. Congress certainly did intend that such situations be reported and that we be notified when there is a change in status in these countries. As a result of this, we must now lower the threshold for triggering a report."

The so-called Glenn Amendment, enacted as section 103 of the International Security and Development Cooperation Act of 1981 (Pub. L. No. 97-113, Dec. 29, 1981, 95 Stat. 1519, 1521), amended section 21(c)(2) as follows:

"(2) Within forty-eight hours of the existence of, or a change in status of significant hostilities or terrorist acts or a series of such acts, which may endanger American lives or property, involving a country in which United States personnel are performing defense services pursuant to this Act or the Foreign Assistance Act of 1961, the President shall submit to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, classified if necessary, setting forth--

"(A) the identity of such country;

"(B) a description of such hostilities or terrorist acts; and

"(C) the number of members of the United States Armed Forces and the number of United States civilian personnel that may be endangered by such hostilities or terrorist acts."

Thus, a report must be submitted within 48 hours of the existence of or a change in status of significant hostilities or terrorist acts which may endanger American lives or property. The law does not define what hostilities or terrorist acts are "significant."

The Reagan administration has never filed a report pursuant to section 21(c)(2) of the AECA. In fact, from December 1980 to March 1982, DOD had no implementing regulation for complying with section 21(c)(2) reporting requirements. On March 18, 1982, DOD issued internal procedures pertaining to implementation of that reporting requirement. Those procedures provide that a report is required only if the hostilities or terrorist acts are "of a meaningful nature" and "constitute a general threat to American lives or property."

#### Implication of a hostile fire area designation

It may be recalled that one reason stated by DOD officials in not designating El Salvador a hostile fire area was that to have done so might have given the impression of triggering the requirements of section 21(c). Such a designation would have required a determination that all military personnel in El Salvador either are subject to hostile fire or are in imminent danger of being so exposed. Section 21(c)(1) prohibits U.S. military personnel performing defense services from engaging in any "combatant duties" and section 21(c)(2), as it then read, required a report

to the Congress within 48 hours of the outbreak of significant hostilities in countries in which U.S. personnel are performing defense services.

Declaring that all U.S. military personnel assigned to an entire country are in imminent danger of being shot at suggests that significant hostilities exist in that country, so as to trigger the necessity for a report to the Congress under section 21(c)(2). It also suggests that some U.S. personnel could be drawn into situations which may engage them in combat activities, an event prohibited by section 21(c)(1).

#### Ilopango air base raid

On January 27, 1982, Salvadoran guerrillas attacked the Salvadoran air base at Ilopango on the outskirts of the capital of San Salvador. The guerrillas destroyed or damaged a significant part of the Salvadoran Air Force, including six of the 14 UH-1H helicopters. All three helicopters destroyed in the attack were owned by the U.S. Army and were being leased to El Salvador. In addition, one of the helicopters which was damaged and returned to the United States for repairs was a leased U.S. Army helicopter. Further, there were two teams of U.S. trainers deployed to the Ilopango air base at the time of the guerrilla raid. They were performing helicopter pilot and maintenance training, and at least some were receiving HFP on a continuous basis.

On February 2, 1982, President Reagan authorized an additional \$55 million in emergency section 506(a) funds for El Salvador, the largest section 506(a) determination ever made and almost twice the total of the amounts previously authorized pursuant to this section. This was justified by State Department officials in testimony before the Senate Foreign Relations and House Appropriations Committees as necessary to replace the aircraft and helicopters lost in the raid to save El Salvador from a "probable victory" by leftist guerrillas. Part of the funds (approximately \$750,000 per helicopter) were used to enable El Salvador to buy the U.S. owned helicopters including those which had been destroyed or damaged in the guerrilla attack. Further, \$265,000 of these funds were required to repair the damaged helicopter.

Whether the reporting requirement of section 21(c)(2) is applicable to any given set of facts depends on whether those facts establish the occurrence of "significant hostilities or terrorist acts" within the meaning of that phrase as used in the AECA. Neither section 21(c)(2) nor its legislative history provides a definition of this phrase or guidance as to the extent of hostile activity that must occur to trigger its requirement. Thus, the determination is ultimately a matter of judgment to be applied on a case by case basis. In this case, a guerrilla raid on El Salvador's principal air base occurred when U.S. personnel were deployed to the air base. Among the aircraft destroyed or damaged in the raid were nearly half of the helicopters used by the Salvadoran Air Force, two-thirds of which were owned by the U.S. Government. In our judgment, this represents "significant hostilities

or terrorist acts" endangering "American lives or property" and should have been reported to the Congress under section 21(c)(2). 1/

Interestingly, a similar question was raised during Senate hearings in 1981 on the situation in El Salvador:

SENATOR "CRANSTON. In your judgment would a guerrilla attack upon U.S. military personnel or the locations where they are stationed bring into play the reporting requirements for the War Powers Resolution."

GENERAL "GRAVES. 2/ I think it would not be the War Powers Resolution, Senator Cranston. But as Mr. Carlucci said in his recent letter to the chairman, if we had an outbreak of significant hostilities, we would report in compliance with section 21(c) of the Arms Export Control Act." Hearings on the Situation in El Salvador Before the Senate Comm. on Foreign Relations, 97th Cong., 1st Sess. 52 (1981).

When asked why a report was not provided in connection with the Ilopango raid, a DSAA official stated that DSAA (which would have initiated such a report) was not provided any information on which to form a judgment on whether or not a section 21(c)(2) report was required. Thus, he maintained that DSAA had no knowledge that U.S. lives and property were endangered in El Salvador, and consequently no report was required.

#### WAR POWERS RESOLUTION

After numerous attempts and over a Presidential veto, the Congress on November 7, 1973, passed the War Powers Resolution (50 U.S.C. §§1541-48) to govern the use of U.S. armed forces abroad in the absence of congressional authorization or a declaration of war. Among other objectives, the Resolution was intended

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1/The Senate report on the Glenn amendment (S. Rep. No. 97-83 at 27 (1981)) contains a sentence that states: "The report would be required only if those U.S. personnel performing defense services might be endangered by the hostilities or terrorist acts." Whatever significance is attributable to the omission in the sentence of any reference to the loss of property, we have concluded from our study of the facts that the hostilities at Ilopango included a clear potential for endangerment of U.S. personnel. As noted earlier, DOD procedures call for a report if hostilities "constitute a general threat to American lives or property."

2/At the time, General Graves was Director of the Defense Security Assistance Agency (DSAA).