

EFFECTIVE INFLUENCE: AMENDING THE LEAHY LAWS TO INCENTIVIZE U.S. ARMY SPECIAL FORCES UNITS TO CORRECT GROSS VIOLATIONS OF HUMAN RIGHTS

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ABSTRACT: *Congress should amend the Leahy Laws to incentivize U.S. Army Special Forces (SF) units to develop more robust human rights doctrine and to correct the gross human rights violations of their foreign counterparts. The Leahy Laws restrict foreign assistance to foreign units that commit gross violations of human rights. Currently, the Leahy Laws are not effective in countries with weak accountability mechanisms. These countries lack the ability or will to achieve the underlying purpose of the Leahy Laws: to promote adherence to human rights law by requiring countries to prosecute human rights violators. SF units have the ability to address this gap in the laws by independently correcting the gross human rights violations of their foreign counterparts in these countries. However, the Leahy Laws discourage SF units from establishing robust human rights doctrine because the State Department is responsible for vetting all recipients of U.S. foreign assistance before Special Forces units can perform their missions. Further, the Leahy Laws require the foreign government, not SF units, to correct gross violations of human rights before assistance can be provided to the human rights violators. Therefore, in many instances, SF units cannot independently correct gross violations of human rights or carry out their mission without approval from the State Department. This results in not only more gross violations of human rights, but also limits SF units' ability to accomplish their national security mission. SF soldiers influence their foreign counterparts to accomplish complex missions. For this influence to be effective, they must also ensure their counterparts comply with human rights law. Using what the author terms "Effective Influence," SF soldiers can accomplish their mission and correct the gross human rights violations of their counterparts. The Leahy Laws should be amended to ensure SF units have Effective Influence.*

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I. INTRODUCTION

In 1997, Congress passed a limitation on funding to any counternarcotic unit that committed a gross violation of human rights (GVHR).¹ Just a year later, in 1998, Congress expanded the Foreign Assistance Act to apply this limitation to any State Department (DOS) foreign assistance provided to any foreign unit.² In 2001, Congress expanded the limitation further to cover assistance originating with the Department of Defense (DOD).³ Collectively known as the “Leahy Laws,” these laws affect almost all foreign assistance provided to foreign units by U.S. forces.

Despite these laws, foreign units advised by U.S. Special Forces (SF) soldiers have continued to receive assistance after committing GVHRs.⁴ One reason for this occurrence is there are no internal reporting requirements for SF units to directly report GVHRs to the Secretary of Defense.⁵ Unlike the DOS Leahy Law, which prescribes detailed requirements for how embassies should monitor and report abuses, the DOD Leahy Law has vague requirements that allow the DOD to rely on determinations made by the DOS.⁶ As a result, the DOD has not developed robust internal reporting requirements like the DOS.

Additionally, a small number of countries where SF units deploy escape application of the Leahy Laws due to so-called notwithstanding clauses on the funding appropriations for specific SF missions.⁷ Notwithstanding clauses allow

¹ Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, Department of State International Narcotics Control, 110 Stat. 3009 (1996). The Foreign Assistance Act defines gross violations of human rights as torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of the person. 22 U.S.C. § 2304 (2014). Throughout this article, gross violations of human rights refers to this statutory definition. If the author refers to human rights violations, these are other violations of human rights without a specific statutory definition.

² 28 U.S.C. § 2378d (2014). Throughout this article, this expansion is referred to as the “DOS Leahy Law.”

³ 10 U.S.C. § 362 (2016). Throughout this article, this expansion is referred to as the “DOD Leahy Law.” Specifically, this provision applies to all equipment, training, and other assistance from DOD. Effectively, it covers almost all assistance originating in the DOD.

⁴ See U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2012: AFGHANISTAN (2012); Comm. Against Torture on Concluding Observations on the Second Periodic Report of Afghanistan, U.N. Doc. CAT/C/AFG/CO/2 (2017); HUMAN RIGHTS WATCH, “TODAY WE SHALL ALL DIE”: AFGHANISTAN’S STRONGMEN AND THE LEGACY OF IMPUNITY, 31-72 (2015); Gary Owen, *A Warlord, A Drug Smuggler, and a Killer: Meet the Men Poised to Lead Afghanistan*, VICE NEWS, MAY 28, 2014.

⁵ 10 U.S.C. § 362; See Michael J. McNerney et. al., RAND, Improving Implementation of the Department of Defense Leahy Law 4 (2017) (summarizing the history of the DODs reliance on the DOS to vet recipients of assistance under the Leahy Laws).

⁶ 10 U.S.C. § 362 (2016); 28 U.S.C. § 2378d (2014).

⁷ Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 2448 (2007). Congress included the notwithstanding provision to the funding appropriation for Afghanistan Security Forces. The notwithstanding clause appears in the same appropriation and states, “such funds shall be available to the Secretary of Defense, notwithstanding any other provision of law . . .” In

SF units to avoid the limitations of the Leahy Laws when training foreign troops.⁸ As a result, SF units continue to advise units that commit GVHRs.⁹

However, the structure, text, and legislative history of the Leahy Laws indicate that Senator Patrick Leahy of Vermont and other contemporaneous members of Congress never intended the Leahy Laws to apply in countries with weak accountability mechanisms. The main purpose of the Leahy Laws is to incentivize countries to punish gross violators of human rights in military units.¹⁰ In a country without strong accountability mechanisms, governments lack the resources and motivation to prosecute most human rights violators. The Leahy Laws must be amended to address this weakness. However, to date, most of the amendments to the Leahy Laws have focused on the types of assistance that the Laws should regulate.¹¹

With more robust human rights doctrine,¹² SF units could address this gap in the Leahy Laws and correct GVHRs in countries without strong accountability mechanisms. However, the Leahy Laws do not incentivize SF units to independently correct GVHRs. Instead, the Leahy Laws incentivize, even mandate, SF units to rely solely on the DOS's determination without taking any independent steps to correct the violations.¹³

This article argues that the Leahy Laws should be amended to incentivize SF to develop more robust human rights doctrine to ensure that human rights violators are held accountable in countries without strong accountability mechanisms. Even though SF units have the technical skill to influence their foreign counterparts, SF units' human rights doctrine is not adequate to address the complex environments in which SF units deploy.¹⁴ An SF unit can take an unorganized group of 500 irregular soldiers, and with just a 12-man team,

effect, the notwithstanding clause allows the DOD to focus on the national security mission and waive any requirements of the Leahy Law when assisting Afghan forces.

⁸ See Daniel R. Mahanty, *The "Leahy Law: Prohibiting US Assistance to Human Rights Abusers: Pulling Back the Curtain*, JUST SECURITY (June 27, 2017), <https://www.justsecurity.org/42578/leahy-law-prohibiting-assistance-human-rights-abusers-pulling-curtain> [https://perma.cc/8D88-82DG] (explaining the application of the notwithstanding provision to the Afghanistan Security Forces Fund in Afghanistan).

⁹ Cf. Erica Gaston, *The Leahy Law and Human Rights Accountability in Afghanistan: Too Little, Too Late or a Model for the Future?*, AFGHANISTAN ANALYSTS NEWS NETWORK (Mar. 5, 2017), <https://www.afghanistan-analysts.org/the-leahy-law-and-human-rights-accountability-in-afghanistan-too-little-too-late-or-a-model-for-the-future/> [https://perma.cc/9TYN-SZQJ] (stating that U.S. strategy is undermined when SF do not encourage adherence with human rights law).

¹⁰ SENATE COMMITTEE ON APPROPRIATIONS, 107TH CONG., MR. LEAHY REP. TO ACCOMPANY H.R. 2506, (COMM. PRINT 2001) (Senator Leahy announcing the purpose of the Leahy Laws).

¹¹ Department of Defense Authorization for Appropriations for Fiscal Year 2015 and the Future Years Defense Program: A Hearing Before the Senate Armed Services Committee, 30 (2014) (statement of Admiral McRaven, Commander, SOCOM commenting that the Leahy Laws hinder training of foreign forces).

¹² Human rights doctrine refers to the collection of regulations, training manuals (field manuals), and other DOD and Department of the Army regulations that instruct Special Forces units on how to address human rights law in the units they advise. Currently, there is no single regulation that contains all human rights doctrine, instead, several regulations contain brief mentions to human rights law without a concentrated focus on human rights law.

¹³ See Michael J. McNeerney et. al., RAND, *Improving Implementation of the Department of Defense Leahy Law 4* (2017) (summarizing the history of the DOD's reliance on the DOS to vet recipients of assistance under the Leahy Laws).

¹⁴ See generally PATERSON, PATRICK, *TRAINING SURROGATE FORCES IN INTERNATIONAL HUMANITARIAN LAW: LESSONS FROM PERU, COLOMBIA, EL SALVADOR, AND IRAQ 24* (Joint Special Operations University Press, 2016) (stating that most special operations manuals have inadequate instruction on how to train human rights law).

transform it into a professional unit with the equivalent combat power of 1,000 regular soldiers.¹⁵ In this respect, SF units act as force multipliers. However, this influence can only be effective if SF soldiers train their counterparts to respect human rights law.¹⁶

“Effective Influence,” as described herein, is the ability of a SF soldier to ensure that his foreign counterpart can accomplish the mission while also ensuring the counterpart adheres to established human rights law. Currently, SF human rights doctrine is not detailed enough to ensure SF units have Effective Influence.¹⁷ As a consequence, many human rights violators will go unpunished. SF units with Effective Influence will be able to accomplish their national security mission more effectively in the long term. In places like Afghanistan, security is still tenuous because the Taliban, an oppressive regime that committed multiple GVHRs,¹⁸ has been replaced with a regime that is corrupt and has commanders that commit GVHRs.¹⁹ If SF units have robust human rights doctrine, they could train leaders to adhere to human rights law and create a more lasting peace in many of the countries where the U.S. deploys its troops.

Part II starts with a history of SF human rights doctrine to highlight how it has been inadequate to address GVHRs in multiple conflicts. Part III provides a legislative and historical background of the Leahy Laws to show that the laws were not meant to apply in countries with weak accountability mechanisms and no amendments have addressed this gap. Part IV summarizes both domestic and international criminal liability for SF units that advise human rights violators and concludes that in most circumstances, SF units would not be liable for advice given to human rights violators. Finally, Part V proposes an amendment to the Leahy Laws that will incentivize SF units to develop more robust human rights doctrine to ensure they have Effective Influence.

II. A BRIEF HISTORY OF U.S. ARMY SPECIAL FORCES

SF units are some of the most versatile, and proficient units in the U.S. military. They conduct traditional missions such as covert raids and unconventional missions such as training guerillas to overthrow a foreign government.²⁰ Because of these skills, SF units implement foreign policy where other instruments of national power cannot.²¹ To effectively implement foreign policy, SF units must have a duty to correct GVHRs in units they advise.

¹⁵ See Dale G. Uhler, *Force Multiplier for Special Operations*, JOINT FORCE QUARTERLY, 59 (2006).

¹⁶ Effective is capitalized and quoted because it refers to “Effective Influence” which the author defines in the next paragraph and in more detail in Part II.

¹⁷ See U.S. ARMY, FM 3-05.137, ARMY SPECIAL OPERATIONS FORCES FOREIGN INTERNAL DEFENSE, 6-41 (2008) (just one example of the inadequacy of human rights doctrine in SF units. This manual only contains a small section titled “other considerations” which instructs SF soldier to report human rights violations and prevent them when possible).

¹⁸ HUMAN RIGHTS WATCH, “BLOOD-STAINED HANDS”: PAST ATROCITIES IN KABUL AND AFGHANISTAN’S LEGACY OF IMPUNITY, (2005).

¹⁹ See Charles Tiefer, *IG Report Shows Afghanistan Failing to Fight Corruption*, FORBES (June 6, 2018), <https://www.forbes.com/sites/charlestiefer/2018/06/06/ig-report-shows-afghanistan-failing-to-fight-corruption/#7e6f16745f26> [<https://perma.cc/76TC-TE5G>](stating that support for the Taliban has grown in comparison to support for the Afghan government).

²⁰ U.S. ARMY, FM 3-18, SF OPERATIONS, 2-1 (2014).

²¹ PRESIDENT OF THE UNITED STATES OF AMERICA, NATIONAL SECURITY STRATEGY (2017) (identifying goals and missions that can only be accomplished using U.S. SF); DEPARTMENT OF STATE & U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, JOINT STRATEGIC PLAN FY 2018-2022 (2018) (stating that the DOD is instrumental in helping the DOS ensure countries can develop democracies);

Tracing their beginnings to the Vietnam War, SF teams have developed a reputation as fierce diplomat-soldiers capable of speaking multiple languages and training foreign forces to counter insurgencies.²² These skills have enabled them to be what the U.S. military calls a “force multiplier,” or having a capability that, “when added to and employed by a (foreign) combat force, significantly increases the combat potential of that force and thus enhances the probability of success of that force.”²³ SF teams can deploy to a foreign country with a team of 12, and turn a group of 100–200 soldiers or insurgents into a lethal fighting force.²⁴ They can do this in a country that has weak accountability mechanisms and is trying to establish itself as a democracy, or a developed country that needs help defending against a local insurgency.²⁵ Because of this skill set, the DOS and the DOD have included SF units in their strategic plans to accomplish major objectives.²⁶ To ensure that SF units fulfil the strategy of the DOS, the DOD, and the National Security Strategy, SF units must exercise Effective Influence.

SF units exercise great influence over their partner units because of their expertise and status as instruments of U.S. foreign policy.²⁷ In order for that influence to be Effective, however, a SF soldier must do more than advise a foreign commander to accomplish the mission. A SF soldier must also have an equal duty to ensure their partner is acting in accordance with human rights law.²⁸ If a SF soldier only focuses on the mission, any short-term success could be undermined when a counterpart does not adhere to human rights law in the long term.²⁹

The author derives the term Effective Influence from the international criminal law mode of liability for command responsibility whereby a commander can be held liable for the actions of his subordinates if he has effective control.³⁰ If a commander has effective control, he can be responsible for crimes committed by his subordinates if they knew or reasonably should have known that those

Department of Defense, Quadrennial Defense Review (2014) (stating that U.S. SF in critical in building the capacity of foreign forces and foreign governments);

²² See Reyes, Lt. Col. Cole, *The Military Diplomat*, Armed Forces Journal (2009) (explaining the evolution of the SF officer into a diplomatic warrior in today’s conflicts).

²³ Joint Chiefs of Staff, Joint Special Operations Task Force Operations, GL-11 (April 26, 2007).

²⁴ Dale G. Uhler, *Force Multiplier for Special Operations*, JOINT FORCE QUARTERLY, 59 (2006).

²⁵ SF, GOARMY.COM, <https://www.goarmy.com/special-forces/primary-missions.html> [<https://perma.cc/ADJ5-7LH4>].

²⁶ DEPARTMENT OF STATE & U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, JOINT STRATEGIC PLAN FY 2018-2022, 27 (2018) (while not specifically referring to SF units, highlights a major goal of supporting local governments that can only be accomplished using SF soldiers); DEPARTMENT OF DEFENSE, QUADRENNIAL DEFENSE REVIEW 2014, 37 (2014) (refers to SF units’ role in combatting terrorism by advising foreign forces).

²⁷ See U.S. Army, Foreign Internal Defense Tactics, Techniques, and Procedures for SF, I-2–I-3 (1994) (stating that SF soldiers can influence their counterparts to act in specific ways by establishing rapport).

²⁸ Human rights law refers to the established human rights law from treaties, international courts, and customary international law. Though the Leahy Laws only restrict assistance to units with gross violations of human rights, in order to establish more robust human rights doctrine, Special Forces units should strive to adhere to human rights law and not the technical definition of gross violations of human rights applied by the DOS.

²⁹ See Erica Gaston, *The Leahy Law and Human Rights Accountability in Afghanistan: Too Little, Too Late or a Model for the Future?*, AFGHANISTAN ANALYSTS NEWS NETWORK (Mar. 5, 2017), <https://www.afghanistan-analysts.org/the-leahy-law-and-human-rights-accountability-in-afghanistan-too-little-too-late-or-a-model-for-the-future/> [<https://perma.cc/9YXA-KZKC>] (stating that U.S. strategy is undermined when SF do not encourage adherence with human rights law).

³⁰ Rome Statute, art. 28(a), July 1, 2002.

forces were committing or about to commit international crimes.³¹ Effective Influence, in contrast, is an affirmative duty on SF soldiers to ensure foreign commanders adhere to human rights law before a crime occurs or correct the violation if it does occur. When a SF soldier exercises Effective Influence, accomplishing the mission and promoting human rights law become equal objectives. While some individual SF commanders exercise Effective Influence independently in their units,³² on the whole, SF Command has not incorporated it fully into its doctrine.³³ Until this occurs, the Leahy Laws will not be fully effective.

Since the 1970s, SF doctrine began including references to human rights law, but the doctrine never evolved to the point where SF soldiers, on the whole, exercise Effective Influence.³⁴ Beginning in the Vietnam War, SF doctrine emphasized that the key role of a U.S. SF advisor was to assist their foreign counterparts to solve local issues.³⁵ In order to do this, SF soldiers cultivated a long-term relationship with their counterparts based on trust, rather than using coercion to achieve a short-term goal.³⁶ Using these skills, SF soldiers developed strong local governments disciplined units.³⁷ However, their doctrine contained no clear instruction on how to ensure their counterparts were adhering to human rights law.

In 1970, the New York Times revealed that U.S. SF units were responsible for torture and murder committed by foreign forces in a joint effort with the CIA under the Phoenix Program.³⁸ The CIA originally established the Phoenix Program in 1967 as an effort to centralize intelligence between the U.S. and South Vietnam in order to better coordinate attacks against the Viet Cong Insurgency.³⁹ The Phoenix Program was composed of various South Vietnamese entities including the National Police, the military, the Vietnamese intelligence service, and counter terror teams (later called Provincial Reconnaissance Teams) under the direct supervision of U.S. SF Officers.⁴⁰ The Phoenix Program handbook instructed SF soldiers to use their skills as an advisor to instruct the South Vietnamese on how to gather intelligence on Viet-Cong forces.⁴¹ Despite

³¹ *Id.*

³² See Lieutenant Colonel John Fenzel III, *The Human Dimension of Human Rights*, in ETHICAL DIMENSIONS FOR SF WORKSHOP, 40 (Harvard University John F. Kennedy School of Government ed., 2003) (panel member stating that the SF trained him how to advise a partner commander to not execute a prisoner).

³³ See PATERSON, PATRICK, TRAINING SURROGATE FORCES IN INTERNATIONAL HUMANITARIAN LAW: LESSONS FROM PERU, COLOMBIA, EL SALVADOR, AND IRAQ 24 (Joint Special Operations University Press, 2016) (stating that most special operations manuals have inadequate instruction on training human rights law).

³⁴ See U.S. ARMY, FM 3-05.137, ARMY SPECIAL OPERATIONS FORCES FOREIGN INTERNAL DEFENSE, 6-41 (2008) (contains a small section titled “other considerations” which instructs SF soldiers to report human rights violations and prevent them when possible); U.S. ARMY, TC 31-73, SF ADVISOR GUIDE 3-8 (2008) (contains only a small section advising SF Commanders to tell their counterparts that human rights violations will not be tolerated).

³⁵ U.S. Army, FM 31-22, U.S. Army Counterinsurgency Forces, 4-5 (1963).

³⁶ *Id.* at 111-12.

³⁷ DEPARTMENT OF THE ARMY, FM 31-21, SF OPERATIONS, 7-4 (1969).

³⁸ Sterba, James P., *The Controversial Operation Phoenix: How It Roots Out Vietcong Suspects*, N.Y. TIMES (Feb. 18, 1970), <https://www.nytimes.com/1970/02/18/archives/the-controversial-operation-phoenix-how-it-roots-out-vietcong.html> [<https://perma.cc/8VJ6-UC5X>].

³⁹ WILLIAM ROSENEAU & AUSTIN LONG, RAND, THE PHOENIX PROGRAM AND CONTEMPORARY COUNTERINSURGENCY 7 (2009).

⁴⁰ U.S. MILITARY ASSISTANCE COMMAND, PHUNG HOANG ADVISOR HANDBOOK 4 (1970).

⁴¹ *Id.* at 9, 12.

clear guidance to conform with all U.S. and international law, the Phoenix Program quickly devolved into a program of torture and assassination with U.S. SF directly supervising their South Vietnamese counterparts.⁴² Allegations surfaced that these South Vietnamese units tortured, murdered, and covered up evidence of these incidents, and the U.S. SF advisors reported none of the atrocities.⁴³ The Phoenix Program illustrates the consequences of SF units not having strong human rights doctrine. While SF doctrine contained references to international law, it did not instruct them on how to incorporate it into their missions.

Unfortunately, SF human rights doctrine throughout the 1980s did not change significantly to account for the atrocities that occurred during the Phoenix Program.⁴⁴ However, in 1980 U.S. SF undertook an operation in El Salvador with the goal of correcting human rights violations in military units. The U.S. sent 55 advisors to El Salvador in 1981 to help prevent El Salvador from collapsing and falling into the hands of the Soviet Union.⁴⁵ The U.S. advisors, composed of both U.S. SF and conventional soldiers, faced the challenge of turning an 11,000 man militia that regularly committed GVHRs into a professional fighting force.⁴⁶ The advisors, with little to no training in human rights law, were responsible for correcting all human rights abuses.⁴⁷

While most of the advisors understood how to train foreign forces to fight professionally, few of them had the competence or experience necessary to train their counterparts to adhere to human rights law.⁴⁸ As a result, even though the advisors increased the ability of the El Salvadoran Armed forces to combat the insurgency, the armed forces still committed GVHRs.⁴⁹ Ultimately, without a strong foundation in human rights doctrine, efforts were disorganized and did not result in lasting improvements to peace in El Salvador.

It was not until the 1990s in the wake of the School of Americas (SOA) controversy, that SF manuals began to more comprehensively instruct soldiers on how to address human rights law. In the late 1980s and early 1990s, allegations surfaced that the U.S. trained Latin American military commanders at the School

⁴² DOUGLAS VALENTINE, *THE PHOENIX PROGRAM*, 1–5 (1990) (through first person interviews with Phoenix Program advisors, Valentine documents many of the atrocities committed under the Phoenix Program).

⁴³ Nomination of William H. Colby to be the Director of Central Intelligence: Hearing Before the Senate Armed Service Committee, 93rd Cong. 101–17 (1972) (Statement of K. Barton Osborn, U.S. Army Intelligence Agent Handler in Vietnam) (highlighting some of the atrocities of torture and murder committed under the Phoenix Program and the CIA's effort to downplay U.S. involvement); Richard E. Ward, *Phoenix Program Under House Inquiry*, *THE NATIONAL GUARDIAN*, Oct. 18, 1972.

⁴⁴ In fact, no edits were made to any SF handbooks until 1990 when the special operations handbook was updated to instruct advisors to correct even minor infractions but still no mention of human rights law. U.S. Army, FM 31-20, *Doctrine for SF Operations* 9-13 (1990).

⁴⁵ See PATRICK PATERSON, *TRAINING SURROGATE FORCES IN INTERNATIONAL HUMANITARIAN LAW: LESSONS FROM PERU, COLOMBIA, EL SALVADOR, AND IRAQ* 65–67 (Joint Special Operations University Press, 2016).

⁴⁶ A.J. BACEVICH, *AMERICAN MILITARY POLICY IN SMALL WARS: THE CASE OF EL SALVADOR* 24 (1988).

⁴⁷ ROBERT D. RAMSEY III, *ADVISING INDIGENOUS FORCES: AMERICAN ADVISORS IN KOREA, VIETNAM, AND EL SALVADOR* 84–85 (2006).

⁴⁸ *Id.* at 91 (quoting several advisors and SF soldiers stating that they received no training on how to advise or correct human rights violations).

⁴⁹ See BENJAMIN C. SCHWARZ, RAND, *AMERICAN COUNTERINSURGENCY DOCTRINE AND EL SALVADOR* 25 (1991) (stating that despite U.S. pushing human rights law on El Salvador, no lasting peace was achieved after advisors departed).

of the Americas who later committed GVHRs upon returning to their countries.⁵⁰ In 1996, the U.S. released documents that the U.S. Army used manuals in Spanish containing instruction on how to torture, blackmail, and coerce information out of enemies.⁵¹ In response to these allegations, the SOA faced increased criticism and oversight from Congress resulting in the closing of the School of Americas in 2000 and its replacement with the Western Hemisphere Institute for Security Cooperation.⁵² In response, the curriculum of the School of Americas changed to focus more on human rights law, vetting of prospective students became more stringent, and an outside board of visitors was created to ensure compliance with human rights law and international law.⁵³

After the passage of the Leahy Laws and the aftermath of the increased scrutiny following the SOA scandal, SF Manuals increased their focus on human rights law but still fell short of ensuring units had Effective Influence. The 1994 Manual, Foreign Internal Defense Tactics, Techniques, and Procedures for SF, instructs SF to report human rights abuses to their superiors and to immediately correct human rights abuses by any means.⁵⁴ Even though this approach seems appropriate, these are the only references to human rights law in the entirety of the 219-page manual.⁵⁵ In fact, when viewed in comparison to the rest of the manual and similar SF manuals, the instructions actually seem inconsistent with how a SF soldier should advise a foreign counterpart.

SF manuals instruct soldiers first and foremost to establish rapport with their counterpart by being patient and recognizing that change takes time.⁵⁶ Ultimately, success comes when a counterpart accomplishes the military mission advised by the SF soldiers rather than being directly led by US SF.⁵⁷ Finally, a SF soldier is instructed to never use direct threat, intimidation, or psychological pressure to achieve his goals because that could undermine the long-term relationship.⁵⁸ And yet, the same manual instructs SF soldiers to immediately report human rights abuses to both chains of command, apply coercive strategies to avoid human rights abuses, and withhold assistance to violators of human

⁵⁰ *School of Americas Closes*, WASHINGTON POST (Dec. 17, 2000), https://www.washingtonpost.com/archive/politics/2000/12/17/school-of-the-americas-closes/92746b1f-cf46-4763-a73d-5f558ea48a47/?utm_term=.355d231f9454 [<https://perma.cc/43QQ-GDWA>].

⁵¹ U.S. ARMY SCHOOL OF THE AMERICAS, MANUAL DE ESTUDIO (STUDENT MANUAL), INTERROGACION (INTERROGATION) (1991); Dana Priest, *U.S. Instructed Latins on Executions, Torture*, WASHINGTON POST (Sept. 21, 1996), https://www.washingtonpost.com/archive/politics/1996/09/21/us-instructed-latins-on-executions-torture/f7d86816-5ab3-4ef0-9df6-f430c209392f/?utm_term=.93dc9febaca3 [<https://perma.cc/MGJ5-WGJM>].

⁵² 10 U.S.C. § 2166 (2000) (legislation establishing the Western Hemisphere Institute for Security Cooperation); RICHARD F. GRIMMET & MARK P. SULLIVAN, CONGRESSIONAL RESEARCH SERVICE, U.S. ARMY SCHOOL OF THE AMERICAS: BACKGROUND AND CONGRESSIONAL CONCERNS CRS-7–CRS-14 (2001) (summarizing the proposed bills and Congressional oversight of the SOA that resulted in the establishment of WHINSEC).

⁵³ 10 U.S.C. § 2166 (c), (d), and (e) (2000) (The Board of Visitors included members of the Senate and House, individuals from academia, the individual responsible for U.S. Army doctrine, and the commander of the southern geographic command and required them to review the curriculum of WHINSEC and determine whether it complied with U.S. and international law).

⁵⁴ U.S. ARMY, FM 31-20-3, FOREIGN INTERNAL DEFENSE TACTICS, TECHNIQUES, AND PROCEDURES FOR SF, A-2, C-10 (1994).

⁵⁵ *Id.*

⁵⁶ *Id.* at I-3.

⁵⁷ *Id.*

⁵⁸ *Id.*

rights.⁵⁹ SF soldiers have no discretion to correct human rights abuses without using the DOS bureaucracy. Instead, SF soldiers are instructed to correct human rights abuses by taking immediate and drastic measures at the risk of undermining rapport with their counterpart.

In many present-day conflicts, SF units have advised several human rights violators because of a failure to establish strong internal human rights doctrine. CPT Dan Quinn, a former U.S. Army SF Commander was relieved of command after he struck his Afghan counterpart in response to a discovery that the commander kept Afghan boys as sex slaves.⁶⁰ According to the New York Times, his commanders told him to look the other way and fired him for his conduct.⁶¹ While it is troubling that a U.S. SF Officer would be fired for standing up for human rights law, what is more troubling is that subsequent investigations by the Department of Defense Inspector General revealed that the U.S. had no policy or doctrine in place to report these abuses.⁶²

An investigation published by the Special Inspector General for Afghanistan Reconstruction revealed that even though the DOD had a system in place to record GVHRs to include abuse of children, there was no system in place to correct the violations once the DOD recorded them.⁶³ Instead, the DOD continued to provide assistance to these groups under the notwithstanding provision to the Afghan Security Forces Fund.⁶⁴ The Afghanistan Security Forces Fund is the main funding authority for Afghanistan Security Forces supported by the U.S.⁶⁵ With a notwithstanding provision, all assistance under this authority is not subject to the Leahy Laws.⁶⁶

In response to these allegations and reports by both the SIGAR and the DOD Inspector General,⁶⁷ Congress amended the Afghan Security Forces Fund

⁵⁹ U.S. ARMY, FM TC 31-73, SF ADVISOR GUIDE, A-7 (2008) (stating that SF soldiers must immediately prevent, stop, and report any human rights violations in their partner unit).

⁶⁰ Joseph Goldstein, *U.S. Soldiers Told to Ignore Sexual Abuse of Boys by Afghan Allies*, N.Y. TIMES (Sept. 20, 2015), <https://www.nytimes.com/2015/09/21/world/asia/us-soldiers-told-to-ignore-afghan-allies-abuse-of-boys.html?action=click&contentCollection=Asia%20Pacific&module=RelatedCoverage®ion=Marginalia&pgtype=article> [https://perma.cc/D4CY-KLC9].

⁶¹ *Id.*

⁶² Rod Nordland, *Afghan Pedophiles Get Free Pass From U.S. Military, Report Says*, N.Y. TIMES (Jan. 23, 2018), <https://www.nytimes.com/2018/01/23/world/asia/afghanistan-military-abuse.html> [https://perma.cc/M2WD-6HKS].

⁶³ SPECIAL INSPECTOR GENERAL FOR AFGHANISTAN RECONSTRUCTION, SIGAR 17-47-IPC, CHILD SEXUAL ASSAULT IN AFGHANISTAN: IMPLEMENTATION OF THE LEAHY LAWS AND REPORTS OF ASSAULT BY AFGHAN SECURITY FORCES 3-4 (2017).

⁶⁴ *Id.* at 4.

⁶⁵ Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 2448 (2007). Congress included the notwithstanding provision to the funding authority for Afghanistan Security Forces in every Consolidated Appropriations Act from 2007 until 2017 when the DOD IG revealed that the DOD had been using the provision to provide assistance to Afghan unit commanders that sexually abused boys.

⁶⁶ See Daniel R. Mahanty, *The Leahy Law: Prohibiting US Assistance to Human Rights Abusers; Pulling Back the Curtain*, JUST SECURITY (June 27, 2017), <https://www.justsecurity.org/42578/leahy-law-prohibiting-assistance-human-rights-abusers-pulling-curtain> [https://perma.cc/3TY3-ESDE] (explaining the application of the notwithstanding provision to the Afghanistan Security Forces Fund in Afghanistan).

⁶⁷ INSPECTOR GENERAL U.S. DEPARTMENT OF DEFENSE, DODIG-2018-018, IMPLEMENTATION OF THE DOD LEAHY LAW REGARDING ALLEGATIONS OF CHILD SEXUAL ABUSE BY MEMBERS OF THE AFGHAN NATIONAL DEFENSE AND SECURITY FORCES ii-iii (2017); SPECIAL INSPECTOR GENERAL FOR AFGHANISTAN RECONSTRUCTION, SIGAR 17-47-IPC, CHILD SEXUAL ASSAULT IN AFGHANISTAN:

authority and removed the notwithstanding clause.⁶⁸ While this amendment will hopefully require SF to report GVHRs more consistently, it does not fix the underlying problem that caused this controversy—a lack of strong internal SF human rights doctrine. By removing the notwithstanding provision, the hope was that the Leahy Laws would incentivize Afghanistan to hold those responsible accountable. In 2015, when these allegations came to light, Ashraf Ghani pledged that he would punish those responsible for the abuse.⁶⁹ Three years later, few if any have been prosecuted—Sarwar Jan, the Afghan officer originally alleged to have abused boys, still has not been prosecuted.⁷⁰

Several other SF counterparts accused of GVHRs have gone unpunished despite the removal of the notwithstanding clause. The DOS, the United Nations, Human Rights Watch, and multiple news organizations all reported that Abdul Raziq (now deceased)—the former police chief of Kandahar Province—committed multiple war crimes and GVHRs.⁷¹ Despite this, he still received funding, and SF units took no action to correct his GVHRs.⁷² In addition, Afghanistan showed no intention to prosecute Raziq.⁷³ Raziq, in an interview with NPR in 2015, articulated the immunity he enjoyed saying, “Are they going to give this area back to the Taliban? . . . They will give us (assistance).”⁷⁴

III. THE LEAHY LAWS: HISTORICAL AND LEGISLATIVE BACKGROUND

The text, legislative history, and historical background of the Leahy Laws indicate they can only be effectively applied in countries with strong accountability mechanisms. First, the structural organization of the amendments indicates an intent that the foreign government receiving assistance is responsible for correcting GVHRs. Second, the legislative history and historical background

IMPLEMENTATION OF THE LEAHY LAWS AND REPORTS OF ASSAULT BY AFGHAN SECURITY FORCES 3–4 (2017).

⁶⁸ Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, 150–151 (2018).

⁶⁹ Matthew Rosenberg, *Ashraf Ghani, Afghan President, Vows to Crackdown on Abuse of Boys*, N.Y. TIMES (Sep. 23, 2015), <https://www.nytimes.com/2015/09/24/world/asia/ashraf-ghani-afghan-president-vows-to-crack-down-on-abuse-of>

<https://www.nytimes.com/2015/09/24/world/asia/ashraf-ghani-afghan-president-vows-to-crack-down-on-abuse-of-boys.html?action=click&contentCollection=Asia%20Pacific&module=RelatedCoverage®ion=Marginalia&pgtype=article> [https://perma.cc/2H6V-T7ZX].

⁷⁰ Rod Nordland, *Afghan Pedophiles Get Free Pass From U.S. Military, Report Says*, N.Y. TIMES (Jan. 23, 2018), <https://www.nytimes.com/2018/01/23/world/asia/afghanistan-military-abuse.html> [https://perma.cc/GR68-6RET]; Quil Lawrence, *A U.S. Marine Tried to Warn a Comrade, Now He Faces a Discharge*, NPR (Sept. 6, 2016), <https://www.npr.org/2016/09/06/492725042/in-trying-to-oust-afghan-official-marine-draws-u-s-scrutiny-to-himself> [https://perma.cc/F8FD-T5TC].

⁷¹ See U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2012: AFGHANISTAN (2012); Comm. Against Torture on Concluding Observations on the Second Periodic Report of Afghanistan, U.N. Doc. CAT/C/AFG/CO/2 (2017); HUMAN RIGHTS WATCH, “TODAY WE SHALL ALL DIE”: AFGHANISTAN’S STRONGMEN AND THE LEGACY OF IMPUNITY, 31–72 (2015); Gary Owen, *A Warlord, A Drug Smuggler, and a Killer: Meet the Men Poised to Lead Afghanistan*, VICE NEWS, May 28, 2014.

⁷² See Erica Gaston, *The Leahy Law and Human Rights Accountability in Afghanistan: Too Little, Too Late or a Model for the Future?*, AFGHANISTAN ANALYSTS NEWS NETWORK (Mar. 5, 2017), <https://www.afghanistan-analysts.org/the-leahy-law-and-human-rights-accountability-in-afghanistan-too-little-too-late-or-a-model-for-the-future/> [https://perma.cc/RBM4-4B3X].

⁷³ Hasib Danish Alikozai, *Corruption Encourages Parallel Judiciary in Afghanistan*, VOICE OF AMERICA (Jan. 12, 2016), <https://www.voanews.com/a/corruption-encourages-parallel-judiciary-afghanistan/3142316.html> [https://perma.cc/W3V5-KWYQ].

⁷⁴ Tom Bowman, *He Calmed Kandahar. But at What Cost?*, NPR (May 21, 2015), <https://www.npr.org/sections/parallels/2015/05/21/407979759/he-calmed-kandahar-but-at-what-cost> [https://perma.cc/YWW2-98E7].

of the Leahy Laws indicate they were only meant to be applied in countries with strong accountability mechanisms.

Because of these limitations, the laws should be amended to place a duty on SF to correct GVHRs in countries where the Leahy Laws are ineffective. Most scholarship surrounding the Leahy Laws has focused on what assistance they should restrict, and to what type of units; while also emphasizing when they should be modified to meet the national security mission of the DOD. None of the debate has focused on whether SF units should have an independent duty to develop human rights doctrine. Ultimately, the Leahy Laws will not be effective until they are amended to incentivize SF to develop Effective Influence in countries with weak accountability mechanisms.

A. THE TEXT OF THE LEAHY LAWS

Although both the DOD and the DOS Leahy laws restrict assistance to those units which have committed GVHRs, each version of the law is significantly different in how it instructs the DOD and the DOS to address GVHRs. The DOS Leahy Law instructs DOS to develop internal reporting mechanisms to prevent assistance from falling in the hands of human rights violators.⁷⁵ The DOD Leahy Law on the other hand, instructs the DOD to rely on the DOS to vet recipients without encouraging the development of internal reporting requirements or more robust human rights doctrine.⁷⁶

Apart from the main clause of each amendment, there are multiple differences in other sections of the Leahy Laws. First, each law proscribes how each department should determine credible information. The DOD Leahy Law requires the Secretary of Defense to make a determination to provide training based on consultation with the Secretary of State using “credible information available to the department of state.”⁷⁷ The DOD also has a duty to share any information of GVHRs to the DOS.⁷⁸ Conversely, the DOS Leahy Law requires detailed procedures to assess credible information.⁷⁹ Therefore, the DOS bears most, if not all, responsibility for receiving and analyzing credible information and although the DOD has a duty to share any information in its possession, it is unclear what in “possession” means and exactly who in the DOD has a duty to share and report credible information.⁸⁰ Unlike the DOS Leahy Law which lays out detailed reporting requirements, the DOD Leahy Law has no specific requirements—only that the DOD report information in its possession.⁸¹

Even though there is no statutory duty for Special Forces units to report violations, the Standing Rules of Engagement for a particular campaign will, more often than not, discuss the obligations of U.S. servicemembers to report violations of the Law of Armed Conflict (LOAC)⁸² or other human rights laws to include

⁷⁵ 22 U.S.C. § 2378d (c) (2016).

⁷⁶ 10 U.S.C. § 362 (a)(2) (2014).

⁷⁷ 10 U.S.C. § 362 (2016).

⁷⁸ 10 U.S.C. § 362(d) (2016).

⁷⁹ 22 U.S.C. § 2378d(d) (2014).

⁸⁰ 10 U.S.C. § 362(d) (2016).

⁸¹ 10 U.S.C. § 362(d) (2016); 22 U.S.C. § 2378d(d) (2014).

⁸² LOAC is the law that regulates soldiers actions during war and is generally less restrictive; human rights law is the law that regulates a state’s actions during peace time and is generally more restrictive.

GVHRs as defined in the Leahy Laws.⁸³ Ultimately, therefore, the decision to adopt reporting requirements for GVHRs is left to the commander of the campaign or his/her higher commander. Additionally, while the DOS Leahy Law requires the DOS to keep a record of units that should be rejected assistance, the DOD Leahy Law does not require the DOD to maintain a similar record.⁸⁴ As a result, there is no mechanism in the DOD Leahy Law that incentivizes SF units to develop internal reporting requirements or robust human rights doctrine.

The DOD Leahy Law provides the DOD some escape hatches from the harsh punishments on foreign units.⁸⁵ In the DOS Leahy Law, the Secretary of State may determine that the government is taking effective steps to bring the responsible members to justice.⁸⁶ The DOS further defines effective steps as disciplinary actions undertaken by the military, or criminal prosecutions enforced by the government.⁸⁷ The DOD has similar language but allows transfers to a different unit to suffice as taking necessary corrective steps.⁸⁸ In addition to the exception, the DOD Leahy Law also contains a waiver that allows the Secretary of Defense to provide assistance to rejected units after consultation with the Secretary of State. The DOS has a duty to ensure abuses are corrected, while the DOD has a waiver that incentivizes them to place the interests of national security above developing more robust human rights doctrine.

Finally, the DOS Leahy Law includes a duty to notify the foreign government of the GVHRs within its units; the DOD Leahy Law contains no similar provision.⁸⁹ This provision requires the DOS to inform the foreign government when it decides to withhold assistance and to assist that government in bringing the responsible members to justice.⁹⁰ The DOD has no notification requirement for units that receive assistance except when they exercise a waiver.⁹¹ As a result, the DOS is incentivized to encourage foreign governments to correct GVHRs, but there is no incentive for the DOD to do the same.

Using the Whole Text Canon which states that the text must be construed as a whole,⁹² the application of the Leahy Laws appears to be limited to those countries with strong accountability mechanisms. The duty to notify and the exception to allow assistance to countries taking “effective steps” indicate that Senator Leahy and other legislators intended for the DOS Leahy Law to only

⁸³ Most of these Rules of Engagement are classified secret, but some have been declassified after the specific campaign has ended. See CHAIRMAN OF THE JOINT CHIEFS OF STAFF, CJCSI 3710.01B, DOD COUNTERDRUG SUPPORT, A-16 (2014). Standing Rules of Engagement are the rules of engagement that regulate the level and type of force that can be used by soldiers in the campaign to which they apply. *Id.* They also contain provisions for when a commander can amend the ROE to make them more or less restrictive. *Id.* Less restrictive measures, such as less reporting of GVHRs, are normally harder to authorize.

⁸⁴ 22 U.S.C. § 2378d(d) (2014).

⁸⁵ 10 U.S.C. § 362(b), (c) (2016); 22 U.S.C. § 2378d(b) (2014).

⁸⁶ 22 U.S.C. § 2378d (b) (2014).

⁸⁷ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-866, HUMAN RIGHTS: ADDITIONAL GUIDANCE, MONITORING, AND TRAINING COULD IMPROVE IMPLEMENTATION OF THE LEAHY LAW, 6 (2013).

⁸⁸ 10 U.S.C. §362(b) (2016); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-866, HUMAN RIGHTS: ADDITIONAL GUIDANCE, MONITORING, AND TRAINING COULD IMPROVE IMPLEMENTATION OF THE LEAHY LAW, 7 (2013).

⁸⁹ 22 U.S.C. §2378d(c) (2014).

⁹⁰ 22 U.S.C. § 2378d(c) (2014).

⁹¹ 10 U.S.C. § 362 (2016).

⁹² Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, Thomson West, 167 (2012).

apply in countries with strong accountability mechanisms in place. For those provisions of the statute to be effective, the country must possess investigatory and prosecutorial capabilities to bring the violators to justice. Additionally, the statute places duties on the DOS that incentivize them to ensure GVHRs are reported and ultimately corrected.

Conversely, the structure and language of the DOD Leahy Law seems to indicate that Congress intended for the DOD to rely on the DOS to correct abuses without any independent duty on the DOD to internally report or independently correct GVHRs.⁹³ The DOD Leahy Law does not have a notification requirement, it allows for more expedient remedial measures to correct abuses, and it contains a waiver for national security.⁹⁴ This structure incentivizes the DOD to rely on the DOS instead of developing their own mechanisms to correct GVHRs.

B. THE LEGISLATIVE HISTORY OF THE LEAHY LAWS

The legislative history of the DOS Leahy Law also shows that Congress intended for the DOS Leahy Law to apply only in countries with strong accountability mechanisms. The DOD Leahy Law's legislative history on the other hand shows that there has been fierce resistance to any amendments. Because of this resistance, the DOD Leahy Law has been amended only twice, whereas the DOS Leahy Law has been amended several times. An additional consequence of this resistance has been that much of the debate around the DOD Leahy Law focuses on how to limit its application. As a result, no one in Congress has addressed how the DOD Leahy Law should apply in countries with poor accountability mechanisms and how SF units can be incentivized to develop more robust human rights doctrine in these countries.

1. LEGISLATIVE HISTORY OF THE DOS LEAHY LAWS

Before the Leahy Laws, the only limit on foreign assistance was Section 502B of the Foreign Assistance Act. Passed in 1974, Section 502B aimed to restrict foreign assistance to authoritarian and repressive regimes such as Afghanistan, North Korea, and South Vietnam.⁹⁵ Unlike the Leahy Laws however, the goals of 502B were limited. Senator Alan Cranston of California, one of 502B's chief authors, stated the law aimed to separate the U.S. from repressive regimes and save taxpayer money by reducing the national debt.⁹⁶

Even before passage of 502B, several Senators expressed concern. Senator Donald Fraser of Minnesota cautioned that the provisions were too broad and would be ignored because they would be nearly impossible to implement without eviscerating all foreign aid.⁹⁷ To allay some of these concerns, other senators stated it would only apply to military assistance.⁹⁸ After these hearings, the amendment passed in the Senate 48–34 with 18 abstaining.⁹⁹

⁹³ 10 U.S.C. § 362 (2016).

⁹⁴ 10 U.S.C. § 362 (2016).

⁹⁵ 22 U.S.C. § 2304; 93 CONG. REC. 33467, 33513-15 (1974).

⁹⁶ 93 CONG. REC. 33467, 33513-15 (1974).

⁹⁷ 93 CONG. REC. 33467, 39135-36, 39136 (1974) (Comments by Senator Fraser).

⁹⁸ 93 CONG. REC. 33467, 39135-36, 39136 (1974) (Comments by senator Fraser,).

⁹⁹ 93 CONG. REC. 33467, 33471 (1974).

After passage, the Committee on Foreign Affairs published a list of sixty countries that would be affected by the amendment.¹⁰⁰ Because of the breadth of the countries covered and the broadness of the Act's language, the DOS stated that they seldom applied the provision because it was "overly broad."¹⁰¹ While the ambitions of the statute were noble, it was limited by its overly broad application.

As expected, 20 years later, 502B proved to be ineffective in addressing human rights violations by repressive regimes.¹⁰² In El Salvador in the 1980s, President Carter and Reagan condemned human rights violations but never committed to restricting all assistance to the country under 502B.¹⁰³ Despite multiple calls from the Senate to limit or prohibit assistance under 502B, both the Reagan and Carter administration continued sending military advisors to El Salvador.¹⁰⁴ In the early 1990s, media outlets publication of torture in the SOA, described above, further highlighted the limits of 502B.¹⁰⁵ Finally in the late 1990s, the U.S. provided assistance to counter-narcotics units in foreign countries that committed GVHRs and escaped coverage under 502B as well.¹⁰⁶

Legislators responded to each of these controversies differently, resulting in some fixes to specific problems, but mandated no unified strategy in the DOD to address future human rights law issues in SF units. To address the SOA controversy, Congress increased the oversight of the training provided at WHINSEC to ensure it indoctrinated the trainees with human rights law.¹⁰⁷ Despite this focus on a change in human rights doctrine at WHINSEC, no similar initiative developed to change SF human rights doctrine following the GVHRs supervised by SF in Vietnam and El Salvador.¹⁰⁸ Instead, legislators focused on creating a stronger limitation in the law than that from section 502B. As a result, they halted discussion on how to develop a more robust SF human rights doctrine.

To prevent counternarcotic assistance falling into the hands of human rights violators, legislators adopted a more specific approach which would prove more successful than the broad approach of 502B and evolve into the Leahy Laws. The debate to address the counternarcotic funding issue began in a Senate hearing before the Subcommittee on Foreign Operation on counternarcotic assistance provided to human rights violators in Burma. Senator Leahy initially proposed

¹⁰⁰ *Markup Foreign Assistance Legislation: Hearing Before the House Committee on Foreign Affairs*, 93rd Congress 866, (1974) (comments of Mr. Wolff, Senator).

¹⁰¹ CONGRESSIONAL RESEARCH SERVICE, "LEAHY LAW" HUMAN RIGHTS PROVISIONS AND SECURITY ASSISTANCE: ISSUE OVERVIEW, 2 n.8, 2014.

¹⁰² SENATE COMMITTEE ON APPROPRIATIONS, 107TH CONG., MR. LEAHY REP. TO ACCOMPANY H.R. 2506, (COMM. PRINT 2001).

¹⁰³ See President Jimmy Carter, Statement on the Death of the Archbishop of San Salvador (March 25, 1980); Valerie S. Payne, *U.S. Assistance to Latin America* 51–54 (1995) (summarizing U.S. assistance to El Salvador and restrictions based on human rights violations).

¹⁰⁴ Valerie S. Payne, *U.S. Assistance to Latin America* 51–54 (1995) (summarizing U.S. assistance to El Salvador and restrictions based on human rights violations).

¹⁰⁵ Cf. RICHARD F. GRIMMET & MARK P. SULLIVAN, CONGRESSIONAL RESEARCH SERVICE, U.S. ARMY SCHOOL OF THE AMERICAS: BACKGROUND AND CONGRESSIONAL CONCERNS CRS-7–CRS-14 (2001) (summarizing congressional action that occurred, none of which occurred under Section 520 M to restrict funding).

¹⁰⁶ *Burma: Narcotics, Democracy, and Human Rights: Hearing Before Subcomm. on Foreign Operations, Export Financing, and Related Programs of the S. Committee on Appropriations*, 104th Cong. 6-31 (1995) (a hearing highlighting the fact that many of the assistance that went to Burma for counternarcotic ended up in the hands of units that committed GVHRs).

¹⁰⁷ 10 U.S.C. § 2166 (2000).

¹⁰⁸ See discussion *supra* Part I.

that no counternarcotic assistance of any kind should be furnished to countries that committed GVHRs in accordance with 502B.¹⁰⁹ However, many ambassadors testified that they were resistant to such sweeping measures. Ambassador Robert S. Gelbard, Assistant Secretary of State, said in response to Leahy's remarks, "heroin is killing more people today than ever before . . . our national interest requires us to do what we can under present circumstances to combat the Burmese heroin trade."¹¹⁰ Similarly, Assistant Ambassador Winston Lord stated, "Congress should not limit U.S. counter-narcotics programs . . . these programs are already very limited."¹¹¹

As a compromise to these concerns, Congress passed the Omnibus Consolidated Appropriations Act of 1997 with a limitation that prohibited any counter-narcotics assistance to security forces that committed GVHRs.¹¹² Specifically, the provision stated that no counter-narcotics assistance could be "provided to any unit of the security forces of a foreign country if the Secretary of State has credible evidence to believe such unit has committed GVHRs."¹¹³ This formed the foundation for the later adoption of the Leahy Laws. While Senator Leahy ultimately voted for this provision, he expressed hesitancy that its effects would be limited in a country that does not have strong accountability mechanisms.¹¹⁴ Senator Leahy stated that any counter-narcotics funding to Burma would not be effective while the State Peace and Development Council (SLORC) had control in Burma because the assistance would be used to commit GVHRs and the country would not independently correct these violations.¹¹⁵

Despite Senator Leahy's reservations that such legislation would not be effective in countries with weak accountability mechanisms, within a year he expressed his intent to have this same limitation apply to all foreign assistance.¹¹⁶ In announcing the limitation to all foreign assistance, Senator Leahy stated that the purpose was threefold, "1) to reduce the chance that U.S. assistance goes to human rights violators, 2) uphold the rule of law, and 3) promote accountability for human rights violations."¹¹⁷ In order to ensure the limitation corrected human rights violations, Senator Leahy stated that it would be crucial that the countries receiving assistance have strong accountability mechanisms, and that the DOS assists those governments in prosecuting those responsible for the violations.¹¹⁸ What he did not address, however, was how the law should apply in countries

¹⁰⁹ *Burma: Narcotics, Democracy, and Human Rights: Hearing Before Subcomm. on Foreign Operations, Export Financing, and Related Programs of the S. Committee on Appropriations*, 104th Cong. 6-31, 3 (1995) (statement of Senator Leahy, Vermont).

¹¹⁰ *Burma: Narcotics, Democracy, and Human Rights: Hearing Before Subcomm. on Foreign Operations, Export Financing, and Related Programs of the S. Committee on Appropriations*, 104th Cong. 6-31, 11 (1995) (statement of Assistant Ambassador Gelbard).

¹¹¹ *Burma: Narcotics, Democracy, and Human Rights: Hearing Before Subcomm. on Foreign Operations, Export Financing, and Related Programs of the S. Committee on Appropriations*, 104th Cong. 6-31, 10 (1995) (statement of Assistant Ambassador Lord).

¹¹² Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, Department of State International Narcotics Control, 110 Stat. 3009 (1996).

¹¹³ *Id.*

¹¹⁴ See *Burma: Narcotics, Democracy, and Human Rights: Hearing Before Subcomm. on Foreign Operations, Export Financing, and Related Programs of the S. Committee on Appropriations*, 104th Cong. 3 (1995) (statement of Senator Leahy, Vermont).

¹¹⁵ *Id.*

¹¹⁶ 105 CONG. REC. S12527, S12529 (1997).

¹¹⁷ SENATE COMMITTEE ON APPROPRIATIONS, 107TH CONG., MR. LEAHY REP. TO ACCOMPANY H.R. 2506, (COMM. PRINT 2001).

¹¹⁸ 105 CONG. REC. S12527, S12529 (1997).

without strong accountability mechanisms, which remains a weakness in the law to this day.

After the passage of the Leahy Laws, the Leahy Laws showed success in countries that had strong accountability mechanisms. The U.S. greatly increased assistance to Colombia in 2001.¹¹⁹ As U.S. aid increased, human rights violations in Colombia also increased until 2007.¹²⁰ This increase in human rights violations was due primarily to the “False Positives” scandal.¹²¹ The False Positives scandal involved Colombian military commanders killing civilians and falsely reporting those murdered as insurgents in order to receive promotions or other awards for killing a higher number of insurgents.¹²² In 2007, Colombian units that received assistance from the U.S. committed 312 human rights violations—an all-time recorded high for a one year period.¹²³

Once the False Positive scandal came to light, the U.S. addressed the issue and solved it through reporting and correcting GVHRs under the Leahy Law. First, in 2007, the U.S. cut assistance to Colombian units that allegedly committed GVHRs.¹²⁴ Second, the Human Rights Unit of the Attorney General’s Office began prosecuting military leaders for executing civilians.¹²⁵ Third, in 2007, William Brownfield became Ambassador of Colombia and focused on ending the “False Positives” scandal.¹²⁶ Finally, after President Obama was elected in 2008, he announced his foreign policy objective to eliminate human rights abuses in Colombia.¹²⁷

Before these policy changes, the U.S. focus was on counter-narcotics and counter terrorism issues, without a unified focus on human rights law.¹²⁸ In 2000, President Bill Clinton signed into law Plan Colombia—a program designed to end the civil conflict in Colombia by providing security assistance and eliminating

¹¹⁹ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-71, PLAN COLOMBIA: DRUG REDUCTION GOALS WERE NOT FULLY MET, BUT SECURITY HAS IMPROVED; U.S. AGENCIES NEED MORE DETAILED PLANS FOR REDUCING ASSISTANCE, 17 (2008) (summarizing the initial increase in Assistance to Colombia under PLAN Colombia in the late 1990s and 2001).

¹²⁰ See MILITARY ASSISTANCE AND HUMAN RIGHTS, FELLOWSHIP OF RECONCILIATION: U.S. OFFICE ON COLOMBIA, 9 (2010) (a graph showing that executions significantly dropped after the year 2007).

¹²¹ Chris Kraul, *In Colombia, 6 Sentenced in “False Positives” Death Scheme*, LOS ANGELES TIMES, Jun. 14, 2012, <https://www.latimes.com/world/la-xpm-2012-jun-14-la-fg-colombia-false-positives-20120614-story.html> [<https://perma.cc/3M4Z-BF85>].

¹²² See CONGRESSIONAL RESEARCH SERVICE, 7-5700, COLOMBIA: BACKGROUND, U.S. RELATIONS, AND CONGRESSIONAL INTEREST 24 (2012).

¹²³ MILITARY ASSISTANCE AND HUMAN RIGHTS, FELLOWSHIP OF RECONCILIATION: U.S. OFFICE ON COLOMBIA, 9 (2010) (a graph of showing executions significantly dropped after the year 2007).

¹²⁴ See MILITARY ASSISTANCE AND HUMAN RIGHTS, FELLOWSHIP OF RECONCILIATION: U.S. OFFICE ON COLOMBIA, 11, n. 30 (2010) (stating that a decrease in assistance to the 11th and 30th Brigades led to a decrease in human rights violations by those groups).

¹²⁵ PEACE PRESENCE, THE RISE AND FALL OF “FALSE POSITIVE” KILLINGS IN COLOMBIA: THE ROLE OF U.S. MILITARY ASSISTANCE, 2000-2010, (May 13, 2014), <https://peacepresence.org/2014/05/13/the-rise-and-fall-of-false-positive-killings-in-colombia-the-role-of-u-s-military-assistance-2000-2010/> [<https://perma.cc/RSU9-ZDVP>].

¹²⁶ ANALYSIS OF AMBASSADOR WILLIAM BROWNFIELD’S ADDRESS ON COLOMBIA, COUNCIL ON HEMISPHERIC AFFAIRS (2009) <http://www.coha.org/analysis-of-ambassador-william-brownfields-address-on-colombia/> [<https://perma.cc/WN6S-LWQS>].

¹²⁷ Press Release, President Obama, Readout of President Obama’s Meeting with President Santos of Colombia (September 24, 2010) available at <http://www.presidency.ucsb.edu/ws/index.php?pid=89148> [<https://perma.cc/45K2-5F6W>].

¹²⁸ See Daniel Mejia, BROOKINGS INSTITUTION, Plan Colombia: An Analysis of Effectiveness and Costs, 4 (2017) (summarizing Plan Colombia, instituted by the Clinton Administration with a focus on counter-narcotics issues).

drug-trafficking.¹²⁹ Over the course of eight years, from 2000 to 2008, the U.S. spent an average of \$540 million dollars every year on military assistance alone.¹³⁰ During this time, organizations such as the Fellowship of Reconciliation criticized U.S. policy that allowed extrajudicial killings to go unnoticed in support of U.S. policy to increase security.¹³¹ An example of this hypocrisy came when President George Bush awarded President Uribe with the presidential medal of freedom.¹³² President Uribe was later investigated by the Supreme Court for his ties to the extrajudicial killings of the “False Positives” scandal.¹³³ It was not until this scandal came to light that Leahy achieved its purpose of correcting GVHRs.

As a result of these policy changes, the State Department took an active role in helping Colombia enforce accountability. By 2014, both the State Department and Human Rights Watch reported that while some extrajudicial killings still occurred in Colombia, they were isolated incidents and unrelated to government policy.¹³⁴

A major reason that Colombia was able to address and correct the False Positives scandal within six years was because since the late 1990s, the DOS had been working with Colombia to hold violators of human rights accountable under the Leahy Laws. In a hearing before a subcommittee of the House Appropriations Committee addressing the DOS’s adherence to the Leahy Law, Secretary of State Madeleine Albright stated, “abuse of human rights is fundamentally contradictory to the principle of the rule of law on which . . . all law enforcement in a democratic state, must be based.”¹³⁵ She then stated that those who were alleged to have committed human rights violations were investigated and prosecuted by the Colombian government.¹³⁶ These accountability mechanisms allowed for a swift resolution of the False Positives scandal under the Leahy Laws.

However, despite this proven success in Colombia, other legislators warned that the Leahy Laws were an incomplete tool to address human rights violations in countries with weak accountability mechanisms. In a House floor debate before the passage of the Leahy laws, Congressman Esteban Torres of California stated, “the human rights provision (Leahy Law) was the bare minimum standard we should utilize before releasing millions of dollars of U.S.

¹²⁹ JUNE S. BEITTEL, CONGRESSIONAL RESEARCH SERVICE, COLOMBIA: BACKGROUND AND U.S. RELATIONS R43813 CRS-25 (2017)

¹³⁰ Daniel Mejia, BROOKINGS INSTITUTION, *Plan Colombia: An Analysis of Effectiveness and Costs*, 4 (2017).

¹³¹ MILITARY ASSISTANCE AND HUMAN RIGHTS, FELLOWSHIP OF RECONCILIATION: U.S. OFFICE ON COLOMBIA, 9 (2010).

¹³² Press Release, President Bush Honors Presidential Medal of Freedom Recipients, The White House (Jan. 13, 2009), <https://georgewbush-whitehouse.archives.gov/news/releases/2009/01/20090113-7.html> [<https://perma.cc/WAC2-BNWC>].

¹³³ *Extrajudicial Executions*, COLOMBIA REPORTS DATA (July 24, 2018), <https://data.colombiareports.com/false-positives/> [<https://perma.cc/8LP2-HN2G>].

¹³⁴ See U.S. DEPARTMENT OF STATE, MEMORANDUM OF JUSTIFICATION CONCERNING HUMAN RIGHTS CONDITIONS WITH RESPECT TO ASSISTANCE FOR THE COLOMBIAN ARMED FORCES 2012; WORLD REPORT 2014: COLOMBIA, HUMAN RIGHTS WATCH, (2014) <https://www.hrw.org/world-report/2014/country-chapters/colombia> [<https://perma.cc/TM74-PPSS>].

¹³⁵ *Foreign Operations, Export Financing, and Related Programs for 1998: A Hearing on the Appropriations Act of 1998 Before the Subcommittee on Foreign Operations, Export Financing, and Related Programs of the House Appropriations Committee*, 105th Cong. 99–100 (1997) (comments by Secretary Madeline Albright, Dep’t of State).

¹³⁶ *Foreign Operations, Export Financing, and Related Programs for 1998: A Hearing on the Appropriations Act of 1998 Before the Subcommittee on Foreign Operations, Export Financing, and Related Programs of the House Appropriations Committee*, 105th Cong. 101 (1997) (comments by Secretary Madeline Albright, Dep’t of State).

aid.”¹³⁷ Even Senator Leahy, in subsequent debates around the same time as the passage of the Leahy expressed concern that assistance should not be provided to countries with poor accountability mechanisms and a poor record of complying with human rights law.¹³⁸ In a hearing on providing assistance to Cambodia, Leahy stated that withholding assistance from repressive regimes is “a necessary and appropriate response to those that stand in the way of democracy.”¹³⁹ While the Leahy Laws work when applied to countries with strong accountability mechanisms, they were not meant to correct GVHRs in countries with weak accountability mechanisms.

Despite this initial understanding that the Leahy Laws were only meant to apply in countries with strong accountability mechanisms,¹⁴⁰ much of the debate surrounding the Leahy Laws has been the push for their application in countries without strong accountability mechanisms. Particularly, in countries where U.S. SF units deploy. Senator Leahy has admitted that when a country is not willing to address GVHRs, the Leahy Laws will not be adequate to fix the problem.¹⁴¹ And while proposing no other solution, he has also been a fierce critic of the DOD for resisting the application of the Leahy Law in places with poor accountability mechanisms.¹⁴² This focus on the Leahy Laws as the only solution has been a band-aid to a much larger problem: a lack of developed SF human rights doctrine in countries with poor accountability mechanisms.¹⁴³

2. LEGISLATIVE HISTORY OF THE DOD LEAHY LAWS

Unlike the DOS Leahy Law, the DOD Leahy Law was not designed to apply solely in areas with strong accountability mechanisms. Congress designed the DOD Leahy Law to be less burdensome on the DOD by placing the sole vetting authority in the DOS. However, it is clear from the legislative history that the DOD Leahy Laws, like the DOS Leahy Laws, are ineffective at correcting GVHRs, but for different reasons. Members of the DOD have expressed their frustration in the inefficient process used by the DOS to vet recipients while expressing an eagerness to correct GVHRs internally. At the same time, the DOS

¹³⁷ 105 Cong. Rec. H6356 (1997) (statement of Congressman Torres).

¹³⁸ *Foreign Operations, Export Financing, and Related Programs Appropriations for Fiscal Year 1998: Hearing on H.R. 2159/S. 955 Before the Subcomm. on Foreign Operations, Export Financing, and Related Programs of the S. Comm. On Appropriations*, 105th Cong. 254 (1998) (statement by Senator Leahy, Vermont).

¹³⁹ 105 CONG. REC. S12527, S12529 (1997).

¹⁴⁰ 114 Cong. Rec. S6128 (2016) (Senator Leahy stating that when countries, in this case the Philippines, are unwilling to hold human rights violators accountable, the Leahy Laws will not be successful in addressing GVHRs).

¹⁴¹ Press Release, News Backgrounder on the “Leahy Law” and Leahy REAX on ABC News Report on Atrocities by Iraqi Militias (Mar. 11, 2015), https://www.leahy.senate.gov/press/breaking-news-backgrounder-on-the-leahy-law-and-leahy-reax-on-abc-news-report-on-atrocities-by-iraqi-militias_ [<https://perma.cc/JCL5-NNHH>] (Senator Leahy stating that the Leahy Laws become very difficult to apply in countries like Iraq where there is conflict and minimal accountability mechanisms).

¹⁴² See Eric Schmitt *Military Says Law Barring U.S. Aid to Rights Violators Hurts Training Mission*, N.Y. TIMES (June 20, 2013), <https://www.nytimes.com/2013/06/21/us/politics/military-says-law-barring-us-aid-to-rights-violators-hurts-training-mission.html> [<https://perma.cc/Z7YY-B8VK>] (quoting Senator Leahy responding to military complaints saying they are unfounded, and the Leahy Law can be effective even in countries with poor accountability mechanisms).

¹⁴³ Cf. Rachel Kleingfield, *Rethinking U.S. Security Assistance Beyond the Leahy Law*, JUST SECURITY (Jan. 28, 2017), <https://www.justsecurity.org/42626/rethinking-security-assistance-leahy-law/> [<https://perma.cc/B7LU-CJ7Z>] (stating that the Leahy Laws were only meant to fix a few bad apples and not fix corrupt governments).

and some Senate democrats have been resistant to any amendments to the DOD Leahy Law that would limit their ability to vet recipients or give any exclusive vetting authority to the DOD.¹⁴⁴ Instead, they insist that if they had more funding, they would be able to vet more efficiently.¹⁴⁵

This stalemate has ensured there have been few meaningful amendments to the DOD Leahy Law. Consequently, the DOD, and SF units specifically, continue to deploy in areas where the DOS cannot vet effectively.¹⁴⁶ SF units are forced to wait on a bureaucratically inefficient process. In response, SF units do one of two things: (1) wait and hinder the mission, or (2) ignore the vetting requirements. The first option results in correcting GVHRs, but hamstringing the national security mission. The second option results in achieving the short term national security mission while doing long term damage by not addressing GVHRs. To assist the DOD, and allow SF units to not deliberately ignore the law, Congress has adopted notwithstanding clauses to allow SF units to ignore the Leahy Laws when in the interest of national security.¹⁴⁷

After Congress incorporated the initial DOD Leahy Laws into § 362, there was not a single amendment to the DOD Leahy Laws for a full twelve years.¹⁴⁸ Congress significantly amended the DOS Leahy Law three times in that same amount of time.¹⁴⁹ Instead of learning from the controversy of SOA and adopting more robust SF human rights doctrine, much of the debates surrounding the DOD Leahy Laws has centered around how the DOD can avoid their application.

When the DOS Leahy Laws were amended in 2011, the amendment received significant criticism from several military leaders and this criticism has halted any more stringent requirements to the DOD Leahy Law. In 2011, Congress amended the DOS Leahy Law to restrict assistance to an entire unit when one of its members committed GVHRs.¹⁵⁰ Additionally, the amendment required the DOS and the DOD to adhere to several procedural requirements before making a determination on providing assistance to a foreign unit.¹⁵¹ This

¹⁴⁴ See Michael J. Mc Nerney et. al., RAND, *Improving Implementation of the Department of Defense Leahy Law 4* (2017) (summarizing the history of the DOD's reliance on the DOS to vet recipients of assistance under the Leahy Laws).

¹⁴⁵ *Id.*

¹⁴⁶ See Nick Turse, *Special Operations Forces Continue to Expand Across the World--Without Congressional Oversight*, THE NATION (July 17, 2018), <https://www.thenation.com/article/special-operations-forces-continue-expand-across-world-without-congressional-oversight/> [<https://perma.cc/TQK6-RXGX>] (stating that Special Forces units routinely deploy to Somalia, Niger, and other countries with a small embassy and DOS presence).

¹⁴⁷ See Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 2448 (2007); Erica Gaston, *The Leahy Law and Human Rights Accountability in Afghanistan: Too Little, Too Late or a Model for the Future?*, AFGHANISTAN ANALYSTS NEWS NETWORK (Mar. 5, 2017), <https://www.afghanistan-analysts.org/the-leahy-law-and-human-rights-accountability-in-afghanistan-too-little-too-late-or-a-model-for-the-future/> [<https://perma.cc/KS8A-W7XW>] (citing the International Narcotics and Law Enforcement funds as an act that contains a notwithstanding clause).

¹⁴⁸ The first amendment was in 1999 adding the DOD Leahy Law and the next amendment did not come until 2011 when they added specific reporting requirements for when the waiver was used by the DOD.

¹⁴⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-866, HUMAN RIGHTS: ADDITIONAL GUIDANCE, MONITORING, AND TRAINING COULD IMPROVE IMPLEMENTATION OF THE LEAHY LAWS 1-2 (2013).

¹⁵⁰ Consolidated Appropriations Act of 2012, Pub. L. No. 106-79, 125 Stat. 786, 820 (2011).

¹⁵¹ *Id.*

caused many DOD training missions to be stalled.¹⁵² Admiral William McRaven, then commander of U.S. Special Operations Command (SOCOM), stated the Leahy Laws, “restricted us in a number of countries across the globe in our ability to train units that we think need to be trained.”¹⁵³ General John Kelly, then commander of U.S. Southern Command (SOUTHCOM), echoed these same concerns when he said he had to “wait until the State Department sorts these things out before I can send people in.”¹⁵⁴ In these same hearings, however, both of them expressed support for human rights law and an earnest attitude towards addressing human rights law in the units they trained.¹⁵⁵ However, they ultimately said they could not address these issues on their own because they had no authority without approval by the DOS.¹⁵⁶

Three years after these complaints, the DOD still had significant problems with the way the Leahy Laws were being executed by the DOS. In 2013, in a hearing before the Senate Armed Services Committee, Admiral McRaven once again complained that the vetting took too long and hindered SOCOM missions.¹⁵⁷ In fact, McRaven stated that the vetting was so inefficient that it hindered one of the Leahy Laws most important functions: remediation.¹⁵⁸ Admiral McRaven said that holding violators accountable and correcting their abuses could not be accomplished because of the process.¹⁵⁹ This bureaucracy not only hindered the Leahy laws from being effective, but it also hindered SF units from developing their own doctrine because the DOS prevented them from doing so.¹⁶⁰

Because of the criticism of the Leahy Laws by the DOD leadership, the Senate has been reluctant to pass any major amendments to the DOD Leahy Law which would indirectly make the DOS vetting process more stringent. In response to General Kelly’s criticisms noted above, Congressman Mac Thornberry of Texas stated that he felt any new requirements would be a costly burden for special operations because it would require more trained individuals to conduct vetting.¹⁶¹ For the past three years, the House has attempted to pass an amendment to the DOD Leahy Law that would require the DOD to annually report units

¹⁵² Eric Schmitt, *Military Says Law Barring U.S. Aid to Rights Violators Hurts Training Mission*, N.Y. TIMES (June 20, 2013), <https://www.nytimes.com/2013/06/21/us/politics/military-says-law-barring-us-aid-to-rights-violators-hurts-training-mission.html> [<https://perma.cc/NRW3-7MB6>].

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Sydney J. Freedberg Jr., *Reps. Mac Thornberry, Adam Smith Lead Push for More Foreign Military Training; Leahy Amendment Targeted*, BREAKING DEFENSE (Mar. 6, 2013), <https://breakingdefense.com/2013/03/thornberry-smith-lead-bipartisan-house-push-for-more-foreign-mi/> [<https://perma.cc/PP5V-UV42>] (quoting Admiral McRaven stating that training to units is restricted when they likely need human rights training the most to correct their abuses).

¹⁵⁶ Phil Stewart, *U.S. Commander Seeks to Ease Human-Rights Rules That Limit Training*, REUTERS (Mar. 6, 2013), <https://www.reuters.com/article/us-usa-military-rights-idUSBRE9251NB20130306> [<https://perma.cc/48RD-F8HS>].

¹⁵⁷ Department of Defense Authorization for Appropriations for Fiscal Year 2015 and the Future Years Defense Program: A Hearing Before the Senate Armed Services Committee, 30 (2014) (statement of Admiral McRaven, Commander, SOCOM).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ National Defense Authorization Act for Fiscal Year 2015: A Hearing Before the House Armed Services Committee, 9 (2014) (statement of Adm. McRaven, Commander, SOCOM).

¹⁶¹ *The Posture of U.S. Northern Command and U.S. Southern Command: Hearing on the National Defense Authorization Act of 2015 Before the House Armed Services Committee*, 113th Cong. 12 (2014) (comments from General John Kelly, Commander, U.S. Southern Command).

rejected aid.¹⁶² In 2014, the House proposed an amendment similar to that in the current DOS Leahy Law which would have required the DOD to report the total number of cases submitted, vetted, rejected, and approved; reasons for the rejection; and comments by the Unified Combatant Command (COCOM) commanders on the process.¹⁶³ The Senate did not adopt this version of the amendment, and it has not been passed in subsequent years.¹⁶⁴ Congress has likely been resistant to these amendments because they only impose more requirements on the DOD, without providing the DOD any ability to correct GVHRs. The amendments add more steps in a bureaucratized process that has already been criticized by DOD leaders. Instead, Congress needs to alter their approach by allowing the DOD some ability to correct GVHRs.

While Congress has been hesitant to adopt amendments to the DOD Leahy Law, several legislators have proposed and adopted complete exemptions to the application of the Leahy Laws to SF units by adopting notwithstanding clauses: clauses added to funding authorities with the words “notwithstanding other provisions of law” that effectively exempts that funding authority from the application of the Leahy Laws.¹⁶⁵ Since 2007, the Afghan Security Forces Fund—the major source of funding for the war in Afghanistan—contained a notwithstanding provision that exempted the DOD from applying the Leahy Laws in Afghanistan.¹⁶⁶ It wasn’t until eleven years later in 2018 that Congress withdrew the notwithstanding clause when it came to light through an Inspector General investigation that the DOD used the clause to provide assistance to commanders that sexually abused boys.¹⁶⁷ Congress replaced the notwithstanding clause with a section allowing the DOD to be exempt from the Leahy Laws if certain requirements were met.¹⁶⁸ While this is a step in the right direction, it still provides the DOD an exception to applying the Leahy Laws and ultimately disincentivizes SF units from correcting abuses on their own.

As a consequence of not amending the DOD Leahy Laws, they are still ineffective in countries with weak accountability mechanisms. In 2015, allegations surfaced that Iraqi military units trained by the U.S. had murdered

¹⁶² 114th Cong. Rec. H6748 (2016).

¹⁶³ See HOUSE ARMED SERVICES COMMITTEE, 113th CONG., LEGISLATIVE TEXT AND JOINT EXPLANATORY STATEMENT TO ACCOMPANY H.R. 3979 246 (Comm. Print 2014). A Unified Combatant Command is a regionally aligned military command composed of forces from two or more services and has a broad continuing mission under a single commander. COCOMs are either regionally or functionally aligned. U.S. DEPT. OF DEFENSE, JP 1, DOCTRINE OF THE ARMED FORCES OF THE UNITED STATES xix (2013).

¹⁶⁴ *Id.*

¹⁶⁵ See Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 2448 (2007); Erica Gaston, *The Leahy Law and Human Rights Accountability in Afghanistan: Too Little, Too Late or a Model for the Future?*, AFGHANISTAN ANALYSTS NEWS NETWORK (Mar. 5, 2017), <https://www.afghanistan-analysts.org/the-leahy-law-and-human-rights-accountability-in-afghanistan-too-little-too-late-or-a-model-for-the-future/> [<https://perma.cc/KS8A-W7XW>] (citing the International Narcotics and Law Enforcement funds as an act that contains a notwithstanding clause).

¹⁶⁶ Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 2448 (2007).

¹⁶⁷ Special Inspector General for Afghanistan Reconstruction, SIGAR 17-47-Ipc, *Child Sexual Assault in Afghanistan: Implementation of the Leahy Laws and Reports of Assault by Afghan Security Forces 3-4* (2017).

¹⁶⁸ Consolidated Appropriations Act 2018, Sec. 9022 (the DOD must certify within 30 days the decision to provide assistance to a group otherwise prohibited under the Leahy Laws. Further, the assistance must be in furtherance of a national security interest and the government of Afghanistan must take the necessary steps to correct the violation).

innocent civilians, tortured prisoners, and committed other inhumane acts.¹⁶⁹ Senator Leahy responded to these atrocities by stating they were a clear violation of the Leahy Laws and its two principal purposes, “to shield our country from complicity in GVHRs, and to encourage foreign governments to bring to justice members of their army and police forces when crimes occur.”¹⁷⁰ However, in the next sentence in his report, Senator Leahy stated, “it can be challenging to apply the law under the conditions that exist in Iraq today. That makes it harder to do the vetting of recipients of our aid, harder to identify those responsible for crimes, and harder to bring people to justice.”¹⁷¹ It is “harder”, because Iraq has weak accountability mechanisms.¹⁷²

In countries with strong accountability mechanisms, on the other hand, the DOD has effectively executed the Leahy Laws. In a hearing in 2014 before the House Armed Services Committee, Admiral McRaven, the former commander of SOCOM, stated that the Leahy Laws have been instrumental in bringing peace to Colombia.¹⁷³ Admiral McRaven fully supported the implementation of the Leahy Laws in places like Colombia.¹⁷⁴ In fact, Admiral McRaven stated that Colombia would not have had such success against its rebels had they not used Leahy Laws to correct the GVHRs in police forces and trained those police forces to address human rights law.¹⁷⁵ However, many of the places where SF deploy do not have strong accountability mechanisms and the Leahy Laws need to be amended to address this.

IV. PROPOSED AMENDMENTS TO THE LEAHY LAWS

In countries with strong accountability mechanisms, the DOS Leahy Laws achieve their purpose to incentivize foreign governments to punish military human rights violators as shown by their legislative history and success in Colombia. The DOD Leahy Laws should be amended when applied in these countries to ensure internal bureaucratic reporting mechanisms are effective. However, in countries with weaker accountability mechanisms, the DOS Leahy Laws are not adequate, and the DOD Leahy laws must be amended to fill the gap. Amending the DOD Leahy Laws would incentivize SF to develop doctrine to correct GVHRs when the foreign countries are unable or unwilling to do so. This would enable them to exercise Effective Influence and accomplish their national security mission more effectively.

¹⁶⁹ *Dirty Brigades: U.S. Trained Iraqi Forces Investigated for War Crimes*, ABCNEWS, <http://abcnews.go.com/International/dirty-brigades-us-trained-iraqi-forces-investigated-war/story?id=29193253> [<https://perma.cc/VSX5-VWRX>].

¹⁷⁰ Press Release, Senator Leahy, News Report on Atrocities by Iraqi Militias, Senator Leahy website, https://www.leahy.senate.gov/press/breaking-news-backgrounder-on-the-leahy-law-and-leahy-reax-on-abc-news-report-on-atrocities-by-iraqi-militias_ [<https://perma.cc/39YY-FLLF>].

¹⁷¹ *Id.*

¹⁷² See Christopher Wilcke, *Why Accountability for Iraq’s Militias Matters*, JUST SECURITY (May 27, 2016), <https://www.justsecurity.org/31152/accountability-matters-iraq/> [<https://perma.cc/FL33-BEM8>] (explaining the difficulty Iraq has in prosecuting members of the Iraqi Shia militias that have allegedly committed war crimes).

¹⁷³ *The Posture of U.S. Special Operations Command and U.S. Transportation Command, A Hearing on the National Defense Authorization Act for Fiscal Year 2015 Before the House Committee on Armed Services*, 113th Cong. 10 (2014).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

A. AMENDING THE DOD LAW IN COUNTRIES WITH WEAK ACCOUNTABILITY MECHANISMS

Before any amendments to the DOD Leahy Law can be proposed, it is first important to consider that no major amendment to the DOD Leahy Law has been passed in Congress since 2011. Subsequent to that, several amendments have been proposed, but none have been adopted to the DOD Leahy Law.¹⁷⁶ All of these amendments would have imposed more stringent requirements on DOD reporting.¹⁷⁷ In addition, the only other major amendment that indirectly affected the DOD Leahy Law, the withdrawal of notwithstanding clauses, came only after there was concrete evidence discovered by the DOD IG showing that the DOD misapplied the notwithstanding clause.¹⁷⁸ Based on this history of the DOD Leahy Law, Congress will likely not pass any amendments that impose further requirements on the DOD without concrete evidence of misconduct. However, consistent with the pleas of the DOD leaders, legislators may be open to considering amendments that loosen SF units' reliance on the DOS.

However, because the DOS controls and has controlled the vetting of foreign units for more than twenty years since the adoption of the Leahy Laws, the DOS and senate democrats like Senator Leahy would likely express resistance to any amendments that reduce their control over vetting. In an interview with Tim Rieser, Senator Leahy's staff lead on the Leahy Laws, he expressed concern with giving SF units control over vetting or other human rights corrective mechanisms.¹⁷⁹ He stated that SF units do not have a strong record correcting GVHRs in places like El Salvador and the modern wars in Afghanistan and Iraq.¹⁸⁰ However, this critique, while true in some cases, fails to address many areas where SF have effectively addressed GVHRs. Much of the success correcting GVHRs in Colombia discussed in Part II would not have been possible without SF units providing essential security.¹⁸¹ Any amendment to the Leahy Laws will likely need State Department's support, especially amendments that limit the DOS's vetting authority.

Before applying the amended Leahy Laws, an entity, Congress or an executive agency, must determine whether the country has weak accountability mechanisms. One proposed method is for Congress to adopt the amended DOD Leahy Law instead of adopting a notwithstanding clause. When Congress adopts a notwithstanding clause for human rights limitations, Congress is essentially determining that the national security interests are great, and the mission should

¹⁷⁶ See HOUSE ARMED SERVICES COMMITTEE, 113th CONG., LEGISLATIVE TEXT AND JOINT EXPLANATORY STATEMENT TO ACCOMPANY H.R. 3979 868 (Comm. Print 2014); 114th CONG. REC. H6748 (2016).

¹⁷⁷ See *id.*

¹⁷⁸ INSPECTOR GENERAL U.S. DEPARTMENT OF DEFENSE, DODIG-2018-018, IMPLEMENTATION OF THE DOD LEAHY LAW REGARDING ALLEGATIONS OF CHILD SEXUAL ABUSE BY MEMBERS OF THE AFGHAN NATIONAL DEFENSE AND SECURITY FORCES ii-iii (2017)

¹⁷⁹ Telephone Interview with Tim Rieser, Senior Foreign Policy Aide to Senator Leahy (April 7, 2018).

¹⁸⁰ Telephone Interview with Tim Riser, Senior Foreign Policy Aide to Senator Leahy (April 7, 2018).

¹⁸¹ Yolima Dussán, *Colombia Designs Training for Special Operations NCOs*, DIALOGO (Sept. 4, 2018), <https://dialogo-americas.com/en/articles/colombia-designs-training-special-operations-ncos> [<https://perma.cc/TGV8-LMW5>] (reporting on a joint program between U.S. SOCOM and Colombia Joint Special Operations Command to develop NCOs in special forces to among other things, adhere to human rights).

not be restricted by human rights law.¹⁸² Further, in places where Congress has adopted notwithstanding clauses—Afghanistan, Egypt, and Iraq—those countries have also had poor accountability mechanisms.¹⁸³ Because Congress indirectly makes this determination already, it is not a huge leap for Congress to decide whether the amended Leahy Law should apply by determining whether the country has strong accountability mechanisms.

However, there are several weaknesses to this approach. First, the notwithstanding clause has only been adopted two times, once in relation to appropriations for Afghanistan and once under the International Narcotics and Law Enforcement funds.¹⁸⁴ Second, Congress, does not always act expeditiously, especially with amendments to defense authorizations.¹⁸⁵ SF units often deploy rapidly to address emerging conflicts; relying on Congress could hamper the mission in these areas.

Because Congress is slow to act, the DOS may provide a more expedient and balanced approach. The DOS currently approves and has the most experience vetting assistance to foreign units.¹⁸⁶ Since they have this authority, they may be hesitant to allow SF to have independent ability to vet and correct GVHRs. However, if the DOS determined when SF units have this authority, they may be more willing to relinquish control. The DOS could determine when a country has weak accountability mechanisms using their annual human rights reports.¹⁸⁷ Each year, the DOS publishes the global human rights reports which helps identify those countries with strong or weak accountability mechanisms.¹⁸⁸ Under this system, the DOS would be able to evaluate when to give SF authority.

Upon determining that the DOD Leahy Law should be applied, the proposed amendment to the DOD Leahy Law should apply to the exclusion of other sections of the Leahy Law. While the amendment should impose fewer requirements on the DOD to rely on other agencies, there should be a greater responsibility for SF units to use their Effective Influence to correct GVHRs. The

¹⁸² See UNITED STATES INSTITUTE OF PEACE, TO STABILIZE AFGHANISTAN, U.S. AND PARTNERS MUST COMMIT TO THE LONG HAUL (Mar. 24, 2015), <https://www.usip.org/publications/2015/03/stabilize-afghanistan-us-and-partners-must-commit-long-haul> [<https://perma.cc/Y6HK-8MSV>] (quoting former DOS senior advisor Dr. Barnett Rubin stating whenever there was a conflict between the counterterrorist agenda and anything else in Afghanistan, the counterterrorist agenda won out).

¹⁸³ Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 2448 (2007).

¹⁸⁴ See Erica Gaston, *The Leahy Law and Human Rights Accountability in Afghanistan: Too Little, Too Late or a Model for the Future?*, AFGHANISTAN ANALYSTS NEWS NETWORK (Mar. 5, 2017), <https://www.afghanistan-analysts.org/the-leahy-law-and-human-rights-accountability-in-afghanistan-too-little-too-late-or-a-model-for-the-future/> [<https://perma.cc/55B8-UQJU>] (stating U.S. strategy is undermined when SF units do not encourage adherence with human rights law).

¹⁸⁵ See e.g. 114th Cong. Rec. H6748 (2016) (amendment to the Leahy Laws that Congress has attempted to pass for the last three years).

¹⁸⁶ See Michael J. McNerney et. al., RAND, *Improving Implementation of the Department of Defense Leahy Law 4* (2017) (summarizing the history of the DOD's reliance on the DOS to vet recipients of assistance under the Leahy Laws).

¹⁸⁷ 22 U.S.C. § 2304(b) (2014) (the congressional authority mandating the DOS to publish human rights reports of countries receiving foreign assistance); BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, STATE DEPARTMENT, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2017 (2017) (Human Rights Report for 2017).

¹⁸⁸ 22 U.S.C. § 2304(b) (2014) (the congressional authority mandating the DOS to publish human rights reports of countries receiving foreign assistance); BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, STATE DEPARTMENT, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2017 (2017) (Human Rights Report for 2017).

Proposed Amendment to the DOD Leahy Law should be added to section (b) of the DOD Leahy Law and would be composed of the following:

(b)(1) Exception

(b)(2) Secretary of State Determination: The prohibition in subsection (a)(1) shall not apply if the Secretary of State determines that a country does not have strong accountability mechanisms. In such circumstances, the Defense Secretary must apply the following procedures:

- (i) The Secretary through Special Operations Command has one year to correct the gross violation of human rights;
- (ii) The Secretary must notify the defense committees of a decision to provide such assistance within 30 days;
- (iii) The Secretary has sought a commitment by the counterpart unit commander to take all necessary corrective steps;
- (iv) If after one year and after consultation with the Secretary of State and the Defense Committees of the House and Senate it is determined that the gross human rights violation has not been corrected, the prohibition in subsection (a)(1) shall apply;
- (v) Such notification in subsection (b)(2)(ii) shall be accompanied by a report describing:
 - (1) The information relating to the gross violation of human rights;
 - (2) The security force unit involved;
 - (3) The assistance provided and withheld;
 - (4) The corrective steps to be taken.

This amendment would incentivize SF units to create a more robust human rights doctrine but would also ensure human rights violators are punished. First, the requirement that DOS determines when it should be applied ensures that this amendment will only be applied when countries have weak accountability mechanisms. Therefore, it will not affect the normal duties of the DOD to report violations when notwithstanding clauses do not apply. Second, the DOD has one year to correct the unit that is violating human rights. This incentivizes SF units to establish more robust human rights doctrine if they want to maintain a relationship with their counterpart. Additionally, the requirement to consult with the Secretary of State will ensure that the DOS can determine whether corrective steps have been taken and can still reject assistance to violators who have not been corrected. Third, the SF units must notify the foreign commander as an extra step to ensure they are attempting to correct the abuse. Finally, the reporting requirements ensure that the appropriate congressional committees and the DOS have the necessary information to determine if corrective steps have been taken. In many ways, this amendment to the law mirrors the DOS Leahy Law; the main difference is that the burden to correct GVHRs is on SF units and the foreign commander, instead of on the DOS and the foreign government. Additionally, the DOS Leahy Law allows remedial actions to be taken before withdrawing support.

It should be noted that in the short term, this amendment will likely lead to more GVHRs by foreign units or will allow the U.S. to continue to support units that commit GVHRs. However, in the long term, the amendment will likely lead to more effective application of the Leahy Laws, the accomplishment of the U.S. national security mission, and greater adherence to human rights law in

countries with weak accountability mechanisms. Under their current form, the Leahy Laws are ineffective at correcting GVHRs in countries with weak accountability mechanisms. Strong accountability mechanisms cannot be formed in these countries because they lack the basic security necessary to form peaceful governments. Special Forces units can provide that requisite security.

The Special Forces motto is “de opresso liber,” Latin for “to free the oppressed.” Special Forces units have a proven track record of helping to topple oppressive dictators, or defending foreign democracies against communist insurgencies. Take Colombia, for instance, discussed in Part II. Much of the success of the Obama administration in correcting GVHRs could not have been achieved if Colombia did not have strong accountability mechanisms. Colombia would likely not have strong accountability mechanisms if Special Forces units has not been deployed there for nearly 50 years advising foreign forces and giving them security against the drug cartels and communist insurgent forces. SF commanders need the freedom to choose the units they advise, and the freedom to correct GVHRs in order to be successful. These amendments allow the SF commanders to do just that by encouraging to adopt robust human rights doctrine to teach those leaders they have chosen to meet their national security mission.

An additional criticism is that the year window to suspend application of the Leahy Laws could be exploited by SF units to escape application of the Leahy Laws altogether. SF units could choose a human rights violator, advise them for a year, and then choose another leader once the one year window is over. Or, if the mission is short term, they may not be focused on training human rights. However, SF units are regionally aligned and routinely redeploy to the same place where they have built relations with foreign leaders over the course of multiple years in that country.¹⁸⁹ It would not be beneficial to their mission to scrap one leader for another after having built up a relationship with that leader for a year. Additionally, in many of the countries where they deploy, SF units already apply the Leahy Laws as a matter of policy. This would just give SF commanders another policy tool to train and coach their foreign counterparts.

B. AMENDING THE DOD LEAHY LAW IN COUNTRIES WITH STRONG ACCOUNTABILITY MECHANISMS

Even though legislators have been reluctant to amend the DOD Leahy Laws in ways that put further limitations on the DOD, that reluctance may change if the proposed legislation above is adopted by Congress. Additionally, DOD leaders have stated that the Leahy Laws work in countries with strong accountability mechanisms and thus legislators may be more open to imposing greater requirements on the DOD in these countries.¹⁹⁰ Many of the main concerns surrounding amending the DOD Leahy Laws are with imposing more requirements on the DOD in places where national security interests are high.¹⁹¹

¹⁸⁹ U.S. ARMY SPECIAL FORCES COMMAND, ARSOF FACT BOOK 2019, 7 (2019).

¹⁹⁰ See, e.g., *The Posture of U.S. Special Operations Command and U.S. Transportation Command, A Hearing on the National Defense Authorization Act for Fiscal Year 2015 Before the House Committee on Armed Services*, 113th Cong. 10 (2014) (Admiral McRaven stating that the Leahy Laws were crucial to mission accomplishment in Colombia).

¹⁹¹ See Sydney J. Freedberg Jr., *Reps. Mac Thornberry, Adam Smith Lead Push for More Foreign Military Training; Leahy Amendment Targeted*, BREAKING DEFENSE (Mar. 6, 2013), <https://breakingdefense.com/2013/03/thornberry-smith-lead-bipartisan-house-push-for-more-foreign-mi/> [https://perma.cc/X37D-RQGN] (quoting Admiral McRaven stating that training to units is restricted for the units that need it the most).

Many of these concerns should not be as great in countries with strong accountability mechanisms. There, any security concerns will be outweighed by an equal concern for countries to hold violators accountable. Additionally, the DOD has already expressed eagerness to apply the Leahy Laws in countries with strong accountability mechanisms.¹⁹²

The proposed amendment in countries with strong accountability mechanisms should follow this framework:

(a)(2) The Secretary of Defense, in consultation with the Secretary of State *and each Global Combatant Commander and the Special Operations Commander...*

(a)(3) **Credible Information:** The Secretary shall establish, and periodically update, procedures to—

(i) ensure that each Global Combatant Commander and Special Operations Commander has a list of all security forces receiving U.S. training, equipment, or other types of assistance

(ii) routinely request and obtain such information from the Global Combatant Commanders and Special Operations Commander.

(iii) routinely request and obtain such information from the Department of State, the Central Intelligence Agency, and other U.S. Government sources.

(iv) ensure that such information is evaluated and preserved;

(v) seek to identify the unit involved when credible information exists but the identity of the unit is lacking.

These requirements would ensure the DOD uses all information they possess to vet human rights violators rather than relying solely on the DOS to make a determination under the DOS Leahy Law.

All amendments to the DOD Leahy law should complement the vetting already done by the DOS. The DOS has a comprehensive tracking system used to record vetted units and allegations of GVHRs called INVEST.¹⁹³ INVEST is an online database accessible to all embassies in the world that tracks whether assistance to units was approved, rejected, suspended, or cancelled as well as the allegations against a particular unit.¹⁹⁴ This article's purpose is not to propose that the DOD create its own INVEST system; the purpose is to require reporting of SF to complement the DOS effort and fill gaps where the DOS cannot get information.

V. CONCLUSION

In their current state, the Leahy Laws are not effective in countries without strong accountability mechanisms. First, the DOS Leahy Law specifically states that the foreign government must correct GVHRs in their own units. Second, the DOS does not have the capability, compared to SF, to correct GVHRs in units that receive assistance. To correct this gap, the Leahy Laws

¹⁹² See *The Posture of U.S. Special Operations Command and U.S. Transportation Command, A Hearing on the National Defense Authorization Act for Fiscal Year 2015 Before the House Committee on Armed Services*, 113th Cong. 10 (2014).

¹⁹³ GOV'T ACCOUNTABILITY OFFICE, HUMAN RIGHTS: ADDITIONAL GUIDANCE, MONITORING, AND TRAINING COULD IMPROVE IMPLEMENTATION OF THE LEAHY LAWS 9 (2013).

¹⁹⁴ Michael J. McNerney et. al., RAND Corp., *Improving Implementation of the Department of Defense Leahy Law* xii (2017).

should be updated to incentivize SF units to develop human rights doctrine to correct GVHRs.

The U.S. will continue to be involved in countries where SF units are the only instrument of national power. As conventional forces draw down in areas like Iraq, Syria, and Afghanistan, SF units will likely fill these gaps and maintain a continuous presence in countries around the globe. To assure they accomplish their missions effectively, SF units need to have a more active role in addressing GVHRs in foreign units they advise. The DOD Leahy Law should be amended to incentivize SF units to exercise Effective Influence over their counterparts. Exactly what type of human rights doctrine should be adopted by SF units is beyond the scope of this article. However, these amendments will provide the necessary incentive for SF units to adopt effective human rights doctrine. These amendments will ensure that SF soldiers will exercise Effective Influence and correct GVHRs.