

**JOINT FORCES STAFF COLLEGE
JOINT ADVANCED WARFIGHTING SCHOOL**

The Rule of Law and the U.S. Quest for Security in El Salvador

By

Anthony K. Stapleton

U.S. Department of State

A paper submitted to the Faculty of the Joint Advanced Warfighting School in partial satisfaction of the requirements of a Master of Science Degree in Joint Campaign Planning and Strategy.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Joint Forces Staff College, the Department of Defense, or the Department of State.

Signature: _____

March 12, 2007

Thesis Advisor: Thomas Snukis, Col., U.S. Army

Abstract

This paper examines U.S. efforts to promote the rule of law in El Salvador from 1977 to the present. The study begins with a discussion of the theoretical and practical meanings of the rule of law and follows with an examination of the centrality of the concept in U.S. strategic thinking. Separate case studies examine U.S. efforts to promote the rule of law in El Salvador in response to security threats ranging from human rights violations and insurgency to illegal immigration and transnational street gangs. The central argument of the paper is that under the rubric of promotion of the rule of law, the U.S. has unsuccessfully sought to eliminate threats to U.S. national security by trying to remedy fundamental flaws in the Salvadoran government. As such, U.S. rule of law promotion efforts in El Salvador must be seen as failed attempts at nation-building. Using the U.S. experience in El Salvador as a reference point, the paper reaches the conclusion that promoting the rule of law is not an effective means of addressing threats to U.S. national security.

Dedication

This paper is dedicated to Victoria Ann Stapleton.

Acknowledgements

The author of this paper gratefully acknowledges the generous assistance of thesis mentor Col. Thomas Snukis, USA.

“America must stand firmly for the non-negotiable demands of human dignity: the rule of law; limits on the absolute power of the state; free speech; freedom of worship; equal justice; respect for women; religious and ethnic tolerance; and respect for private property.”

The National Security Strategy of the United States of America, September 2002.

“One of the most important ways to fight terrorism is to promote democracy, and one of the most important ways to promote democracy is the rule of law.”

Attorney General Alberto Gonzales, July 2005

“We also recognized the need for increased public engagement in improving law enforcement, anti-corruption, and the rule of law as a basis of democracy and as a deterrent to terrorism.”

Jonathan D. Farrar, Deputy Assistant Secretary of State for International Narcotics and Law Enforcement, May 25, 2005

“Supporting the rule of law and building civil societies where they do not exist today, or where they are in their infancy, is fundamental to winning the long war.”

Quadrennial Defense Review Report, February 6, 2006

“Help Iraq strengthen the rule of law and promote civil rights.”

Strategic Pillar Six, National Strategy for Victory in Iraq, National Security Council, November 2005.

“Like a product sold on late-night television, the rule of law is touted as able to accomplish everything from improving human rights to enabling economic growth to helping to win the war on terror.”

Rachel Kleinfled Belton, Competing Definitions of the Rule of Law, Rule of Law Series, Democracy and Rule of Law Project, Carnegie Endowment for International Peace

Table of Contents

ABSTRACT	2
DEDICATION.....	3
ACKNOWLEDGEMENTS	4
INTRODUCTION	8
Why El Salvador?.....	9
CHAPTER ONE: THE RULE OF LAW IN THEORY AND PRACTICE	11
The Rule of Law in Western Democratic Government.....	11
The Rule of Law as Foreign Assistance: Theoretical Definitions.....	12
The Rule of Law According to the Practitioners	14
The Rule of Law in U.S. Foreign Assistance	16
History of U.S. Rule of Law Promotion.....	19
Lessons Learned	20
Overview of the Rule of Law in U.S. Strategy.....	22
CHAPTER TWO: PROMOTING THE RULE OF LAW IN EL SALVADOR IN THE CONTEXT OF WAR	29
Case Study: Human Rights and the Rule of Law	29
Evaluation of U.S. Efforts to Promote Human Rights through the Rule of Law.....	36
Human Rights and the Rule of Law: Conclusions.....	40
Case Study: Counterinsurgency and the Rule of Law	41
Evaluation of U.S. Efforts to Counter Insurgency by Promoting the Rule of Law	48
Counterinsurgency and the Rule of Law: Conclusions	52
CHAPTER THREE: PROMOTING THE RULE OF LAW IN EL SALVADOR IN THE CONTEXT OF PEACE	53
Strategic Context: Globalization and the Rise of International Crime	53
Post-War Security Environment in El Salvador and the Evolution of U.S. Policy.....	56

Overview of Current U.S. Rule of Law Assistance in El Salvador.....	59
Case Study: The Rule of Law and Illegal Immigration.....	62
Evaluation of the Rule of Law and Illegal Immigration	63
Case Study: Transnational Street Gangs and the Rule of Law	67
Strategic Setting: Post-War Crime and Insecurity.....	67
The Rise of Transnational Street Gangs.....	69
The Rule of Law and Transnational Street Gangs	73
Evaluating the U.S. Response to Transnational Street Gangs.....	74
 CHAPTER FOUR: SYNTHESIS AND RECOMMENDATIONS.....	 76
The Rule of Law, El Salvador, and U.S. National Security Interests.....	76
Limitations of this Study.....	81
Implications and Recommendations.....	82
Bibliography.....	87
Vita.....	94

Introduction

With the onset of the Global War on Terror (GWOT), exporting democracy has moved to the forefront of U.S. national security strategy. In keeping with this emphasis on exporting democracy, promoting the rule of law has evolved into a principal tool for countering threats to U.S. national security. In Iraq and Afghanistan, as well as numerous lower profile trouble spots, promoting the rule of law is a central component of U.S. efforts to defeat terrorism, consolidate democracy, counter extremism, and manage post-conflict reconstruction and stabilization. In the wider context of the GWOT, promoting the rule of law is seen as a key means of countering extremism and protecting U.S. national interests.

Yet, despite the centrality of the rule of law to U.S. national security strategy, there is little understanding of what all is involved in promoting the rule of law overseas, and, more importantly, serious underestimation of the sheer difficulty of establishing the rule of law in a culture where it has not previously existed. Moreover, it remains to be seen whether promoting the rule of law is an effective means of achieving U.S. security objectives, or whether the concept is more suited to a long-term development agenda. In light of this uncertainty, U.S. reliance on the rule of law raises serious questions regarding the soundness of U.S. national security strategy.

This paper examines U.S. efforts to promote the rule of law in El Salvador from 1977 to the present. The study begins with a discussion of the theoretical and practical meanings of the rule of law, and follows with an examination of the centrality of the rule of law to U.S. strategic thinking. Separate case studies examine U.S. efforts to promote the rule of law in El Salvador in response to security threats ranging from human rights

violations and insurgency to illegal immigration and transnational street gangs. The central argument of the paper is that under the rubric of rule law promotion, the U.S. has unsuccessfully sought to eliminate threats to U.S. national security by trying to remedy fundamental flaws in the Salvadoran government. As such, U.S. efforts in El Salvador must be seen as failed attempts at nation building. Using the U.S. experience in El Salvador as a case in point, the paper reaches the conclusion that promoting the rule of law is not an effective means of addressing threats to U.S. national security.

Why El Salvador?

The U.S. interventions in Afghanistan and Iraq are not the first instances in which the U.S. has promoted the rule of law in order to counter threats to U.S. national security interests. In fact, U.S. efforts to explicitly promote the rule of law as a means of managing threats to U.S. national security interests began much closer to home. Starting with an initiative to reform the Salvadoran military in the wake of a 1977 coup, the U.S. has consistently sought to establish security and stability in El Salvador. In keeping with this goal, over the last 30 years the U.S. has promoted the rule of law in El Salvador against security threats ranging from human rights violations and insurgency to illegal immigration and transnational street gangs. Although there has been considerable fluidity in terms of threat perception, U.S. actions have placed a consistent emphasis on promoting the rule of law as a means of achieving U.S. security objectives.

For a variety of reasons, the American experience in El Salvador from 1977 to the present provides a useful lens for examining the promotion of the rule of law as a tool of U.S. national security policy. At the most basic level, U.S. efforts to reform the Salvadoran judicial system were the first instance of U.S. foreign assistance formally

offered under the title ‘rule of law’ promotion. In many respects, the initial contours and parameters of what has developed into a major category of U.S. foreign assistance emerged in the U.S. experience in El Salvador. Moreover, U.S. involvement in El Salvador spans almost the entire spectrum of national security threats the U.S. has tried to address with rule of law promotion. U.S. involvement in El Salvador ranges from war to peace, and has encompassed a spectrum of bi-national, regional, and transnational threats. Separate case studies in this paper examine how the U.S. promoted rule of law reforms in response to threats to U.S. national security arising from human rights, insurgency, illegal immigration, and transnational street gangs. Furthermore, examining U.S. involvement in El Salvador is instructive because U.S. rule of law promotion is still going on there to this day. U.S. efforts to promote the rule of law in El Salvador are now in their thirtieth year, with no apparent end in sight. As will be examined in detail later in this study, throughout this period the perceived threats to U.S. national security have changed, but the proposed solutions and the tools for arriving at them have remained remarkably consistent. In light of the scope and duration of U.S. rule of law promotion efforts in El Salvador, the U.S. experience there is instructive for evaluating the prominent role which the rule of law currently plays in U.S. strategic thinking. Lessons learned there should be evaluated and compared with ongoing efforts, as well as juxtaposed against assumptions and mindsets employed in current GWOT-driven rule of law promotion efforts.

Chapter One: The Rule of Law in Theory and Practice

The Rule of Law in Western Democratic Government

The rule of law evolved gradually over the course of seven centuries of Western history. The origin of the concept dates back to the genesis of modern Western European constitutional government. The English Magna Carta (1215) is generally recognized as setting the foundation for defining the rights of the governed in relation to the sovereign. Subsequent Western political theorists such as Thomas Hobbes (1588-1679) and Samuel Rutherford (1600-1661) developed the idea of social contract theory, in which the sovereign maintains legitimacy by governing the populace in accordance with a body of clearly defined law. Later Western political philosophers from the period of the Enlightenment such as John Locke (1632-1794) and Montesquieu (1689-1755) went on to develop other important concepts including the consent of the governed and the separation of powers, both of which significantly advanced the importance of the rule of law in Western political philosophy. The Declaration of Independence (1776) and the ratification of the U.S. Constitution (1789) formally incorporated the concept of the rule of law into U.S. political practice and governance. The rule of law arguably did not reach full maturity in the U.S. until the middle of the 20th century, when the federal government intervened to end racial segregation in the south, and the Civil Rights Movement succeeded in extending full voting rights to black Americans. As the above time line indicates, development of the rule of law was a complex evolutionary process which took well over seven centuries to reach maturity.

In current usage, the concept of the rule of law has come to be characterized by, among other attributes, a government ruled by laws, not men, as well as limits on the

power of government as embedded in written constitutions, a coherent body of criminal and civil law, and a system of checks and balances amongst various branches of government. In keeping with the development of the modern Western state, be it a republic or a constitutional monarchy, the rule of law has evolved into a foundational concept of Western liberal democracy.

Beginning in the 18th Century, European colonial expansion, most notably the ascent of the British Empire, began to expose non-Western civilizations to concepts such as constitutional democracy and the rule of law. Western colonial powers, notably the United Kingdom and the U.S., attempted with varying degrees of success to export representative democracy, and related institutions such as judiciaries and legislatures, to the territories they controlled. With the gradual curtailment of Western colonial domination of large parts of Africa and Asia following the end of the Second World War, encouraging developing countries to adopt democratic forms of government became an important element of the foreign policy of many Western governments. As such, the concept of the rule of law took on added importance in the context of international relations and foreign policy.

The Rule of Law as Foreign Assistance: Theoretical Definitions

A review of the literature on the rule of law in the context of international relations and foreign policy reveals various theoretical interpretations of the meaning of the term.

Thomas Carothers, one of the leading academic analysts of the rule of law as a foreign policy issue, offers a comprehensive definition of the concept:

“The rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal

human rights over the last half-century. In particular, anyone accused of a crime has the right to a fair, prompt, hearing and is presumed innocent until proven guilty. The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.”¹

Carothers argues that promoting the rule of law as a foreign policy goal results in emphasis on three types of legal reform: “reform” of existing laws; “strengthening of law-related institutions” to “make them more competent, efficient, and accountable;” and “increasing government’s compliance with the law” and “achieving genuine judicial independence.”²

Rachel Kleinfeld Belton, another prominent academic analyst of the rule of law, contends that there are “two categories of definitions” of the rule of law: “those that emphasize the ends that the rule of law is intended to serve within society;” and “those that highlight the institutional attributes believed necessary to accentuate the rule of law.”³ She argues that “legal scholars and philosophers favor the first type of definition”, while “practitioners of rule-of-law development programs” favor the second.⁴ Kleinfeld-Belton synthesizes her two categories of definitions of the rule of law into a unified description of the concept as follows:

“...the rule of law is not a single, unified good but is composed of five separate, socially desirable goods, or ends: (1) a government bound by law, (2) equality before the law, (3) law and order, (4) predictable and efficient rulings, (5) and human rights.”⁵

¹ Thomas Carothers, ed., *Promoting The Rule of Law Abroad: In Search of Knowledge* (Washington: Carnegie Endowment for International Peace, 2006), 4.

² Ibid., 7-8.

³ Rachel Kleinfeld Belton, *Competing Definitions of the Rule of Law* (Washington: Carnegie Endowment for International Peace, 2005); available from www.CarnegieEndowment.org/pubs.

⁴ Ibid., 3.

⁵ Ibid.

Kleinfeld Belton argues that there are two parallel but different ways of defining the rule of law:

- 1) One definition enumerates the goods that the rule of law brings to a society, such as law and order, a government bound by law, and human rights.
- 2) Another definition describes the attributes of the legal institutions of a society possessing the rule of law, i.e. an efficient and trained judiciary, a non-corrupt police force, and published, publicly known laws.⁶

She contends that foreign assistance “practitioners” focus on developing three “primary institutions” in order to establish the rule of law in developing and transitional countries: laws, a judiciary, and a force capable of enforcing the laws.⁷

As the above discussion indicates, the rule of law is a complicated concept which is premised upon the existence of several supporting institutions, such as a judiciary and law enforcement organizations, as well as other attributes such as a coherent body of laws and some sort of constitution or governing document. More importantly, this general consensus of what the rule of law consists of forms the basis of what Western policy-makers have in mind in terms of an end result when they seek to establish the rule of law abroad.

The Rule of Law According to the Practitioners

The following section examines how U.S. government practitioners define the rule of law. In general, practitioners, policy-makers, and academics tend to use roughly similar interpretations of the rule of law. The U.S. Agency for International Development

⁶ Rachel Kleinfeld Belton, *Promoting The Rule of Law Abroad: In Search of Knowledge* (Washington: Carnegie Endowment for International Peace, 2006), 34.

⁷ *Ibid.*, 47.

(USAID), along with the Department of State and the Department of Justice, are tasked with promoting the rule of law abroad in furtherance of U.S. foreign policy. The Democracy and Governance section of the USAID Development web site defines the rule of law as follows:

“The term ‘rule of law’ embodies the basic principles of equal treatment of all peoples before the law, fairness, and both constitutional and actual guarantees of basic human rights. A predictable legal system with fair, transparent, and effective judicial institutions is essential to the protection of citizens against the arbitrary use of state authority and lawless acts of both organizations and individuals.”⁸

The definition from the USAID web site goes on to describe the results of the lack of the effective rule of law in developing countries:

“In many states with weak or newly-emerging democratic traditions, existing laws are not fair or are not fairly applied, judicial independence is compromised, individual and minority rights are not truly guaranteed, and institutions have not yet developed the capacity to administer existing laws. Weak legal institutions endanger democratic reform and sustainable development in developing countries.”⁹

In a June 1999 United States General Accounting Office (GAO) study, the term “rule of law” is broadly defined as follows:

“U.S. assistance efforts to support legal, judicial, and law enforcement reforms undertaken by foreign governments. This term encompasses assistance to help reform legal systems (criminal, civil, administrative, and commercial laws and regulations) as well as judicial and law enforcement institutions (ministries of justice, courts, and police, including their organizations, procedures, and personnel). It includes assistance ranging from long-term reform efforts, with countries receiving funding over a long period of years, to one-time training courses provided to the police or other law enforcement organizations.”¹⁰

⁸ U.S. Agency for International Development. Office of Democracy and Governance. *Strengthening the Rule of Law and Respect for Human Rights*. (Washington, D.C., 2006). Available from <http://www.usaid.gov/ourwork/democracyandgovernance/rol.html>. Internet. Accessed 3 September 2006.

⁹ Ibid.

¹⁰ United States General Accounting Office, *Foreign Assistance: Rule of Law Funding Worldwide for Fiscal Years 1993-98*, Report to Congressional Requesters, GAO/NSIAD-99-158, June 1999.

As the above discussion demonstrates, practitioners view the rule of law in the same general terms as academics, and have also developed some working definitions of what the rule of law looks like in practice. The following section examines how U.S. policy-makers and rule of law practitioners operationalize their understanding of the rule of law.

The Rule of Law in U.S. Foreign Assistance

Rule of law promotion is a major component of U.S. foreign assistance. The term has come to signify U.S. attempts at enacting comprehensive reforms of a foreign government's judicial and political systems, with the aim of creating an equitable body of laws, a functioning and impartial judiciary, and effective law enforcement organizations which respect human rights. In terms of desirable outcomes, the rule of law is seen as a pillar of a liberal political order, and the foundation of a market economy. The end result is hopefully a culture of lawfulness, and a nation ruled by laws, not men. The ultimate objective of U.S. rule of law promotion is to set up a framework for the assisted nation to peacefully integrate itself into the global political and economic orders.

The responsibility for rule of law promotion extends across several U.S. government components and agencies. The GAO breaks down the responsibility for rule of law programs and activities as follows:

“The Congress funds rule of law programs primarily through the international affairs appropriations of USAID and State. State has overall responsibility for coordinating rule of law programs and activities. USAID and Justice are the primary implementing agencies. Justice receives funds from State and USAID to carry out its activities, including those implemented by its International Criminal Investigative Training Assistance Program (ICITAP). State also funds other rule of law activities implemented by U.S. law enforcement agencies.”¹¹

¹¹ United States General Accounting Office, *Foreign Assistance: Status of Rule of Law Program Coordination*, Report to Congressional Requesters, GAO/NSIAD-00-8R, October 1999, 3.

Institutional roles and responsibilities for U.S. rule of law promotion programs vary. The Department of Justice has two international training sections: the International Criminal Investigative Training Assistance Program (ICITAP), which has responsibility for enhancing police and investigative capabilities of foreign law enforcement organizations; and the Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT), which has responsibility for improving judicial and prosecutorial functions of foreign criminal justice institutions. USAID has responsibility for improving the capabilities of judges, prosecutors, public defenders, and judicial institutions, and increasing citizen access to justice.¹² The State Department Bureau of International Narcotics and Law Enforcement (INL), which has primary responsibility for rule of law activities within State, defines its role as follows:

“Facilitate the establishment of stable criminal justice systems to strengthen international law enforcement and judicial effectiveness while respecting human rights, bolstering cooperation in legal affairs and societal support for the rule of law.”¹³

USAID has developed rule of law promotion into a coherent package of foreign assistance. The USAID Handbook of Democracy and Governance Program Indicators identifies the following objectives for rule of law promotion:

Agency Objective 2.1: Strengthened Rule of Law and Respect for Human Rights
 Intermediate Result 2.1.1: Foundations for protection of human rights and gender equity conform to international commitments
 - Legislation promoting human rights enacted

¹²Ibid., 3.

¹³Jonathan Farrar, “*Transparency and the Rule of Law in Latin America*” (Testimony before the U.S. House of Representatives Committee on International Relations on May 25, 2005), U.S. Department of State, Washington, DC. Obtained from Bureau of International Narcotics and Law Enforcement, U.S. Department of State intranet site.

- Effective advocacy for adherence to international human rights commitments increased
- Government mechanisms protecting human rights established
- Intermediate Result 2.1.2: Laws, regulations, and policies promote a market-based economy
- Legislation, regulations and policies in conformity with sound commercial practices enacted
- Effective advocacy for the promotion of a market-based economy increased
- Government mechanisms that promote market-based economies established
- Intermediate Result 2.1.3: Equal access to justice
- Increased availability of legal services
- Increased availability of information
- Decreased barriers
- Intermediate Result 2.1.4: Effective and fair legal sector institutions
- Increased transparency
- Increased independence
- Improved management and administrative capacity
- Improved functional organization
- Professionalization of technical personnel¹⁴

The Department of Justice, through the ICITAP program, also plays a central role of U.S. rule of law foreign assistance. Given that it is an entity within the Department of Justice, it is not surprising that ICITAP tends to focus on building up the police and judicial institutions of foreign countries in order to promote effective law enforcement and the establishment of law and order. ICITAP identifies the following as central components of rule of law assistance: creation of civilian policing agencies which operate under democratic policing principals; improving police management; enhancing police accountability; developing capacity for professional criminal investigation and evidence handling; integrating improved policies, procedures, and techniques into police training.¹⁵

¹⁴U.S. Agency for International Development. Center for Democracy and Governance. *Handbook of Democracy and Governance Program Indicators* (Washington, D.C., 1998), 17. Available from www.usaid.gov. Internet. Accessed November 7 2006.

¹⁵U.S. Department of Justice. International Criminal Investigative Training and Assistance Program. *ICITAP Project Overview El Salvador* (Washington, D.C., 2006). Available from <http://www.justice.gov/criminal/icitap/elsalvador.html>. Accessed September 5, 2006.

History of U.S. Rule of Law Promotion

A brief overview of the history of U.S. rule of law promotion efforts provides helpful context for the discussion which follows. The concept of promoting the rule of law as a tool of U.S. foreign policy dates back to the founding days of USAID in the early 1960's. The idea first emerged in an embryonic form in the 'law and development movement' of the early 1960's, in which U.S. development experts tried to assist newly-decolonized nations in Asia and Africa to develop democratic political systems as the first step towards modernization and eventual economic development.¹⁶ The main emphasis was on encouraging the formation of robust democratic systems to help newly-independent Third World nations to incorporate into the global political order, and, perhaps more importantly, to provide viable alternatives to the Marxist economic development models then in vogue. Examples include the Kennedy Administration's Alliance for Progress and other 1960's era U.S. foreign aid initiatives.

The first official rule of law promotion programs began in Latin America in the mid-1980s.¹⁷ The 1984-89 USAID effort in El Salvador was the first formal use of the term 'rule of law' for a U.S.-funded legal development program.¹⁸ The programs have also variously been referred to as "administration of justice." In addition to the efforts in El Salvador, major U.S. rule of law promotion programs first came into existence in Latin America, with country programs in Colombia, Guatemala, Honduras, and Panama. Rule of law promotion programs next came into existence in Eastern Europe, as former Soviet satellites threw off communism and sought to transition to democracy and market-based

¹⁶ Carothers, 16.

¹⁷ Ibid, 17.

¹⁸ U.S. Agency for International Development. *Achievements in Building and Maintaining the Rule of Law* (Washington, D.C., 2002), 65.

economies. The programs also spread to the former Soviet Union itself, as well as sub-Saharan Africa and Asia.¹⁹ As the programs became more complex, participation expanded to include major representation by the Department of Justice, the Department of State, and even agencies having limited foreign affairs portfolios such as the Department of Commerce and the Security and Exchange Commission.²⁰

Over the years, U.S. rule of law promotion programs have increasingly become intertwined with post-conflict stabilization and reconstruction efforts. As will be discussed in detail shortly, the U.S. effort in El Salvador came about largely in conjunction with U.S. involvement in the Salvadoran civil war of 1979-1992. A rule of law promotion program was a major part of U.S. efforts in Panama following the 1989 takedown of the Noriega government in Operation Just Cause. Major U.S. military engagements of the 1990's, such as in the Balkans and Haiti, also eventually gave rise to some form of rule of law assistance. The newly created State Department Office of the Coordinator for Reconstruction and Stabilization (S/CRS) lists rule of law promotion as one of its main organizational priorities in both post-conflict situations and prevention of state failure.

Lessons Learned

Given that the U.S. has accumulated over two decades worth of experience in promoting the rule of law overseas, practitioners, policy analysts and academics have begun to compile numerous lessons learned. The Democracy and Rule of Law Project at the Carnegie Endowment for International Peace is a leader in the field. While an exhaustive review of the principal findings of the Democracy and Rule of Law Project is beyond the

¹⁹Carothers, 15.

²⁰Ibid.

scope of this paper, a sampling of the lessons learned the organization has compiled offers some important insights into the prevailing conventional wisdom regarding the efficacy of promoting the rule of law as a tool of U.S. foreign policy.

Democracy and Rule of Law Project Lessons Learned:

- There is a lack of fundamental applied research examining how successful rule of law reform takes place.²¹
- Western policymakers lack a basic understanding of how lasting change occurs in foreign legal systems, and are not sure what measures will bring it about.²²
- U.S. policymakers advocating rule of law assistance underestimate the difficulty and complexity of legal development.²³
- Rule of law reform probably requires a level of intervention in the affairs of a foreign country that is beyond what most donor governments and organizations are willing or capable of undertaking.²⁴
- Rule of law reform is a generational undertaking that demands patient, sustained attention.²⁵
- Reformers mistakenly assume that writing new laws and drafting new constitutions are sufficient to achieve legal reform.²⁶
- Cultural and social practices are major obstacles to rule of law reform.²⁷
- The primary obstacles to rule of law reform are political and human, rather than technical or financial.²⁸
- Institutionalized corruption and cynicism are major obstacles to rule of law reform.²⁹
- Elites will often resist rule of law reform, and only give in to changes under intense pressure from outside actors.³⁰
- Reforming non-western legal systems by importing western models results in the “hasty transplant syndrome,” where local governments are unable to implement or enforce the laws, and local populations can not understand them.³¹

²¹ Steven Golub, *Promoting The Rule of Law Abroad: In Search of Knowledge* (Washington: Carnegie Endowment for International Peace, 2006), 131.

²² Carothers, 15.

²³ Frank Upham, *Promoting The Rule of Law Abroad: In Search of Knowledge* (Washington: Carnegie Endowment for International Peace, 2006), 75.

²⁴ Carothers, 12.

²⁵ Ibid.

²⁶ Wade Channell, *Promoting The Rule of Law Abroad: In Search of Knowledge* (Washington: Carnegie Endowment for International Peace, 2006), 144-149.

²⁷ Ibid.

²⁸ Carothers, 4.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid, 25.

- Most rule of law reform does not have a deep impact on the state institutions it tries to affect.³²
- Policymakers mistakenly assume that democracy will automatically result from improvements in the rule of law.³³
- Most rule of law reform focuses on institutional changes, but overlooks the necessity for political and cultural changes as well.³⁴
- Outside aid from Western reformers can not substitute for the will to reform, which must come from the society in question.³⁵
- Efforts to strengthen basic legal institutions have proven slow and difficult, with the results generally positive but usually modest.³⁶
- Major U.S. judicial reform efforts have foundered on the assumption that external aid can substitute for the internal will to reform.³⁷

As the above citations suggest, achieving tangible progress via promotion of the rule of law is premised upon U.S. policymakers and practitioners successfully surmounting numerous significant political, social, economic, cultural, and bureaucratic hurdles. Policymakers who underestimate the sheer complexity of the task would seem to do so at their peril. Nonetheless, in spite of the difficulty of establishing the rule of law overseas, as the next section examines, U.S. policymakers have enshrined the concept at the forefront of U.S. strategic thinking.

Overview of the Rule of Law in U.S. Strategy

The concept of the rule of law is deeply imbedded in every level of U.S. strategic thought. Policy documents discussing grand strategy prominently feature the rule of law, as do strategic documents discussing lower levels of strategy, both civilian and military alike. In the foreign affairs community, emphasis on the rule of law cuts across military, diplomatic, development and law enforcement communities. The various users impart

³² Ibid, 332.

³³ Ibid, 18.

³⁴ Kleinfeld Belton, 55.

³⁵ Carothers, 4.

³⁶ Ibid, 11.

³⁷ Ibid, 12.

somewhat different meanings to the concept of the rule of law, but each entity accords significant importance to promoting the rule of law in order to accomplish organizational objectives.

The 2006 National Security Strategy of the United States of America, the principal document articulating U.S. grand strategy, makes heavy use of the concept of the rule of law. The document, which runs to a total of forty-nine pages, specifically uses the term a total of twelve times, and includes numerous additional indirect references to the concept. The rule of law makes its first appearance on page four of the 2006 National Security Strategy, under the goal of promoting effective democracies. Here the concept is referred to as one of four main hallmarks of an effective democracy.³⁸ Reliance on the concept of the rule of law is not, however, restricted solely to promoting democracy. Subsequent specific uses of the literal term “rule of law” are included in sections of the strategy dealing with the following issues: human rights; economic growth; fighting corruption; promoting transparency; fighting terrorism; rebuilding Iraq; post-conflict stabilization and reconstruction; enhancing energy security and clean development; opening, integrating, and diversifying energy markets to ensure energy independence; and U.S. relations with South and Central Asia.

The 2002 version of the National Security Strategy features a similar reliance on the concept of the rule of law. The term makes its first appearance on page three of the strategy, where it is included amongst the “non-negotiable demands of human dignity.”³⁹ As in the 2006 national Security Strategy, in the 2002 version the rule of law is most

³⁸ U.S. President, *National Security Strategy of the United States of America*, (Washington, D.C., 2006), 4.

³⁹ U.S. President, *National Security Strategy of the United States of America*, (Washington, D.C., 2002), 3.

closely associated with democratic governance. The term is specifically used or referred to in subsequent sections of the 2002 strategy, across a range of political, economic, and security contexts, in very similar terms to those described above.

In addition to holding a prominent place in key strategic guidance documents such as the National Security Strategy, the rule of law is a central concept in many of the more narrowly-focused supporting U.S. strategy documents. The National Strategy for Combating Terrorism, issued in September 2006, depicts the rule of law a key weapon in the war on terror. The strategy argues that the rule of law, if implemented, replaces “festered grievances” with “peaceful resolution of disputes and the habits of advancing interests through compromise.”⁴⁰ As such, the rule of law is a key component in the U.S. “long term approach” for winning the war on terror.

The National Strategy for Victory in Iraq, which was released in November 2005, incorporates the concept of the rule of law in several key sections. The document details an “integrated strategy along three broad tracks,” i.e. political, security, and economic.⁴¹ The security track, which puts forward an overall objective of “developing Iraqi capacity to secure their country while carrying out a campaign to defeat the terrorists and neutralize the insurgency,” lists “advancing the rule of law” as a central goal of U.S. assistance to Iraqi security forces.⁴² In a subsequent section of the document, eight strategic objectives for victory in Iraq are detailed. Pillar number six lists the following objective: “Help Iraq Strengthen the Rule of Law and Promote Civil Rights.”⁴³

⁴⁰U.S. President, *National Strategy for Combating Terrorism*, (Washington, D.C., 2006), 4.

⁴¹National Security Council, *National Strategy for Victory in Iraq*, (Washington, D.C., 2005), 1.

⁴²*Ibid*, 8.

⁴³*Ibid*, 25.

Not surprisingly, the concept of the rule of law is deeply embedded in the strategic thinking of the civilian foreign affairs agencies. The Department of State, the lead civilian foreign affairs agency, lists promoting democracy and the rule of law as “one of the pillars of its foreign policy.”⁴⁴ Within the Department, principal statutory responsibility for promoting the rule of law resides within the Bureau of International Narcotics and Law Enforcement (INL). INL’s focus on the rule of law encompasses anti-corruption, counter-narcotics, trans-national crime, police assistance, and money laundering. Emphasis on the rule of law is not, however, limited to INL. Over the years, the Bureau of Western Hemisphere Affairs, with policy responsibility for Latin America and the Caribbean, has strongly focused on rule of law issues. Moreover, under Secretary of State Rice’s leadership, every geographic bureau, and most of the functional bureaus within the Department are tasked with advancing the rule of law within their annual bureau program plans (BPP). Recent institutional developments within the State Department further attest to the strategic importance which the organization places on the rule of law. The recently formed Office of the Coordinator for Reconstruction and Stabilization (S/CRS) lists promotion of the rule of law among its principal missions. Furthermore, Secretary of State Rice’s recent plan for implementing “transformational diplomacy,” under which U.S. diplomats are tasked with serving as active agents of change, places primary importance on the concept of the rule of law.⁴⁵

USAID, the executive agency with principal statutory responsibility for administering U.S. foreign assistance, is one of the main institutional promoters of the

⁴⁴ Farrar, 1.

⁴⁵ U.S. Department of State. Office of the Spokesman. *Fact Sheet on Transformational Diplomacy* (Washington, D.C., 2006). Available from <http://www.state.gov/r/pa/prs/ps/2006/59339.htm>. Internet. Accessed 7 November 2006.

rule of law as a foreign policy tool. In fact, the term ‘the rule of law’ as applied to foreign assistance programs was coined to describe USAID judicial reform projects that began in El Salvador and Guatemala in the mid-1980’s.⁴⁶ Since then, USAID has been the principal agent of U.S. rule of law assistance overseas. In its recent white paper “U.S. Foreign Aid: Meeting the Challenges of the 21st Century,” USAID describes the rule of law, along with quality of governance, as “the primary determinants of development.”⁴⁷ The extended USAID definition of the rule of law included above offers further insights into the intellectual and programmatic weight which USAID places on the concept. A recent USAID document, the January 2005 Fragile States Strategy, lists promotion of the rule of law as a main tool for restoring stability to fragile or failing states.⁴⁸ The strategy goes on to link the rule of law to progress in political, economic, social, and security reform in fragile states.

Despite the fact that the majority of its responsibilities are domestic in nature, nonetheless the Department of Justice (DOJ) views promotion of the rule of law overseas as an important component of its strategy for accomplishing institutional objectives. The International Criminal Investigative Training Assistance Program (ICITAP) is the Department of Justice’s principal executive agent for promoting the rule of law overseas. The overall goal of ICITAP is to “create civilian police agencies that operate under democratic policing principals and that are responsive to public needs.”⁴⁹ Specific ICITAP goals include police management, police accountability, improving capacity for

⁴⁶ United States General Accounting Office, *Foreign Assistance: U.S. of Rule of Law Assistance to Five Latin American Countries*, Report to Congressional Requesters, GAO/NSIAD-99-195, August 1999, 8.

⁴⁷ U.S. Agency for International Development, *U.S. Foreign Aid: Meeting the Challenges of the 21st Century* (Washington, DC., 2004), 11.

⁴⁸ U.S. Agency for International Development, *Fragile States Strategy* (Washington, D.C., 2005), 7.

⁴⁹ U.S. Department of Justice. *ICITAP Project Overview El Salvador*, 1.

criminal investigations, and establishing police academies.⁵⁰ ICITAP, which cooperates closely with the Department of State's Bureau of International Narcotics and Law Enforcement and USAID, currently has programs in Albania, Bosnia, Colombia, Croatia, East Timor, El Salvador, Georgia, Ghana, Guatemala, Indonesia, Kosovo, Macedonia, Moldova, Nicaragua, Nigeria, Pakistan, and Senegal. Another main DOJ component, the Federal Bureau of Investigation (FBI), also engages in rule of law promotion by providing investigative assistance and training out of the various Legal Attaché offices it operates in numerous U.S. embassies and missions, as well as in a few overseas field offices.

The rule of law is an increasingly central component of Department of Defense (DOD) strategic thinking as well. In the 2006 Quadrennial Defense Review Report (QDR), under the section titled Achieving Unity of Effort, DOD deals with the rule of law at length. The authors of the QDR leave no doubt as to the importance they impart to the rule of law as a means of achieving U.S. security objectives:

“Supporting the rule of law and building civil societies where they do not exist today, or where they are in their infancy, is fundamental to winning the long war. In this sense, today's environment resembles a challenge that is different in kind, but similar in scale, to the Cold War – a challenge so immense that it requires major shifts in strategic concepts for national security and the role of military power. Therefore, the United States needs to develop new concepts and methods for interagency and international cooperation.”⁵¹

Noting that “today's complex challenges require unified statecraft,” the QDR calls for increased interagency cooperation to promote the rule of law.⁵² Specific recommendations include the creation of mechanisms for closer collaboration between

⁵⁰ Ibid, 2.

⁵¹ U.S. Department of Defense, *Quadrennial Defense Review Report* (Washington, D.C., 2006), 84.

⁵² Ibid., 83.

State and DOD in Washington and overseas, as well as strengthening planning and interoperability for conducting complex interagency operations abroad. The report goes on to call for the Combatant Commanders to cooperate with the U.S. Chiefs of Mission and Embassy Country Teams to play “important field leadership roles” in complex interagency operations abroad. The authors of the QDR argue that State and DOD must work more closely with allies and foreign constabularies to promote the rule of law, and engage in collaborative efforts on activities ranging from “military diplomacy” and public diplomacy to International Military Education and Training (IMET) and foreign assistance to enhance the concept. The QDR expresses DOD’s strong support for additional funding for State’s Coordinator for Reconstruction and Stability. The tone and content of the QDR give the impression that cooperation in promoting the rule of law in post-conflict reconstruction and stabilization operations is one of the principal “deliverables” DOD hopes to obtain from the Department of State via the interagency process.

As the above discussion demonstrates, the rule of law is central to U.S. strategic thinking. From the level of grand strategy all the way down to combatant commanders and embassy country teams, military, diplomatic and civilian law enforcement officials promote the rule of law to further institutional strategic objectives. Yet, as the following analysis of U.S. involvement in the Salvadoran civil war suggests, U.S. policymakers should perhaps consider a more skeptical view of the utility of pursuing U.S. national security objectives through promotion of the rule of law.

Chapter Two: Promoting the Rule of Law in El Salvador in the Context of War

Promoting the rule of law was a major component of U.S. strategy during the Salvadoran civil war. As the following case studies demonstrate, promotion of the rule of law in El Salvador in time of war took on two central meanings for U.S. policymakers: pressuring the Salvadoran Armed Forces (ESAF) and the government of El Salvador (GOES) to protect human rights, and providing the political component of a U.S. counterinsurgency strategy intended to defeat the Farabundo Marti National Liberation Front (FMLN). The U.S. was not successful in either endeavor. U.S. failure to achieve its principal objectives during the Salvadoran civil war illustrate the shortcomings of the rule of law as a tool of foreign policy, and reinforce the futility of attempting to address threats to U.S. national security interests by promoting the rule of law.

Case Study: Human Rights and the Rule of Law

The following case study is a focused examination of how the U.S. utilized the concept of the rule of law to address a perceived threat to U.S. national interests occasioned by Salvadoran government human rights violations. The case study demonstrates that from the late 1970's onwards, the U.S. government saw the deteriorating human rights situation in El Salvador as a potential threat to U.S. national security interests in the country, and viewed promotion of the rule of law as essential to alleviating that threat. The main thrust of U.S. rule of law promotion was to legitimize continued U.S. assistance to the Salvadoran government in its fight against the FMLN insurgents by creating a situation where the Salvadoran military was answerable to the Salvadoran judiciary, and held accountable for human rights violations.

High-level U.S. government interest in the human rights situation in El Salvador began in 1977, when the Carter administration expressed concern over increased right-wing death squad activity and right-wing threats to murder Jesuit priests alleged to be working in concert with Marxist insurgents.⁵³ Continued right-wing violence against political protestors, murders of labor leaders and members of the political opposition, intensifying guerilla activity, and U.S. media coverage of the human rights situation created concern about the stability of El Salvador within the Carter administration. As detailed in an October 4, 1979 memorandum from the Director of the Office for Central American Affairs to Assistant Secretary of State for Inter-American Affairs Viron Vaky, Salvadoran government human rights violations fed “insurrectional violence” and threatened the “coming to power of a radical regime unacceptable to the U.S. and hostile to its interests.”⁵⁴ The memo went on to call for the State Department to push the Salvadoran government to “meaningfully improve human rights performance” and “democratize the political process.”⁵⁵ Two separate “high level” State Department delegations traveled to El Salvador in 1979 to pressure President Romero to implement the recommended reforms.⁵⁶ After Romero was overthrown in an October 1979 coup, the Carter administration used the remainder of its term in office to pressure two subsequent military juntas to protect human rights, curtail death squad activity, and to democratize the Salvadoran political process.

⁵³William LeoGrande, *Our Own Backyard: The United States in Central America, 1977-1992* (Chapel Hill, NC: University of North Carolina Press, 1998), 38.

⁵⁴Declassified U.S. Department of State document, “U.S. Policy Towards El Salvador,” memorandum from ARA/CEN to Ambassador Vaky, October 4, 1979.

⁵⁵ Ibid.

⁵⁶ LeoGrande, 39.

Beginning in 1980, a series of political murders eventually traced back to the Salvadoran military set in motion a dynamic which resulted in the U.S. promoting the rule of law as a response to the Salvadoran military's human rights violations. Monsignor Oscar Arnulfo Romero, Archbishop of San Salvador and an outspoken critic of human rights violations, was murdered while saying mass on March 24, 1980. Many observers quickly came to suspect that members of the ESAF carried out the assassination. In December 1980, four U.S. nuns who worked with local Salvadoran development organizations were abducted, raped, and murdered by members of the Salvadoran National Guard. In January 1981 two American land reform advisors from the American Institute for Free Labor Development and the head of the Salvadoran Agrarian Reform Agency were murdered while sitting in the bar of the San Salvador Sheraton Hotel. In each case, the Salvadoran government was accused of either covering for the murderers, presumed to be from the military or the political right, or of bungling the investigations through rank incompetence. As the USAID Office of Democracy and Governance states in a 2002 paper, the murders demonstrated that the Salvadoran judicial system "lacked the political will and the technical competence to deal with a series of political murders that shocked the international community."⁵⁷

With each subsequent murder generating extensive media coverage of the human rights situation in El Salvador, much of it highly critical of U.S. government assistance to the Salvadoran junta, the U.S. government felt compelled to justify and legitimate its support for the Salvadoran government. In July 1980 Ambassador Robert White cabled the Secretary of State a summary of the human rights situation in El Salvador. Noting

⁵⁷ U.S. Agency for International Development. Office of Democracy and Governance. *Achievements in Building and Maintaining the Rule of Law* (Washington, D.C., 2002), 65.

that he was “wary of identifying the USG too closely with the Salvadoran military until it improves markedly,” White reported that he had undertaken a program of “constant pressure to improve the military’s human rights performance.”⁵⁸ White then described how he had demanded “two types of action” to demonstrate that the Salvadoran military high command had taken steps to discipline the security forces responsible for official violence:

“First, we need measurable on-the-ground improvement in eliminating officially tolerated or encouraged violations of human rights. Second, we need some symbolic public act which we can point to and use with the Congress as evidence that the High Command is serious about reducing its involvement with excessive violence.”⁵⁹

In the same cable White went on to recommend that the U.S. government condition the provision of additional training, as well as the receipt of military equipment such as helicopters, trucks, and radios, on further demonstrated progress from the High Command on human rights violations. In fact, from 1981 to 1983, the U.S. government insisted that all U.S. military assistance be contingent upon the Salvadoran armed forces making continued progress towards curtailing official human rights abuses.⁶⁰

The U.S. interest in improving the human rights situation in El Salvador also quickly focused attention on shortcomings in the Salvadoran legal system. In a July 16, 1979 memo to the Deputy Secretary of State, Assistant Secretary of State for Human Rights Patricia Derian described U.S. efforts to pressure the Salvadoran government to “end disappearances and arbitrary arrests, and restore the rule of law.”⁶¹ Further on in

⁵⁸ Declassified U.S. Department of State cable, San Salvador 04575, “*Measure to Reduce Violence*,” July 3, 1980.

⁵⁹ Ibid.

⁶⁰ Schwartz, 12.

⁶¹ Declassified U.S. Department of State document. *El Salvador: Game Plan*. Memorandum from Assistant Secretary of State for Human Rights Patricia Derian to deputy Secretary of State, July 16, 1979.

the memo, Derian noted that the U.S. Ambassador informed the Salvadoran government that improvement in the above areas could lead to the U.S. government identifying itself with the policies of the government of El Salvador, increasing U.S. economic assistance, development aid, and possibly security assistance.⁶²

In August 1982, the State Department began pushing the Salvadoran government to undertake specific, concrete reforms of its legal system, to include “the establishment of an investigatory unit for crimes against civilians and a system measuring and monitoring incidents of violence.”⁶³ In September 1982 the State Department proposed an official judicial reform program for El Salvador. A September 2, 1982 cable released under the byline of Secretary of State George Schultz stated:

“We believe it essential that GOES give priority to judicial reform if the sequence of violence and human rights abuses in Salvadoran society is to be broken. We see the criminal justice in particular as the critical area where the courts will be most tested now that the GOES is referring military and other cases to civilian courts for trial.”⁶⁴

The cable instructed the embassy to offer the Salvadoran government a comprehensive package of judicial training, education, and technical assistance for judges, court clerks, and government officials focusing on criminal procedure, rules of evidence, case management, and institutional reform.⁶⁵

As the civil war dragged on and human rights abuses mounted, in 1984 the U.S. government launched a major initiative to reform the Salvadoran judicial system. By this time U.S. policymakers had grown increasingly frustrated with the inability of the

⁶² Ibid.

⁶³ Declassified U.S. Department of State cable, San Salvador 06724, “*Integrated Econ/Pol/Security Plan*,” August 17, 1982.

⁶⁴ Declassified U.S. Department of State cable, SecState 284134, “*Judicial Reform Program for El Salvador*,” September 2, 1982.

⁶⁵ Ibid.

Salvadoran judicial system to successfully prosecute the perpetrators of “high profile murders.”⁶⁶ The U.S. then adopted a “big case focus,” in which the State Department pressured the Salvadoran government to curb human rights abuses by “achieving justice in selected high-profile cases,” while at the same time launching an “ambitious, large-scale judicial reform effort.”⁶⁷

The U.S. decision to launch a major judicial reform effort, which was based in part on the recommendations of the 1984 Report of the National Bipartisan Commission on Central America (i.e. the “Kissinger Commission”), was driven “almost exclusively” by “political concerns in Washington,” and as such the fundamental purpose of the program was to legitimate U.S. assistance to the Salvadoran government and allow it to “obtain important military and economic aid.”⁶⁸ In this instance, the U.S. focus on promotion of the rule of law was intended primarily to satisfy U.S. security interests by legitimizing the Salvadoran government, keeping them in the fight against the FMLN insurgents, and preventing the violent overthrow of the Salvadoran government.

As detailed in a May 1990 GAO report, between 1984 and 1989 the U.S. Congress authorized \$13.7 million (but Embassy San Salvador only actually spent a little over \$5 million) for judicial reform efforts in El Salvador undertaken primarily by the Department of State and USAID.⁶⁹ The U.S. project was the largest judicial reform program in Latin America in the 1980’s.⁷⁰ The GAO report agreed with the assessment of the initiators of the reforms (the State Department and USAID) to the effect that

⁶⁶Popkin, 65.

⁶⁷Ibid., 50.

⁶⁸Ibid., 59.

⁶⁹ United States General Accounting Office, *Foreign Aid: Efforts to Improve the Judicial System in El Salvador*, Report to the Chairman, Subcommittee on Western Hemisphere Affairs, Committee on Foreign Affairs, House of representatives, GAO/NSIAD-90-81, May 1990, 4.

⁷⁰Popkin, 59.

“threats of violence strongly influence the application of law,” and that, as a result, “many crimes, including human rights abuses, go unpunished.”⁷¹ The GAO concluded that the overall goal of the program was to “address some of the systemic problems that have impeded the delivery of justice and to create a more professional judiciary, less susceptible to political pressures.”⁷² The project pursued four major reform tracks: judicial administration and training intended to improve court administration, management, human resources, and physical facilities; creation of a judicial protection unit to provide security for judges, witnesses, prosecutors, and jurors in high-profile criminal cases; a legal commission to improve the legal performance of El Salvador’s judicial system through reform of the laws; and establishment of a commission on investigations to oversee creation of a special investigative unit and a forensic unit intended to investigate serious crimes using advanced scientific and investigative techniques.⁷³

In addition to training and institutional reform, U.S. efforts to promote the rule of law by compelling the Salvadoran military to submit to judicial control also included consistent diplomatic pressure and visits by high level U.S. government officials. Declassified State Department cables from 1984 through 1991 show consistent efforts to pressure the Salvadoran government to improve its performance on human rights.⁷⁴ Several high-level U.S. visitors also pressed the Salvadoran government to make further progress on human rights by instituting the rule of law. Vice President Bush visited El

⁷¹ United States General Accounting Office, *Foreign Aid: Efforts to Improve the Judicial System in El Salvador*, 4.

⁷²Ibid.

⁷³Ibid., 20.

⁷⁴Declassified U.S. Department of State cable, San Salvador 01650, “*Ambassador Points Out Damage ESAF Errors Causing GOES, USG Policy*,” February 7, 1990.

Salvador in December 1983 and threatened to cut off military assistance unless the ESAF expelled military officers suspected of involvement in death squads, issued orders condemning death squad activity, and prosecuted Salvadoran officers involved in the murder of the U.S. nuns and the labor union activists.⁷⁵ Secretary of State George Schultz visited El Salvador in July 1988 and met with senior Salvadoran military leadership at the Estado Mayor, the Salvadoran equivalent of the Pentagon. The declassified briefing memorandum from the Schultz visit indicates the Secretary told the Salvadorans he was concerned over reports of the ESAF and the security forces committing an increasing number of human rights violations.⁷⁶ He went on to tell the Salvadoran generals that the ESAF must thoroughly investigate human rights violations, and ensure that the violators be brought before a court of law.⁷⁷ Vice President Dan Quayle visited El Salvador with a similar message in 1989, as did Assistant Secretary of State Bernard Aronson in 1990.⁷⁸

Evaluation of U.S. Efforts to Promote Human Rights through the Rule of Law

U.S. efforts to end Salvadoran military and security service human rights abuses by promoting the rule of law were for the most part unsuccessful. Despite the U.S. expenditure of over \$5 million dollars on judicial reform efforts from 1984-1989, the ESAF continued to systematically commit human rights violations and political murders. The infamous ESAF murder of several Jesuit priests, a horrific event which for many outside observers came to symbolize the savage nature of the Salvadoran civil war,

⁷⁵LeoGrande, 231.

⁷⁶ Declassified U.S. Department of State cable, San Salvador 08506, "*Briefing Memorandum for SecState*," June 24, 1988.

⁷⁷Ibid.

⁷⁸Schwartz, 91-92.

provides valuable insights into the futility of U.S. efforts to establish human rights through the rule of law.

During the height of the FMLN's 1989 "final offensive" against the Salvadoran capital, ESAF soldiers entered the campus of the Central American University and murdered six Jesuit priests, along with their housekeeper and her 15 year old daughter. The priests, who included the university rector, the vice rector, and the director of the university human rights institute, were all prominent social activists who had been publicly critical of the ESAF's human rights record. The murders sparked intense international press coverage, heightened international criticism of U.S. assistance to the Salvadoran government and armed forces, and generated increased U.S. pressure on the ESAF.

At a very basic level, the fact that the most horrific human rights violation committed by the ESAF during the war took place five years into a massive rule of law assistance program points to the futility of U.S. efforts. In the wake of the murders, U.S. officials, clearly angered and embarrassed by the ESAF's blatant slaughter of non-combatants, placed great importance on bringing the violators to justice. Nonetheless, even in the wake of intense criticism by Assistant Secretary of State Bernard Aronson, Ambassador William Walker, several U.S. Congressmen, and SOUTHCOM Commander General George Joulwan, a State Department cable from February 7, 1990 reported "continuing stonewalling" and "inaction" on the part of the ESAF.⁷⁹ Despite the importance U.S. officials placed on bringing the responsible ESAF members to justice, the Salvadoran civil war had been over for two years by the time a trial finally even took

⁷⁹Declassified U.S. Department of State cable, San Salvador 01650, "*Ambassador Points Out Damage ESAF Errors Causing GOES, USG Policy*," February 7, 1990.

place in 1993. To add insult to injury, the trial itself had a less than cathartic result. One soldier was convicted on the sole count of killing the housekeeper's 15 year old daughter. One analyst has called even this meager result "a political bargain rather than a resolution based on the facts and law."⁸⁰

From a wider perspective, the results of a decade plus of U.S. efforts to protect human rights by promoting the rule of law proved even more disappointing. Several analysts contend that the ESAF simply refused to curb death squad activity and extra-judicial killings. In a study completed for the RAND Corporation, Benjamin Schwarz concluded "U.S. efforts to induce the Salvadoran military to take action against human rights abusers in its own ranks were met not just with inaction, but scorn."⁸¹ Schwarz further argues that the Salvadoran military "remained remarkably immune to American blandishments" on human rights, and even suggests that a reported "decline in official and death squad killings" from 1988 onward was the result of "a more discriminating strategy for political killings" and "the fact that because of past murders there are simply fewer politically suspect persons alive and in El Salvador."⁸²

Margaret Popkin argues that U.S. activities in El Salvador amounted to "an ambitious, large-scale but fundamentally flawed judicial reform effort."⁸³ On the whole, she concludes that despite U.S. efforts to establish the rule of law "human rights violations continued at alarming levels and those responsible were not held accountable."⁸⁴ Moreover, she contends that the U.S. "big case focus," which tried to force progress on human rights by pushing for successful prosecutions in high-profile

⁸⁰ Popkin, 54.

⁸¹ Schwartz, vii.

⁸² Ibid., 37-40.

⁸³ Popkin, 50.

⁸⁴ Ibid., 3.

cases, “graphically illustrated the extent of military impunity and the weakness of the justice system”⁸⁵ Elsewhere she argues that little progress was made in any human rights prosecution unless the U.S. exerted direct pressure on Salvadoran judicial or governmental officials and that once the U.S. pressure let up, progress stopped all together. In a damning summation of U.S. efforts, Popkin concludes:

“The expenditure of millions of dollars between 1985 and 1991 did little to lessen the risks of arbitrary repression or to overcome the historic impunity enjoyed by state actors and influential perpetrators of serious crimes.”⁸⁶

In the process of getting at the heart of why U.S. efforts to protect human rights by promoting the rule of law largely failed, both Schwarz and Popkin argue that the U.S. fundamentally misunderstood the difficulty of the task it was undertaking, and the resistance that it would engender amongst the Salvadoran military and civilian elites. Schwartz concludes that U.S. officials “failed to appreciate the magnitude and breadth of the obstacles to a just legal system in El Salvador.”⁸⁷ As a result, the Salvadoran military and judiciary ignored U.S. insistence on progress on human rights for the simple reason that a military subordinate to civilian control and subject to judicial supervision would “alter fundamentally the position and prerogatives of those in power” and “threaten the very things its ally is fighting to defend.”⁸⁸ As Schwarz notes: “It is one thing to have the key; it is an entirely different matter to force another to use it to unlock a door through which he does not wish to enter.”⁸⁹ Popkin argues that the U.S. staked out an aggressive agenda for change, but “promoted judicial reform without measurable

⁸⁵ Ibid., 56.

⁸⁶ Ibid., 71.

⁸⁷ Schwarz, 34.

⁸⁸ Ibid., 61.

⁸⁹ Ibid., xi.

guidelines for achievement.”⁹⁰ More importantly, U.S. policymakers “failed to take into account that those charged with implementing the reforms had far stronger interests in preserving the status quo.”⁹¹ In the final analysis, Popkin lays the blame on U.S. misunderstanding of the resistance to change within the Salvadoran judiciary, which she labels “more resistant to reform” and “less susceptible to outside pressure than the military.”⁹²

Human Rights and the Rule of Law: Conclusions

The U.S. viewed ESAF and security force human rights violations as main causes of the FMLN insurgency, which threatened to bring a radical, anti-U.S. government to power in El Salvador, and by doing so directly threatening U.S. national interests. The U.S. tried to curb ESAF and security force human rights violations by promoting the rule of law. For a variety of reasons, perhaps the most important of which was the sheer difficulty of promoting the rule of law in a foreign culture, the effort failed. Much to the detriment of U.S. interests, ESAF and Salvadoran security service officials continued to engage in large scale human rights violations throughout the civil war. They had two basic motivations for violating human rights and killing political opponents: It was manifestly in their interests to do so, and it was beyond the ability of the U.S. government to empower the Salvadoran judiciary to force them to stop. U.S. efforts to promote the rule of law could overcome neither the determination of the ESAF, nor the institutional weakness of the Salvadoran judiciary. Thus, in the case of human rights violations,

⁹⁰Popkin, 72.

⁹¹Ibid., 59.

⁹² Ibid., 8.

promotion of the rule of law proved to be an inadequate means of addressing threats to U.S. national security interests.

Case Study: Counterinsurgency and the Rule of Law

The following case study examines the rule of law as a pillar of U.S. counterinsurgency strategy during the Salvadoran civil war. The purpose of the section is not to provide a detailed examination of U.S. counterinsurgency strategy, but rather to illustrate how the rule of law came to be seen as the key non-military component of the U.S. strategy to defeat the FMLN insurgents.

As discussed in the previous section dealing with human rights, U.S. policymakers saw the potential violent overthrow of the Salvadoran government and the establishment of a communist regime in El Salvador as a serious threat to U.S. national security interests. From the outset of American involvement, U.S. policymakers pushed for a comprehensive strategy incorporating military assistance to the ESAF, as well as sweeping political, social, and economic reforms intended to address the grievances generating support for the FMLN insurgency. Within this comprehensive approach, U.S. policymakers saw promotion of the rule of law as a key means of alleviating some of the grievances of the Salvadoran population and generating support for the Salvadoran government. U.S. policymakers also viewed promoting the rule of law as essential to maintaining Congressional approval for continued U.S. military and civilian assistance to the GOES. As was the case with human rights, however, U.S. efforts to promote the rule of law as a tool of counterinsurgency unfortunately proved ineffective in accomplishing the national security objectives U.S. policy-makers set out to realize.

From the early stages of American involvement in El Salvador, U.S. policy-makers argued for a comprehensive approach to countering the threat of the FMLN insurgency. Declassified cables exchanged between Embassy San Salvador and State Department leadership in Washington from 1979 to 1980 indicate that the initial emphasis was on promoting political, economic, and social reforms to undercut the appeal of the insurgents. An August 1979 USAID cable to Washington notes that “political, economic and social vulnerabilities contribute to an unstable situation in El Salvador.”⁹³ The cable argues for a \$20 million dollar “special urban impact development program” that would improve health, sanitation, housing, education, environmental protection, and business opportunities in squatter settlements in San Salvador in order to win over the residents and “weaken their ties and allegiance to extremist groups offering more violent approaches to a solution of their problems.”⁹⁴

In December 1979 a new junta came to power, and El Salvador moved steadily towards all out civil war. The U.S. approach shifted accordingly. A December 22 memorandum from Assistant Secretary of State for Western Hemisphere Affairs William Bowdler to the Secretary of State outlined a comprehensive package of economic, military and political assistance designed to allow the Salvadoran government to “move forward with reform and development and establish its authority throughout the country.”⁹⁵ The economic package included the USAID “special urban impact development program,” which has been increased to a target funding level of \$35 million

⁹³ Declassified U.S. Department of State cable, San Salvador 04959, “*Special Urban AID Impact Program*,” August 30, 1979.

⁹⁴ Ibid.

⁹⁵ Declassified U.S. Department of State document, “*U.S. Program for El Salvador*,” memorandum from Assistant Secretary of State for Western Hemisphere Affairs William Bowdler to the Secretary of State, December 22, 1979.

dollars. On the military side, the memo detailed proposals to increase international military education and training (IMET) funding to finance mobile training teams (MTT's), as well as reprogramming of \$4.5 million dollars in foreign military sales (FMS) credit to cover purchases of new equipment. The memo also noted that a U.S. Southern Command (SOUTHCOM) survey team had been sent to El Salvador to assess ESAF needs. Political actions discussed in the memo included the possibility of a high-level declaration of U.S. support for the GOES, a visit by a high-level U.S. official to reinforce support for GOES reform and development programs, and an initiative to facilitate regional (i.e. non-U.S.) assistance with electoral reform and police training. All three elements discussed above would eventually play central roles in the evolving U.S. strategy for stabilizing El Salvador.

In January 1980 Assistant Secretary of State for Western Hemisphere Affairs William Bowdler traveled to El Salvador to meet with the junta. As detailed in a declassified January 24 cable from Embassy San Salvador, Bowdler aggressively pushed for the GOES to “effect socio-economic changes within a democratic framework.”⁹⁶ More importantly, at this juncture both the State Department and the GOES seem to have reached agreement that stabilizing the situation would necessitate winning the support and confidence of the Salvadoran people. The January 24 cable states that the junta briefed Bowdler and Ambassador Frank Devine on the details of their plans for “creating a center-left government that would weaken extremes” and “create confidence, credibility and legitimacy in a state of law” by “cleansing” human rights abusers from the ESAF, nationalizing the banks and external commerce, and enacting sweeping agrarian

⁹⁶Declassified U.S. Department of State cable, San Salvador 00542, “*Assistant Secretary Bowdler’s Meeting with Junta*,” January 24, 1980.

reforms.⁹⁷ Bowdler expressed support for the proposed reforms, and Devine noted that U.S. military assistance could help the ESAF to “retrain personnel to carry out their duties in a professional way that would help guard against unfavorable public reaction.”⁹⁸

In December 1980 a new military junta, dominated by Christian Democratic Party leader Jose Napoleon Duarte came to power. Almost immediately the junta was faced with severe political fallout when on December 2 members of the Salvadoran National Guard abducted, raped, and murdered four U.S. nuns who had spent years working with local left-leaning social service organizations. In reaction to the murders, on December 5 the U.S. suspended economic and military aid.⁹⁹ On December 13, the State Department forwarded a NIACT IMMEDIATE cable to the U.S. Ambassador setting forth the conditions for resumption of military and economic assistance to El Salvador:

“...greater efficiency in public administration, curtailment of indiscriminate violence, improved human rights performance, consolidation of land reforms, and progress towards dialogue with democratic opposition....”¹⁰⁰

The cable went on to instruct the Ambassador to tell the GOES that the continued ability of the U.S. to provide support would depend upon the GOES asserting control over the security forces. Should the GOES do so, the U.S. would be willing to sign an FY-81 FMS agreement, deliver previously ordered helicopters, and send three U.S. MTT's to train the ESAF.¹⁰¹ The U.S. in fact restored economic assistance to the GOES on December 17, but would not resume military assistance to the ESAF until four days after the FMLN launched a “final offensive” against San Salvador on January 10, 1981.¹⁰²

⁹⁷Ibid.

⁹⁸Ibid.

⁹⁹Schwartz, 87.

¹⁰⁰Declassified U.S. Department of State cable, SecState 329627, “*Instructions for Ambassador*,” December 13, 1980.

¹⁰¹Ibid.

¹⁰²Schwartz, 87.

Between 1981 and 1984 the main elements of the U.S. strategy for defeating the FMLN insurgency evolved. The U.S. pursued a “two track low-intensity conflict” approach that combined “a counterinsurgency strategy that coupled socioeconomic reforms and a buildup and improvement of the military with a transition to democracy.”¹⁰³ Three documents provided the intellectual foundation of the U.S. strategy for defeating the insurgency: the Woerner Report, the National Campaign Plan, and the Report of the National Bipartisan Commission on Central America (i.e. the “Kissinger Commission”).¹⁰⁴

The military elements of U.S. counterinsurgency strategy were in large part based on the Woerner Report and the National Campaign Plan. The Woerner Report, a 1981 document named for USSOUTHCOM Commander Gen. Woerner, provided a plan for expanding, equipping, and training the ESAF to defeat the FMLN insurgents.¹⁰⁵ The overall focus of the Woerner Report was on transforming the ESAF “from a constabulary to a fighting force.”¹⁰⁶ The National Campaign Plan, a 1983 follow-up to the Woerner Report drafted by the Embassy San Salvador MILGROUP, was a “comprehensive counterinsurgency strategy” that aimed to “incorporate” the new capabilities of the ESAF into “an expanding panoply of capabilities intended to earn popular support for the Salvadoran government.”¹⁰⁷

The 1984 Kissinger Commission Report provided the blueprint for the political, economic, and social elements of U.S. counterinsurgency strategy in El Salvador. The

¹⁰³ Tommie Sue Montgomery, *Revolution in El Salvador: From Civil Strife to Civil Peace* (Boulder, CO: Westview Press, 1995), 127.

¹⁰⁴ A.J Bacevich et al, *American Military Policy in Small Wars: The Case of El Salvador* (Cambridge, MA: Institute for Foreign Policy Analysis, Inc., 1988), 21.

¹⁰⁵ Ibid., 4.

¹⁰⁶ Ibid., 21.

¹⁰⁷ Ibid.

report, the final product of a bipartisan commission appointed by President Reagan in 1983, offered broad policy prescriptions for addressing the root causes of unrest and insurgency in Central America. The main thrust of the Kissinger Commission Report recommendations for El Salvador was the following: the immediate implementation of major U.S. assistance programs designed to democratize the Salvadoran political process, strengthen the electoral system, reform the judiciary, enact sweeping land redistribution, and make the ESAF respect human rights¹⁰⁸ More specifically, the Kissinger Commission report called for “establishment of the rule of law and an effective judicial system.”¹⁰⁹ U.S. policymakers quickly took to heart the Kissinger Commission Report recommendations for addressing the root causes of the FMLN insurgency. U.S. policymakers were particularly intent on enacting the recommendations dealing with judicial reform. In fact, promotion of the rule of law took center stage amongst the non-military elements of U.S. counterinsurgency strategy. As discussed at length in the earlier case study on human rights, between 1984 and 1989 the U.S. government spent millions of dollars in an attempt to enact profound reforms of El Salvador’s political, economic, and legal systems in order to address the grievances underpinning the appeal of the FMLN insurgents. As Hugh Byrne summarizes, as a result of the Kissinger Commission, from 1984 onwards

“...the objective of the U.S. in El Salvador was to consolidate and institutionalize the process of ‘democratization’ and reforms... A democratic system could continue to accumulate popular support and undercut the claims of the guerillas to speak for the people while ensuring the external supply of funds to support all aspects of the war effort. This process of consolidation required the following.
1. The creation of a workable system of justice: Public support in El Salvador and aid from the U.S. Congress would be jeopardized if the wealthy and members of

¹⁰⁸ Schwartz, 6.

¹⁰⁹ Ibid., 26.

the armed forces continued to be immune from prosecution for even the most heinous crimes.

2. Significant improvements in human rights and the subordination of the military to civilian control: More than anything else, human rights violations posed a threat to the continuation of U.S. aid.¹¹⁰

Thus, in keeping with the content and tenor of the Kissinger Commission, judicial reform came to be seen as an essential political component of U.S. efforts to defeat the FMLN insurgency.

Perhaps more importantly, the Salvadorans themselves viewed U.S. promotion of the rule of law as first and foremost intended as a tool of counterinsurgency. The Salvadoran people viewed the ESAF's lukewarm commitment to human rights as a matter of "expediency" dictated by the necessity of continued access to U.S. financial and military assistance.¹¹¹ Salvadorans "on all sides of the conflict" viewed USAID rule of law reforms as "primarily an instrument of counterinsurgency."¹¹² USAID's refusal to work closely with non-governmental human rights organizations, or to seek feedback from broad sectors of Salvadoran society, illustrate that the project was first and foremost a "politically motivated" effort to counteract the appeal of the FMLN.¹¹³

The central role of the rule of law in U.S. counterinsurgency strategy also related to the dynamics of U.S. domestic politics and the foreign policy process. A declassified State Department cable dating from July 6, 1984, instructs the Deputy Chief of Mission (DCM) to immediately seek a meeting with President Duarte and urge him to "come to grips with administration of justice issues," and to cooperate with the U.S. in

¹¹⁰Hugh Byrne, *El Salvador's Civil War: A Study of Revolution* (Boulder, CO: Lynne Rienner Publishers, Inc., 1996), 126.

¹¹¹Schwartz, 37.

¹¹²Popkin, 70.

¹¹³*Ibid.*, 71.

implementing a long list of proposed rule of law reforms.¹¹⁴ The cable further instructs the DCM to inform President Duarte that prompt GOES cooperation with rule of law reforms is necessary not only necessary to prevent the FMLN from winning a military victory, but also to prevent “Congressional critics” from attaching specific requirements, timetables, and conditions on further assistance.”¹¹⁵ As this and subsequent cables indicate, the State Department saw promotion of the rule of law as a means of legitimizing the GOES in the eyes of the U.S. Congress by ensuring that the GOES undertook political reforms necessary to generate domestic support, most prominent among them holding the ESAF accountable for human rights violations.¹¹⁶ For the State Department, the appeal of the rule of law thus transcended its direct applicability to military conditions on the ground in El Salvador, and carried over into the intermingled domains of foreign policy justification and Congressional relations.

Evaluation of U.S. Efforts to Counter Insurgency by Promoting the Rule of Law

An examination of the role of promotion of the rule of law as an element of U.S. counterinsurgency strategy must first deal with the fact that the FMLN was never defeated militarily. The Salvadoran civil war ended in a military stalemate, with both sides signing a UN-brokered Peace Accord in January 1992. By the same token, the ESAF was able to prevent the FMLN from violently seizing control of the country, so the U.S. counterinsurgency strategy should not be characterized as a total failure. At best, the rule of law was a central component of a comprehensive counterinsurgency strategy that proved sufficient to prevent defeat, but insufficient to provide victory.

¹¹⁴Declassified U.S. Department of State cable, SecState 198078, “*Judicial Reform*,” July 6, 1984.

¹¹⁵Ibid.

¹¹⁶Byrne, 128.

In terms of realizing the specific objectives U.S. policymakers set out to accomplish, promoting the rule of law to counter insurgency was a failure. Most academic commentators argue that U.S. rule of law reforms were not successful in providing a workable political alternative to counter the appeal of the Marxist guerillas. Hugh Byrne contends that “no significant progress was made in creating a functioning justice system in El Salvador”, and that, “despite intense pressure from the U.S. Embassy, even the suspected perpetrators of symbolically important killings were not prosecuted.”¹¹⁷ Byrne goes on to argue that the failure of the GOES to force the ESAF to cease committing human rights violations severely limited popular acceptance of the Salvadoran government, prevented the “institutionalization of democracy,” and did little to counter the appeal of the FMLN.¹¹⁸ He concludes that U.S. efforts at promoting the rule of law proved far more effective at preventing the cutoff of U.S. assistance than institutionalizing the democratic process or undercutting the guerillas.¹¹⁹

Other academic commentators are equally critical of the rule of law as a tool of counterinsurgency. Tommie Sue Montgomery argues that U.S. attempts to win the support of the Salvadoran populace by forcing the ESAF to respect human rights failed, and that the majority of the Salvadoran public viewed USAID efforts to reform the Salvadoran judiciary as a futile exercise in “reforming the unreformable.”¹²⁰ She contends that despite the four extensive U.S. reform programs, i.e. legal code revision, judicial training, the creation of a Special Investigative Unit (SIU), and the establishment of a Judicial Protection Unit, there was “no significant change in the ability of the

¹¹⁷ Byrne, 141.

¹¹⁸ Ibid.

¹¹⁹ Ibid., 140.

¹²⁰ Montgomery, 203.

Salvadoran judiciary to investigate and prosecute serious violations by the Armed Forces.”¹²¹ As a result, the Salvadoran public remained skeptical of the government.

In his authoritative Rand Corporation study prepared for the Undersecretary of Defense for Policy, Benjamin Schwarz characterizes U.S. counterinsurgency efforts in El Salvador as a failed attempt at large-scale nation building. After noting that American officials he interviewed for the study were “stunned by the awesome dimensions” of what the U.S. set out to accomplish in El Salvador, Schwarz delivers the following epitaph:

“America’s conviction that it can create democracy abroad is a pretense, at least in the most lands at most times. Because of a well-intentioned, but misguided, assumption that techniques, technology, and programs alone could fundamentally transform a violent and unjust society into a liberal and democratic one, the United States perhaps did not consider sufficiently that human character, history, culture, and social structure are highly resistant to outside influence.”¹²²

As such, the underlying principal of U.S. counterinsurgency strategy, i.e. helping the Salvadoran government win the support of its own population by influencing the GOES to “do what was necessary to win its people’s hearts and minds,” was doomed from the start.¹²³ He argues that

“It is neither within America’s power nor its right to contrive the means for a foreign state to win the support of its population. Such an endeavor involves at once the most basic and the most complex political relationships in a society.”¹²⁴

Schwarz is even more critical of U.S. efforts to win over the Salvadoran public through rule of law reform. He notes that the central purpose of U.S. rule of law programs was to establish respect for human rights and to institutionalize democracy, and that the U.S. accomplished neither goal.¹²⁵ As a result, the ESAF “remained remarkably immune to

¹²¹ Ibid.

¹²² Schwarz, 71.

¹²³ Schwarz, 82.

¹²⁴ Ibid., 58.

¹²⁵ Ibid., 57.

U.S. blandishments.”¹²⁶ Schwarz offers the following additional observations on why U.S. rule of law efforts failed to accomplish U.S. counterinsurgency objectives:

- “The mistaken assumption that it is relatively easy to ensure that an ally does what American policymakers deem necessary to eliminate insurgency.”¹²⁷
- The entire enterprise was based on the mistaken assumption that “democracy requires merely the imposition of democratic institutions.”¹²⁸
- “There are limits on the ability of one nation, no matter how powerful, to influence the direction and character of another.”¹²⁹
- The U.S. has “exported the tools and administrative capacity necessary to improve the rule of law and subject the military to civilian government,” but the programs failed because “Salvadoran society has never prized these democratic principals.”¹³⁰
- “Respect for human rights” and “a judicial system that applies to all members of Salvadoran society” require “fundamental changes in the country’s authoritarian culture and political practices.”¹³¹

Margaret Popkin similarly concludes that U.S. efforts to promote the rule of law as a tool of counterinsurgency failed. She argues that U.S. assistance from 1985-1991 did not generate significant popular support for the GOES because it “did little to lessen the risks of arbitrary repression or to overcome the historic impunity enjoyed by state actors and influential perpetrators of serious crimes,” and that “the goal of achieving an independent, responsible, and reliable justice system remained elusive.”¹³² Popkin lists two key reasons for the failure of U.S. rule of law reforms to bolster the counterinsurgency effort:

- The U.S. “allied themselves” with Salvadorans “indifferent to or opposed to reform”.¹³³
- U.S. support for the GOES war effort made it impossible for U.S. to be objective about the GOES’s rule of law performance¹³⁴

¹²⁶Ibid., 83.

¹²⁷Ibid., 61.

¹²⁸Ibid., 71.

¹²⁹Ibid., 61.

¹³⁰Ibid., 72.

¹³¹Ibid., viii-ix.

¹³²Popkin, 71.

¹³³Ibid.

¹³⁴Ibid.

Taken together, the arguments which Byrne, Montgomery, Schwartz, and Popkin offer provide a damning analysis of the efficacy of U.S. efforts to mount an effective counterinsurgency campaign to win the hearts and minds of the Salvadoran populace by promoting the rule of law. Their meticulous, well-documented criticism offers little room for alternative interpretations of the efficacy of U.S. rule of law promotion as a tool of counterinsurgency. Simply put, U.S. efforts to counter the FMLN by winning hearts and minds amongst the Salvadoran population through reform of the judiciary and democratization of the political system failed to deliver discernable results. Fortunately for the U.S., the military incompetence of the FMLN, coupled with the limited appeal of the FMLN political agenda amongst the Salvadoran populace, contributed to the civil war ending in a military stalemate.

Counterinsurgency and the Rule of Law: Conclusions

Between 1984 and 1991, the U.S. government attempted to enact profound reforms of El Salvador's political, economic, and legal systems in order to address the grievances generating support for the FMLN insurgents. Promotion of the rule of law was a central component of non-military efforts to bolster the legitimacy of the GOES and undermine the appeal of the FMLN insurgents. In light of the arguments summarized above, U.S. promotion of the rule of law as part of a comprehensive counterinsurgency strategy proved ineffective. U.S. efforts to buttress the legitimacy of the GOES, and to counter the appeal of the FMLN through rule of law reform failed.

Chapter Three: Promoting the Rule of Law in El Salvador in the Context of Peace

This paper now turns to an examination of U.S. efforts to promote the rule of law in the period following the 1992 conclusion of the Salvadoran civil war. A close examination of U.S. involvement in post-civil war El Salvador reveals that promoting the rule of law has proven to be an ineffective means of realizing U.S. national security interests in a peacetime setting.

U.S. efforts to promote the rule of law in El Salvador from 1992 to the present have been motivated primarily by threats to U.S. national security arising from criminal violence and lawlessness. As the following case studies demonstrate, U.S. rule of law promotion efforts have focused on trying to contain threats to U.S. national security generated by massive illegal immigration and surging transnational street gang activity. In this context, U.S. policymakers have defined the rule of law as the establishment of law and order, with their efforts focusing on enabling the Salvadoran police and judicial system to cope with rising levels of criminal violence and lawlessness. Unfortunately, U.S. efforts to establish law and order in El Salvador and eliminate threats to U.S. national security by promotion of the rule of law do not appear to be succeeding.

Strategic Context: Globalization and the Rise of International Crime

Beginning in the early 1990's, in the aftermath of the collapse of the USSR and the "strategic pause" occasioned by the end of the Cold War, U.S. national security policymakers began to devote increased attention to international crime. This in turn led to a reorientation of U.S. rule of law promotion, with the rule of law now seen as a

crucial tool for combating international crime. This view is reflected in the related strategy documents from the period.

On October 21, 1995, President Clinton signed Presidential Decision Directive 42 (PDD 42), which tasked executive branch agencies of the government with mounting a global response to the threats posed by international crime.¹³⁵ To implement PDD-42, the National Security Council tasked the Departments of Justice, State and Treasury with developing and implementing a comprehensive national strategy to attack international crime.¹³⁶

In May of 1998 the Clinton administration released the International Crime Control Strategy, a new strategic document which declared international crime a “complex worldwide threat” related to the spread of globalization.¹³⁷ In the introductory section of the document, which described the threat to global security and stability posed by international crime, the document states that “...the international commitment to the rule of law, to human rights, and to democracy is under attack from criminal organizations...”¹³⁸ The strategy then offered a “plan of action,” featuring a “blueprint” of eight “broad goals” and “thirty related objectives” for “an effective, long term attack on the international crime problem.”¹³⁹ The eight broad goals were:

- 1) Extend the first line of defense beyond U.S. borders
- 2) Protect U.S. borders by attacking smuggling and smuggling-related crimes
- 3) Deny safe haven to international criminals
- 4) Counter international financial crime
- 5) Prevent criminal exploitation of international trade
- 6) Respond to emerging international crime threats
- 7) Foster international cooperation and the rule of law

¹³⁵ U.S. President, *International Crime Control Strategy*, (Washington, D.C., 1998), 3.

¹³⁶ *Ibid.*, 5.

¹³⁷ *Ibid.*, 1.

¹³⁸ *Ibid.*, 2.

¹³⁹ *Ibid.*, 5.

8) Optimize the full range of U.S. efforts¹⁴⁰

In the section preceding the list of goals, the narrative notes that where rising crime levels are attributed to failures in governance, the U.S. would focus on strengthening the rule of law.¹⁴¹ The general policy framework articulated above, as well as the specific focus on promoting the rule of law to compensate for failures in governance, decisively shaped the U.S. post-war response to national security threats originating in El Salvador and elsewhere, as well as establishing a baseline of policy interest in countering international crime.

Largely as a result of the policy reorientation which took place during the Clinton administration, the rule of law is now a central component of current U.S. efforts to combat international crime. This is reflected in the strategic thinking of the lead rule of law promoter in the U.S. government, i.e. the U.S. Department of State. The State Department Bureau of International Narcotics and Law Enforcement (INL) lists promoting democracy and the rule of law as a pillar of U.S. foreign policy. Furthermore, INL lists the following as a “key thrust” of its work:

“Facilitate the establishment of stable criminal justice systems to strengthen international law enforcement and judicial effectiveness while respecting human rights, bolstering cooperation in legal affairs, and societal support for the rule of law.”¹⁴²

The focus of INL rule of law promotion is on institution building and increasing the capacity of foreign police forces and judiciaries to provide law and order. The strategic plan for FY2006-2010 outlines the following approach:

Strategic goal: Strengthen Criminal Justice Systems

¹⁴⁰Ibid., 6-9.

¹⁴¹Ibid., 6.

¹⁴²U.S. Department of State, Bureau of International Narcotics and Law Enforcement, “*Draft Strategic Plan Fiscal Years 2006-2010*,” January 3, 2006. Obtained via State Department Intranet.

Establish and facilitate stable criminal justice systems to strengthen international law enforcement and judicial effectiveness, bolster cooperation in legal affairs, and support the rule of law, while respecting human rights.

Tactics: Strengthen laws and regulations; improve justice sector capacity; enhance law enforcement capacity; develop border security capacity; augment capacity of penal system; foster international cooperation; stabilize vulnerable borders; support for host nation direct operations; provide criminal investigative assistance; enhance border surveillance and border patrol; enhance international border facilities; augment internal port security; support migrant smuggling and trafficking-in-persons coordination.¹⁴³

The other main vehicle of U.S. rule of law promotion, USAID, also focuses on building institutional capacity to administer justice. USAID lists the following as a central agency objective:

Agency objective: Strengthened rule of law and respect for human rights
Program indicators: legislation promoting human rights enacted; government mechanisms protecting human rights established; equal access to justice; effective and fair legal sector institutions; increased judicial transparency; increased judicial independence; improved management and administrative capacity; improved functional organization; professionalization of technical personnel.¹⁴⁴

As the following section examines, State, USAID, and others have used rule of law assistance to El Salvador in an attempt to realize the above U.S. foreign policy objectives in reference to combating international crime.

Post-War Security Environment in El Salvador and the Evolution of U.S. Policy

U.S. rule of law assistance remained an important component of the bilateral relationship with El Salvador following the conclusion of the civil war in 1992. As part of the UN-brokered Peace Accord which ended the civil war, the U.S. agreed to assist with the establishment of an apolitical National Civilian Police force (PNC) and a National Academy of Public Safety. U.S. assistance to the PNC was channeled through a

¹⁴³Ibid., 3-15.

¹⁴⁴ U.S. Agency for International Development, *Handbook of Democracy and Governance Program Indicators*, 17.

Department of Justice ICITAP project office opened in Embassy San Salvador in 1992, as well as existing offices in the San Salvador USAID program office and the embassy political section. The original goal of the program was to institutionalize the transition to democracy envisioned in the 1992 peace accord by creating an apolitical civilian police agency operating under democratic policing principals.¹⁴⁵

The impact of PDD 42, the release of the 1998 International Crime Control Strategy, and the reorientation of U.S. rule of law promotion towards combating international crime led to a reorientation of U.S. efforts in El Salvador. This change is reflected in the evolution of the ICITAP El Salvador program goals and objectives. According to the ICITAP El Salvador website, since the late 1990's the main effort has been focused on improving overall police performance to respond to local and transnational crime.¹⁴⁶

The mandate to combat international crime gave U.S. policymakers a new perspective on the post-war security environment in El Salvador. While Salvadorans had a long tradition of emigrating abroad in search of work, the onset of full-blown civil war in 1981 pushed the levels of illegal immigration to the U.S. to all-time highs. The number of Salvadorans illegally residing in Los Angeles, Houston, and the Washington D.C. metro area swelled in size from 1979 to the mid-1990's, and provided a powerful pull factor for other illegal aliens eager to come north. An estimated 700,000 Salvadorans illegally entered the U.S. between 1979 and the mid-1980's.¹⁴⁷ The signing

¹⁴⁵ U.S. Department of Justice, *ICITAP El Salvador Project Overview*, 1.

¹⁴⁶ Ibid.

¹⁴⁷ U.S. Agency for International Development, *Central America and Mexico Gang Assessment, Annex One, El Salvador Profile* (Washington, D.C., 2006), 3.

of the 1992 Peace Accords appears to have done little to slow the flood of illegal Salvadoran aliens heading to the U.S.

The large influx of illegal Salvadorans into the U.S., and the associated social problems in recipient communities, eventually drew the attention of the U.S. federal government. As will be discussed at length in the subsequent case study, the influx of illegal Salvadorans contributed to an increase in street gang violence. As the illegal Salvadoran population gained critical mass, federal authorities also began focusing on illegal immigration as part of a nexus of criminal behavior posing a threat to U.S. national security. Federal immigration and other law enforcement officials have documented the link between illegal Central American immigrants and the following criminal activity within the U.S.: violent street crime; organized crime, to include car theft rings, alien smuggling, arms smuggling, production and sale of fraudulent documents, prostitution, underage prostitution, pornography, and organized vice; gang activity; narcotics trafficking; identity fraud; document fraud; fraudulent immigration claims; public benefit fraud; money laundering; financial fraud; insurance fraud; counterfeiting.¹⁴⁸

Examination of U.S. assistance funding to El Salvador provides additional evidence of the shift in U.S. rule of law priorities in the wake of PDD 42. According to the GAO, the majority of U.S. rule of law assistance to El Salvador from 1993-1998 has gone towards criminal justice and law enforcement. From 1993-98, the GAO reports \$25.5 million spent on criminal justice and law enforcement, with \$15.5 million going

¹⁴⁸ U.S. Department of Homeland Security, Office of Immigration Statistics, *Immigration Enforcement Actions: 2004* (Washington, D.C., 2005), 1-5.

towards judicial reform.¹⁴⁹ Thus, although the threat has shifted from human rights violations and insurgency to international crime, rule of law is still an important component of pursuing U.S. national security objectives in El Salvador.

Overview of Current U.S. Rule of Law Assistance in El Salvador

An embassy Mission Performance Plan (MPP) outlines the strategy the country team will pursue in the subsequent year in order to promote U.S. interests. The Embassy San Salvador Mission Performance Plan for FY 2006 accords the rule of law a prominent place in U.S. objectives. Strengthening the ability of the PNC and the Salvadoran judiciary to combat illegal immigration figures prominently in the embassy rule of law agenda. The FY06 MPP identifies seven performance goals, the fifth of which deals with law enforcement and judicial systems. The MPP breaks down the law enforcement and judicial systems section as follows:

Performance goal: Combat domestic and international crime through strong, effective and transparent law enforcement and judicial institutions which cooperate fully with their U.S. and regional counterparts.

Strategy One: Strengthen law enforcement and judicial institutions through justice system reform, modernization of laws, and civic outreach/awareness, along with improved legal education and more effective tools for bringing criminals to justice.

Tactics:

- Help GOES reform criminal procedure codes, including: creating rules of evidence to improve judicial processes; enhancing investigative techniques, and strengthening criminal statutes.
- Continue support to community policing initiatives
- Strengthen public support for rule of law initiatives, and train mission members to work with rule of law initiatives.

Strategy Two: Strengthen El Salvador's ability to control its own borders against terrorists, traffickers and other international criminals, and to investigate, arrest, and prosecute such criminals.

¹⁴⁹ U.S. Government Accounting Office, *Foreign Assistance: Rule of Law Funding Worldwide for Fiscal years 1993-98*, 11.

Tactics: - Deter alien smuggling and promote security by improving screening and investigative techniques of PNC's Border Division, airport, maritime, and land border inspectors.

- Encourage enforcement activities at inspection areas
- Assist in application of immigration and security controls
- Support Salvadoran Attorney General's Alien Smuggling Taskforce and Border Police Unit. Provide training and equipment to prosecutors working on anti-smuggling issues, and broad-based training of police, prosecutors, and judges.

Strategy Three: Utilize and improve international mechanisms for interagency, bilateral, and regional cooperation against crime.

Tactics:

- Promote coordination between police, prosecutors, and judges for more effective investigations and prosecutions. Assist Salvadoran courts, prosecutors, and police in international evidence gathering and the return of fugitives. Solidify bilateral and multilateral mechanisms for improved mutual legal assistance and the exchange of information on criminal deportees.

- Increase El Salvador's participation in regional counter-narcotics and anti-alien smuggling efforts, including Central America's chiefs of police initiatives.

Linkages: Strong law enforcement institutions and effective law enforcement and judicial practices promote democratic stability and development, encourage respect for democratic institutions, encourage Salvadorans to remain in El Salvador, and foster domestic and foreign investment.¹⁵⁰

As the El Salvador MPP indicates, current U.S. rule of law promotion efforts involve three main entities: ICITAP, DOS, and USAID. An overview of each organization's current activities follows.

ICITAP

ICITAP currently focuses primarily on improving overall police performance to respond to local and transnational crime.¹⁵¹ The majority of ICITAP training programs are intended to increase the operational effectiveness of the PNC. ICITAP focuses on four categories of assistance: police management; police accountability; criminal investigations; and academy enhancements. Recent programs integrated community-

¹⁵⁰ U.S. Department of State, *U.S. Mission to El Salvador, Mission Performance Plan FY 2006* (Washington, D.C., 2006), 32-38.

¹⁵¹ U.S. Department of Justice, *ICITAP El Salvador Project Overview*, 1.

based policing, modernization of police deployment and response systems, strengthening case management, patrolling, and 911 emergency response training.¹⁵²

Department of State

The Department of State (DOS) is responsible for overall coordination of rule of law promotion in El Salvador. Within the DOS embassy components, responsibility is shared between the INL program and the political section. INL focuses on building capacity and political will to combat international crime, including illegal immigration. Other important areas of concern include money laundering, corruption, transnational crime, organized crime, arms trafficking, street gangs, and economic crimes such as intellectual property rights violations and production of counterfeit goods.

USAID

USAID is intimately involved in rule of law promotion in El Salvador. USAID's overall aim is to improve conditions in El Salvador in order to give Salvadorans a stake in a peaceful and prosperous future.¹⁵³ USAID's current project overview identifies weakness in the rule of law as a principal source of problems in El Salvador.¹⁵⁴ The democracy and governance program is intended to strengthen deficiencies in the rule of law. While ICITAP focuses on police training and reform, USAID takes the lead on promoting judicial reforms. Overall goals are to reform the judicial system, improve court operations, modernize court administration, and to enhance public access to the judicial system.¹⁵⁵ Specific USAID programmatic goals identified in the FY2005-2006 budget (total of \$8.4 million) include: strengthen the rule of law; increase access to

¹⁵² Ibid.

¹⁵³ U.S. Agency for International Development, *El Salvador Overview* (Washington, D.C., 2006), 1. Available from <http://www.usaid.gov/pubs/bj2001/lac/sv/>. Internet. Accessed October 30, 2006.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid., 3.

justice; promote greater transparency, accountability, and more responsive governance; improve transparency and responsiveness of the judicial system; improve justice sector/legal framework; promote and support anti-corruption; provide training and assistance for judges and prosecutors.¹⁵⁶

USAID lists facilitation of the fight against international crime as a primary focus in El Salvador. The USAID El Salvador web page describes weakness in the rule of law as a major cause of violent crime, which in turn encourages illegal immigration to the U.S. The site details USAID's intention to addresses illegal immigration by promoting judicial improvement, counteracting rural poverty, encouraging development of civil society and the NGO community to buttress rule of law promotion and to give marginalized Salvadorans a stake in the system, as well as proposed advancements in governance, economic development, health, population, and environmental protection as means to strengthening democratic governance.¹⁵⁷

Case Study: The Rule of Law and Illegal Immigration

As the following case study demonstrates, post-war U.S. rule of law assistance has focused on enhancing the ability of the Salvadoran police and judiciary to establish law and order, and in so doing to eliminate threats to U.S. national security occasioned by rising levels of transnational crime and lawlessness. Efforts to control high levels of illegal immigration to the U.S. have figured prominently in these efforts.

The overall goal of U.S. rule of law promotion in context of illegal immigration is to compensate for the failure of the Salvadoran judicial system and law enforcement

¹⁵⁶ U.S. Agency for International Development, *El Salvador Data Sheet* (Washington, D.C., 2006), 1-2.

¹⁵⁷ *Ibid.*, 1-3.

organizations to control the outflow of illegal migrants, as well as to effectively prosecute and dismantle alien trafficking organizations. In essence, the U.S. is attempting to remedy a failure of governance which renders Salvadoran authorities unable to control the exodus of illegal migrants headed to the U.S. The U.S. is trying to fill the void through institutional reform and capacity-building, and to create political will within the GOES to combat illegal immigration. The U.S. embassy country team takes a holistic approach, with the objective of promoting a comprehensive program to tackle illegal immigration at the source. As the MPP says:

Strong law enforcement institutions and effective law enforcement and judicial practices promote democratic stability and development, encourage respect for democratic institutions, encourage Salvadorans to remain in El Salvador, and foster domestic and foreign investment.¹⁵⁸

Other MPP bullets indicate that the mission intends to promote more effective law enforcement and judicial institutions in order to improve public safety and generate greater trust in public institutions, while reducing the likelihood of El Salvador serving as a refuge or transit point for terrorists or other international criminals.¹⁵⁹

Evaluation of the Rule of Law and Illegal Immigration

Unfortunately, U.S. rule of law assistance does not appear to be making any significant progress towards reducing illegal immigration to the U.S. originating in El Salvador. Given the truly daunting scope and magnitude of the problem, El Salvador's illegal migration problem may well have already surged beyond the point where it can be addressed by domestic Salvadoran judicial or law enforcement means.

¹⁵⁸ U.S. Department of State, *U.S. Mission to El Salvador, Mission Performance Plan FY 2006*, 32-38.

¹⁵⁹ *Ibid.*, 5.

A variety of political, economic and social problems in the region have turned Central America into the principal gateway for U.S. bound illegal immigrants, both from within Central America and beyond.¹⁶⁰ Within the region, El Salvador itself is at the epicenter of illegal immigration to the U.S. As the USAID program overview notes, El Salvador has sent more illegal immigrants to the United States than all of Europe, Asia, and Africa combined.¹⁶¹ There are an estimated eight million Salvadorans in the world: roughly six million reside in El Salvador, with another two million or so residing in the U.S. Anecdotal information suggests that upwards of eighty percent of those two million residents are suspected of residing in the U.S. illegally. With this sort of demographic pull, coupled with a readily available support network of illegal immigrants already established in the U.S., efforts to stem the tide by the promoting the rule of law face an up hill battle, to say the least.

Despite U.S. efforts, GOES law enforcement progress against illegal trafficking gangs has to date been negligible. Alien trafficking organizations working out of Central America operate with near impunity.¹⁶² Alien smuggling rings often work hand in hand with transnational street gangs, with the criminal organizations involved in human smuggling, arms trafficking, and narcotics trafficking. Salvadoran law enforcement organizations are beset by financial shortages, an inability to retain quality personnel, and instances of corruption and incompetence. There has been a similar lack of progress in terms of transforming the judiciary into viable tool for combating alien smuggling and associated crime. The end result is that the GOES is incapable of countering waves of

¹⁶⁰ Donald R. Liddick Jr., *The Global Underworld: Transnational Crime and the United States* (Westport, CT: Praeger, 2004), 51.

¹⁶¹ U.S. Agency for International Development, *El Salvador Overview*, 1.

¹⁶² Liddick, 51.

lawlessness and criminality within Salvadoran territory, let alone coming to terms with complex threats such as transnational alien trafficking syndicates.¹⁶³

U.S. efforts to establish the rule of law are further complicated by the economics and politics of illegal immigration. Several powerful incentives encourage the GOES to leave flows of illegal immigrants in place. Remittances sent back to El Salvador by Salvadorans resident in the U.S., roughly \$2 billion dollars annually, currently account for upwards of 14 % of the Salvadoran GNP.¹⁶⁴ In light of the GOES making little discernable progress towards establishing a growing, prosperous economic sector that could serve as magnet for foreign investment and a source of employment, they would be foolish to meddle with an income flow that keeps millions of Salvadorans afloat financially.

To complicate matters further, the onset of the GWOT has shifted the focus of U.S. foreign policy away from Latin America. The limited availability of U.S. foreign assistance funds for Central America, which have to a great extent been redirected towards the Middle East, South Asia, and other regions more directly impacted by the GWOT, further constrains U.S. capacity to address the root economic and social problems which encourage Salvadoran migrants to enter the U.S. illegally. With U.S. attention and resources turned elsewhere, Central American governments, including that of El Salvador, have less incentive, and arguably, capacity, to address complex, deep seated social problems which spill over into transnational crime.

Moreover, the U.S. response to illegal immigration from El Salvador sends mixed political signals. During the civil wars years, as part of an effort to ease pressure on the

¹⁶³ Popkin, 263.

¹⁶⁴ U.S. Department of State, *El Salvador Mission Program Plan FY 2006*, 3.

GOES, the U.S. granted 'temporary protected status' (TPS) to Salvadoran nationals illegally residing in the U.S. Under TPS, U.S. immigration authorities did not actively seek to deport Salvadorans illegally residing in the U.S. In fact, the Immigration and Naturalization Service (INS) began granting illegal Salvadoran immigrants identity cards authorizing them to work 'out of status' (i.e. illegally) for periods of one year at a time, with renewal subject to future determination. The U.S. ended TPS for illegal immigrants from El Salvador after the signing of 1992 Peace Accords, but has since then re-authorized it for Salvadorans in response to two events: Hurricane Mitch in 1998, and a major earthquake which struck San Salvador in 2000. The intention was to prevent the repatriation of illegal aliens back to El Salvador from exacerbating economic and social dislocation caused by the two natural disasters.

Although there have been no additional natural disasters in El Salvador since then, the Bush administration has subsequently renewed TPS for Salvadorans nationals on an annual basis since 2000. There has been some speculation in the U.S. and Salvadoran press that the decision to renew TPS has been a Bush administration quid pro quo offered in return for Salvadoran support for the U.S. at the United Nations (UN) and the Organization of American States (OAS). Proponents of this argument can also cite a Salvadoran voting pattern generally along the same lines as that of the U.S. at the UN and the OAS, as well as the fact that the Salvadoran government vociferously supported the U.S. decision to go to war in Iraq in 2003 and sent military forces there as part of the first wave of the "coalition of the willing." In any event, the political machinations surrounding the decision to renew TPS, real or imagined, as well as the fact that current U.S. policy allows Salvadoran immigrants to reside in the U.S. illegally and send

remittances home to relatives, combine to provide obvious incentives for the GOES to leave northbound illegal immigrant flows unmolested. Needless to say, these dynamics undermine the effectiveness of U.S. efforts to promote the rule of law as a bulwark against illegal immigration originating from El Salvador.

Case Study: Transnational Street Gangs and the Rule of Law

The final case study in this paper examines U.S. efforts to combat the rise of transnational street gangs through promotion of the rule of law. In response to the evolving threat to U.S. national security posed by transnational street gangs, the Department of State, the U.S. Agency for International Development, and the Department of Justice have sought to increase the capabilities of the Salvadoran police and judiciary. As the case study demonstrates, however, U.S. efforts to transform the Salvadoran police and judiciary into effective law enforcement institutions have fallen short of fully addressing the threats posed by transnational street gangs. More importantly, the U.S. response once again demonstrates the inadequacy of rule of law assistance as a means of mitigating threats to U.S. national security.

Strategic Setting: Post-War Crime and Insecurity

Post-war developments in El Salvador continue to present significant national security challenges to the U.S. Despite the fact that the civil war ended in 1992, El Salvador has experienced consistently rising levels of violent crime. El Salvador has suffered through a post-war crime wave that threatens to overwhelm the nascent PNC. El Salvador's homicide rate -- 40 per 100,000 inhabitants -- makes it the most dangerous country in

Latin America, with the nation also suffering from some of the world's highest rates of armed robbery, extortion, and kidnapping.¹⁶⁵

Several factors contribute to El Salvador's spiraling crime rates. According to USAID, the legacy of conflict generated by the civil war, during which "war-related crime" such as kidnapping and extortion became the norm, has resulted in the "socialization of violence" throughout Salvadoran society.¹⁶⁶ The mechanism which settled the civil war may ironically have contributed to the spike in post-war violence. Under the terms of the 1992 U.N. Peace Accords, 30,000 soldiers from the ESAF, 6,400 members of the National Police, and 8,500 combatants from the FMLN were demobilized.¹⁶⁷ Many of these demobilized combatants, with ready access to small arms left over from the war, have sought new employment in organized crime and kidnapping for profit operations. Additionally, high levels of income inequality and limited economic opportunities steer juveniles towards crime and delinquency, and magnify the levels of criminal instability.

According to USAID, the unprecedented levels of violent crime and insecurity threaten the viability of the Salvadoran state. A recent USAID study concludes that violent crime "obstructs economic progress and democratic social development," and that it annually costs El Salvador U.S. \$1.7 billion, which equates to over 11.5% of its gross domestic product.¹⁶⁸

¹⁶⁵U.S. Agency for International Development, *Central America and Mexico Gang Assessment* (Washington, D.C., 2006), 2.

¹⁶⁶ Ibid., 9.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid., 6.

The Rise of Transnational Street Gangs

The wartime exodus of Salvadoran migrants to the U.S., particularly to the Los Angeles metropolitan area, played a major role in the origins of El Salvador's transnational street gangs. Criminologists conclude that the principal Salvadoran street gang, Mara Salvatrucha (popularly known as MS-13), was formed by Salvadoran youths residing illegally in Los Angeles in the early 1980's who sought to protect themselves against existing Mexican street gangs.¹⁶⁹ Shortly afterwards, another gang with strong Salvadoran roots, Mara Calle 18 (i.e. the 18th Street Gang, or M-18), also formed in Los Angeles, and quickly became a main rival of MS-13.¹⁷⁰ Deportations of illegal alien gang members from the U.S. back to El Salvador have internationalized the spread of MS-13 and M-18, and led to the street gangs developing transnational operational networks spanning from Central America and Mexico to the U.S.¹⁷¹ Illegal alien gang members deported back to El Salvador also appear to have introduced crack cocaine production and sale to Central American drug consumers.¹⁷² This in turn encouraged the growth of transnational criminal networks spanning from Central America to the U.S., and fueled spiraling violence in El Salvador and neighboring countries.

Since the early 1980's, the growth of the street gangs has proceeded at an almost geometric rate. The following are estimated numbers of MS-13 and M-18 gang members in Central America and the U.S.:

¹⁶⁹Shelley Feuer Domash, "America's Most Dangerous Street Gang," *Police: The Law Enforcement Magazine*, September 2006. Internet. Available at <http://www.policemag.com>. Accessed September 1, 2006.

¹⁷⁰Library of Congress, Congressional Research Service, CRS Report for Congress, "*Gangs in Central America*," (Washington, D.C., 2005), 3.

¹⁷¹Shelley Feuer Domash, *Police: The Law Enforcement Magazine*, 4.

¹⁷²Ana Arana, "How the Street Gangs Took Central America," *Foreign Affairs* 84 (May/June 2005): 101.

El Salvador:	39,000
Honduras:	10,500
Nicaragua:	2,200
Guatemala:	14,000
Southern Mex Border:	3,000
Northern Mex. Border:	17,000
U.S.:	38,000 ¹⁷³

Within the U.S., federal officials have detected MS-13 and M-18 activity in over thirty-three U.S. states and the District of Columbia, with major concentrations of gang members in Virginia, Maryland, North Carolina, California, Texas, Illinois, New Jersey, and New York.¹⁷⁴

Whether operating in Central America or the United States, MS-13 and affiliated gang members tend to engage in similar sorts of criminal activity. As with most urban street gangs, MS-13 is concerned primarily with controlling territory as a means of exercising monopoly control over criminal activity within their “turf.” Local activities include extortion and protection rackets victimizing local businesses, levying “taxes” against other criminal enterprises such as drug-trafficking and prostitution, and engaging in criminal activity including auto theft, burglary, and kidnapping for profit. Intimidation and murder of rival gang members and civilians who inform on gang activity are also common. Salvadoran police estimate that over 60% of all homicides committed in El Salvador are gang-related.¹⁷⁵

According to many analysts, the scale and impact of street gang activity in El Salvador and neighboring Central American countries has reached the point that it poses

17. ¹⁷³U.S. Agency for International Development, *Central America and Mexico Gang Assessment*,

¹⁷⁴ Shelley Feuer Domash, *Police: The Law Enforcement Magazine*, 3.

¹⁷⁵ CRS Report for Congress, “*Gangs in Central America*,” 1.

a serious threat to regional stability.¹⁷⁶ Gang members operate with near impunity in Central America, and often move across lightly policed international borders in order to avoid police or to seek out new operational areas.¹⁷⁷ As mentioned above, gang activity stifles economic growth and discourages foreign investment. Moreover, the rising levels of violence and rampant insecurity encourage capital flight, as well as the departure of the skilled middle class professionals essential to economic development.¹⁷⁸ Gang activity also fuels illegal emigration of unskilled and semi-skilled laborers to the U.S.¹⁷⁹ Large-scale sweeps and round-ups of gang members by police and the military in El Salvador and Honduras have generated criticism from human rights advocates and civil libertarians on the left, and perhaps helped exacerbate existing class tensions.¹⁸⁰ More importantly, the inability of democratically-elected governments to maintain law and order in the face of gang violence undermines faith in democratic governance.

Some analysts have even begun to argue that the scale of street gang activity transcends mere criminality, and in fact now presents a hybrid threat which contains a burgeoning political agenda. Max Manwaring of the U.S. Army Strategic Studies Institute argues that the Salvadoran street gangs are a “mutated form of urban insurgency” that “abridge sovereign state powers and negate national and regional security.”¹⁸¹ Instead of creating an alternative political structure, the street gangs are focused on negating existing law enforcement controls and creating a vacuum that allows them to operate their criminal enterprises unchecked. Manwaring contends that the threat

¹⁷⁶ Ana Arana, *Foreign Affairs*, 101.

¹⁷⁷ *Ibid.*, 103.

¹⁷⁸ CRS Report for Congress, “*Gangs in Central America*,” 7.

¹⁷⁹ *Ibid.*

¹⁸⁰ Ana Arana, *Foreign Affairs*, 107.

¹⁸¹ Max Manwaring, “*Street Gangs: The New Urban Insurgency*,” a monograph for the Strategic Studies Institute, U.S. Army War College, March 2005; 1. Available from <http://www.carlisle.army.mil/ssi/>. Internet. Accessed September 15, 2006.

the transnational gangs pose is serious enough to warrant “the holistic use of all the instruments of state and international power.”¹⁸²

While the aforementioned street gang activities are certainly of concern to local police authorities in effected communities in both Central America and the U.S., it is the increasingly transnational nature of street gang activity that poses a direct threat to the national security of the United States. The internationalization of the Central American street gangs has coincided with an increase in the scope and sophistication of their activities. According to U.S. law enforcement studies quoted by the Congressional Research Service, MS-13 and other affiliated gangs are increasingly involved in U.S.-based transnational criminal enterprises such as drug smuggling, arms trafficking, alien smuggling, extortion, kidnapping, and international auto theft rings.¹⁸³

MS-13 in particular appears to be the most aggressive Central American street gang in terms of transnational operations. As mentioned above, the gang is reputed to have as many as 20,000 members operating on the northern and southern borders of Mexico. This presence on the borders of Mexico has allowed MS-13 to seize control of alien smuggling rings operating along the migrant corridors stretching from Central America up through Mexico into the U.S., and to consolidate its criminal base within the U.S.¹⁸⁴ MS-13 has also apparently brokered an agreement with Mexican drug smuggling cartels regarding distribution rights within the U.S., and is aggressively merging its weapons and migrant smuggling operations into a unified criminal transportation and logistics network.¹⁸⁵ The MS-13 threat to U.S. national security apparently has the

¹⁸² Ibid., 19.

¹⁸³ CRS Report for Congress, “*Gangs in Central America*,” 1.

¹⁸⁴ Ana Arana, *Foreign Affairs*, 103.

¹⁸⁵ Ibid.

potential to take on ever more sinister dimensions. According to various unsubstantiated media reports, an FBI task force on MS-13, created in January 2005, even investigated an alleged meeting between MS-13 gang members and Al Qaeda operatives interested in using the MS-13 alien smuggling network to transport terrorists into the U.S.¹⁸⁶

The Rule of Law and Transnational Street Gangs

In response to the evolving threat to U.S. national security posed by transnational street gangs, the Department of State, the U.S. Agency for International Development, and the Department of Justice have sought to increase the capabilities of the Salvadoran police and judiciary. As discussed in the section dealing with illegal immigration, the U.S. has attempted to promote rule of law reforms in El Salvador in order to enable the GOES to provide both the Salvadoran and the U.S. populace with an essential public good: law and order.

USAID and ICITAP have provided the bulk of the U.S. rule of law assistance aimed at curbing gang activity. The two organizations have cooperated to provide a community policing program in over 200 municipalities in El Salvador.¹⁸⁷ The centerpiece of the program is a computerized national emergency police response system modeled after one used by the New York City Police Department.¹⁸⁸ The system includes a computerized crime analysis and deployment network, enhanced communications systems, and internet-based connectivity for PNC gang rapid response units.¹⁸⁹ Other specific USAID anti-gang initiatives are intended to help the GOES take

¹⁸⁶ Stratfor.com, *Mara Salvatrucha Gangs and U.S. Security*, internet article, August 22, 2005. Accessed at www.stratfor.com/products/premium/print.php/storyid25426. Accessed on February 14, 2007.

¹⁸⁷ CRS Report for Congress, “*Gangs in Central America*,” 5.

¹⁸⁸ Ana Arana, *Foreign Affairs*, 108.

¹⁸⁹ *Ibid.*, 109.

a holistic approach to the problem of gang activity by promoting institutional reform in the judiciary, expanding democratic governance, creating economic opportunities, strengthening education and improving public health.¹⁹⁰ The Department of State, which has overall responsibility for rule of law promotion in El Salvador, also plays an active role on the anti-gang front. Within the embassy country team, the INL program office focuses on building capacity and political will to combat international crime, including transnational street gangs. The political section focuses on ensuring that appropriate legal mechanisms are in place for sharing law enforcement information at the bilateral and regional level, as well as coordinating repatriation of deportees with street gang connections. Embassy political officers also work to ensure that Salvadoran anti-gang measures are coordinated with regional and multilateral efforts.¹⁹¹ Out of an overall FY2004 assistance budget of \$74.3 million, roughly about \$1 million dollars was allocated for rule of law assistance.¹⁹²

Evaluating the U.S. Response to Transnational Street Gangs

While U.S. policymakers should be lauded for recognizing the threat which transnational street gangs pose to U.S. national security, unfortunately their response appears to be inadequate. Simply put, U.S. efforts to stem the growth of transnational street gangs by promoting the rule of law in El Salvador appear to be failing.

The scale of U.S. assistance does not seem to be commensurate with the magnitude of the threat posed by the Salvadoran gangs. According to an April 2006 USAID study, the level of gang membership in El Salvador is escalating faster than

¹⁹⁰ CRS Report for Congress, "*Gangs in Central America*," 5.

¹⁹¹ *Ibid.*, 4.

¹⁹² *Ibid.*

anywhere else in Central America or Mexico.¹⁹³ The same study also concludes that the ongoing deportation of illegal alien gang members from the U.S. is fueling the spread of gang membership in El Salvador, and strengthening the organizational links between Salvadoran and U.S.-based MS-13 factions.¹⁹⁴ With upwards of 80,000 MS-13 and affiliated gang members already spread out between the U.S. and El Salvador, continued growth will soon push the total number of Salvadoran gang members over the 100,000 member mark. Continued growth in gang membership in El Salvador may well soon create a critical mass that is beyond the ability of the Salvadoran authorities to contain or control in any meaningful fashion. At least one analyst argues that the magnitude of the street gang problem is such that it merits the “holistic” application of U.S. military, diplomatic, and law enforcement capabilities.¹⁹⁵

More ominously, U.S. efforts to counter the threat of transnational street gangs by improving the capabilities of the Salvadoran police and judiciary may well place U.S. national security interests in the hands of two fatally flawed institutions. At least one analyst has concluded that a weak justice system and an overburdened, inexperienced police force render the Salvadoran state incapable of controlling common crime and providing security to the populace.¹⁹⁶ In a brutally frank assessment of the utility of U.S. rule of law assistance to El Salvador, USAID concludes that “weak, ineffective, and corrupt” law enforcement and judicial systems are a main reason for spiraling levels of gang violence.¹⁹⁷ USAID reports that in some areas of El Salvador, the law enforcement

34. ¹⁹³ U.S. Agency for International Development, *Central America and Mexico Gang Assessment*,

¹⁹⁴ Ibid.

¹⁹⁵ Manwaring, “*Street Gangs: The New Urban Insurgency*,” 19.

¹⁹⁶ Popkin, 263.

10. ¹⁹⁷ U.S. Agency for International Development, *Central America and Mexico Gang Assessment*,

presence is so weak and ineffective that gang members are “taking on roles normally reserved to the state” such as levying “taxes on bus drivers and others who want to do business in the neighborhood,” and even “exercising justice” by “demanding certain behavior from citizens and sanctioning those who do not obey.”¹⁹⁸ This is the same essential strategy that many insurgent groups have used to overthrow existing governments. Other analysts contend that corruption amongst PNC officers and state functionaries, some of whom may be receiving payoffs for turning a blind eye to weapons trafficking and other activity, facilitates street gang dominance of some urban areas.¹⁹⁹

In light of these obstacles, U.S. efforts to improve the institutional capabilities of the PNC and the Salvadoran judiciary may well amount to nothing more than wishful thinking. By relying on the GOES to take the lead in countering transnational street gangs, the U.S. is ceding responsibility for protecting U.S. national security to a second party which, from all appearances, is not up to the task. Once again, it appears as if the rule of law is proving to be an inadequate means of realizing U.S. national security objectives in El Salvador.

Chapter Four: Synthesis and Recommendations

The Rule of Law, El Salvador, and U.S. National Security Interests

The U.S. experience in El Salvador demonstrates the futility of trying to eliminate threats to U.S. national security interests by promoting the rule of law. Over the course of the last thirty years of involvement in El Salvador, the U.S. has promoted rule of law reform both in times of war and in times of peace. During the Salvadoran civil war, promoting

¹⁹⁸Ibid., 10.

¹⁹⁹Arana, 108.

the rule of law proved to be an inappropriate tool for the tasks U.S. policymakers set out to accomplish. In the present post-war security environment, the scale of the U.S. rule of law promotion effort seems far too small to counter illegal immigration and transnational organized crime threats which seem to be metastasizing beyond control. Moreover, relying upon a fundamentally flawed Salvadoran government to counter a serious transnational threat to U.S. national security in an age of weapons of mass destruction and global mega-terrorism appears to be an unwarranted acceptance of significant risk. Despite the expenditure of millions of dollars, U.S. rule of law assistance programs have proven incapable of protecting human rights, of countering insurgency, of stemming illegal immigration, and of controlling transnational street gang activity. In short, promoting the rule of law has not enabled U.S. policymakers to achieve any of the national security objectives which they set out to realize over the course of nearly three decades of intense, sustained involvement in El Salvador.

The U.S. experience in El Salvador validates many of the observations regarding the problematic nature of rule of law reform identified in the Carnegie Endowment lessons learned cited at the outset of this study. Perhaps most importantly, U.S. involvement in El Salvador illustrates the sheer difficulty of engineering profound changes in the political, social, and cultural fabric of a foreign country. U.S. attempts to reform various Salvadoran institutions morphed into large-scale bureaucratic efforts to fundamentally transform a foreign country. Efforts to reform institutions such as the Salvadoran army, the PNC, and the judiciary have largely proven ineffective in the face of resistance from well-entrenched political elites who stand to lose power and privilege. Corruption, inefficiency, and mixed political signals regarding the extent of U.S.

commitment to actually curbing illegal Salvadoran immigration have also taken a toll. The less than sterling results of U.S. efforts in El Salvador reinforce the contention that it is not clear exactly what type of U.S. assistance can or will establish the rule of law in a foreign country.

During the period covered by this paper, U.S. efforts to achieve national security objectives through promotion of the rule of law have all been premised upon empowering the government of El Salvador to eliminate threats to U.S. national security interests. Reliance on promoting the rule of law has placed the U.S. in the difficult position of relying on the leadership of another country to deal with direct threats to U.S. national security. Throughout the course of the period covered in this paper, i.e. 1977-2007, the U.S. has sought to transform various Salvadoran government entities, render them capable of carrying out basic tasks of governance, and ensure that they are willing to exercise appropriate civility, restraint, and coercion in dealing with various sectors of their own population. Rather than taking on the problem directly, the U.S. has attempted to arrive at a solution second-hand by increasing Salvadoran government capacity to act. Rule of law promotion has thus served as an attempt to substitute U.S. determination for inadequate Salvadoran will and capacity. Not surprisingly, given that U.S. national interests have not always been identical to those of the GOES, the results have proven to be disappointing to all concerned. When viewed in this light, the U.S. experience in El Salvador amounts to a three decade exercise in failed nation-building.

The U.S. experience in El Salvador suggests that promoting the rule of law is a long-term endeavor that requires persistence and a profound level of involvement in the affairs of another country. Moreover, it also illustrates that U.S. will and effort can not

compensate for lack of local will, effort, and capacity. U.S. policymakers struggling to contain various security threats originating in El Salvador have tended to underestimate the sheer complexity of the endeavor, and assumed that reshaping Salvadoran institutions to render them similar to U.S. institutions, and rewriting Salvadoran laws, would suffice. Unfortunately, the incentives for local elites to resist the U.S.-proposed changes and to attempt to protect practices and modes of behavior that they benefited from proved stronger than the U.S. desire or ability to force change.

The U.S. experience in El Salvador lends itself to the observation that promoting the rule of law is not a viable tool for counterinsurgency or immediate post-conflict stabilization and reconstruction. In those types of environments, attainment of concrete goals within a fixed, visible time-frame is usually of paramount importance in light of the constraints of U.S. domestic opinion on foreign policy and commitment of the U.S. military forces to combat overseas. The scale, scope, complexity, and expected duration of establishing the rule of law should lead U.S. policy-makers to the conclusion that it should not be included amongst first tier stabilization and reconstruction objectives. Moreover, as the U.S. has discovered over the course of almost three decades of sustained effort in El Salvador, despite the best of intentions, rule of law promotion programs can fail. Given the distinct possibility of failure, rule of law promotion thus should not be a primary tool for addressing immediate or near-term threats to U.S. national security.

The U.S. experience in El Salvador suggests that the Department of Defense is setting itself up for disappointment, or perhaps worse, by expecting the rule of law to emerge from the interagency process. As discussed in the latest iteration of the QDR,

DOD seems to expect that effective rule of law reform will be the default end product of improved interagency cooperation and greater involvement in post-conflict reconstruction and stabilization by a more engaged, hands-on, expeditionary-minded State Department. DOD discussion of implementing the rule of law treats the concept as if it were a simple 'plug and play' solution, a turn key fix which can be pulled off of an interagency shelf and inserted, fully functioning, into any given conflict situation. In contrast with apparent DOD expectations, the U.S. experience in El Salvador suggests that the rule of law is likely not an effective tool for counterinsurgency or immediate post-conflict stabilization. Rather, promoting the rule of law is probably a task which can only be seriously engaged once a minimal level of physical security and normality exists for the local populace. Even then, as the U.S. experience in El Salvador suggests, cultural barriers such as social class distinctions and sectarian differences are likely to complicate or even nullify attempts to use the rule of law to counter insurgency. That being the case, DOD strategy and operational plans premised upon assumptions of swift establishment of the rule of law in post-conflict environments are almost certainly flawed from the outset.

The disappointing nature of U.S. efforts in El Salvador also serve to highlight the profound difficulties involved in establishing the rule of law in a culture where it has not previously existed. The U.S. and El Salvador have a significant degree of cultural affinity in that both societies have been strongly influenced by the Judeo-Christian heritage that shaped Western civilization. Moreover, a history of almost two centuries of sustained U.S. interaction with Latin America, the presence of a large Hispanic population in the U.S., and an abundance of U.S. government civilian and military employees who speak Spanish fluently and understand the culture and politics of Central

America would seem to have tilted the odds somewhat in favor of the U.S. realizing its objectives. The limited progress which the U.S. has made towards establishing the rule of law in El Salvador, even in light of the cultural affinities listed above, throws a sobering shadow over the prospects of overcoming the cultural hurdles inherent in establishing the rule of law in Iraq, the greater Middle East, any of the numerous troubled countries in the Muslim world, or for that matter any culture significantly different from the West.

That said, the purpose of this paper is not to argue that promoting the rule of law can never be a worthy goal of U.S. policy. The benefits which the rule of law has bestowed upon Western civilization are obvious to any reasonably objective observer who cares to examine them. The problem lies not with the rule of law, but rather with the immense difficulty of transplanting it to a cultural setting in which it did not naturally evolve. The U.S. experience in El Salvador argues for caution, prudence, humility, and a realistic evaluation of the political, social, and cultural hurdles inherent in establishing the rule of law overseas. In light of those hurdles, it is apparent that promoting the rule of law is not an appropriate tool for dealing with immediate, pressing threats to U.S. national security.

Limitations of this Study

As with any sort of academic undertaking, there are numerous factors which limit the applicability of this study. Of primary importance is the fact that the U.S. experience in El Salvador is the product of specific temporal, cultural, political, social, and geographic circumstances, many of which are specific to El Salvador. As such, the lessons learned

from this study need to be applied with caution in situations where different cultural, political, social, and geographic circumstances come into play.

Although the U.S. experience in El Salvador offers some valuable lessons regarding the wisdom of attempting to export the rule of law, El Salvador is not Iraq, Afghanistan, or Bosnia, where current U.S. efforts to promote the rule of law must be judged on their own merits. Moreover, the genesis of U.S. efforts to promote the rule of law in El Salvador began during the Cold War, and, as discussed at length in the sections dealing with human rights and counterinsurgency, took on a momentum specific to those times. U.S. efforts to promote the rule of law in the current GWOT context must, once again, be evaluated against the metric appropriate to the current geopolitical setting.

Finally, the U.S. experience in El Salvador of course can not serve as the final litmus test of the validity of the concept of achieving U.S. national security objectives by promoting the rule of law. The history of U.S. involvement in El Salvador argues against the wisdom and utility of promoting the rule of law, but in the final analysis it is simply one set of historical circumstances which should be taken into account by policymakers and practitioners. The study of history does not provide obvious answers, but rather helps to frame questions and provides insights which can guide the careful student towards opportunities for reflection, analysis, and creative thinking. U.S. efforts to promote the rule of law in El Salvador, as discouraging and seemingly cautionary as they are, must also be evaluated in this light.

Implications and Recommendations

As this study argues, the U.S. experience in El Salvador demonstrates that the rule of law is not an effective tool for dealing with threats to U.S. national security. This is not to

say that the rule of law is not a desirable or valuable social good, but rather that the difficulty of fostering profound changes in the social structure of a foreign country, let alone exporting a complex socio-political concept to a foreign culture where it did not naturally evolve, argues for removing the concept from the forefront of U.S. national security strategy. In light of the above assertions, the U.S. government should enact the following recommendations in reference to strategy and operational concepts involving exporting the rule of law:

Recommendations Regarding the Rule of Law in U.S. Strategy:

- Downgrade the importance of promoting the rule of law in future U.S. strategy documents such as the National Security Strategy and the Quadrennial Defense Review.
- Recognize that rule of law promotion is best pursued as a long-term development agenda item, and not as a means of countering immediate, pressing threats to U.S. national security.
- Remove rule of law promotion from the counterinsurgency and immediate post-conflict stabilization toolkit. U.S. strategists and policy-makers should not use rule of law reform to attempt to provide security to the local populace or to stabilize an immediate post-conflict situation. Rather, security and stability must be pursued as necessary prerequisites to any attempt to undertake rule of law reform.
- DOD and interagency practitioners should differentiate judicial reform and institution building from initial security operations, counterinsurgency, and immediate post-conflict stabilization and reconstruction operations (i.e. phase four). For example, if the immediate or near-term goal is to establish law and order, this probably means that having sufficient numbers of troops on the ground to protect the populace is more

important than having teams of lawyers and judges trying to reform or build judicial and police institutions in the midst of a civil war or insurgency.

- If U.S. strategists nonetheless opt to undertake rule of law promotion, they must recognize the sheer complexity and the scale of change they are trying to promote. They must work from the premise that promoting the rule of law is in essence an exercise in long-term nation-building, that they are undertaking a generational task, and that it may not work. U.S. policy-makers must never assume that attempts to engineer profound changes in the legal structure of a foreign country will quickly yield beneficial results.
- Rule of law promotion efforts must distinguish between appropriate short-term and long-term objectives. Providing equipment to existing police forces or building new courthouses can likely be accomplished in the short-term. In contrast, more ambitious, abstract objectives such as developing an impartial judiciary, training a competent police force, or educating the local populace to understand their rights and obligations within a democratic legal system are undertakings that will in all likelihood take several generations to accomplish.
- All U.S. government agencies embarking on rule of law promotion should be strongly encouraged to clarify exactly what they are trying to accomplish in each specific project they are undertaking, and to realistically assess the possibility of failure and the potential impact of that failure. They should also identify an expected time frame for program completion.
- All USG rule of law practitioners, both civilian and DOD, should set simple goals, promote reasonable expectations, and staff and resource projects accordingly.

- The DOD (Defense Science Research Board) should sponsor a comprehensive examination of rule of law reform, with specific emphasis on empirical research focused on identifying the practices and policies which have resulted in effective rule of law reform. Any such study should include a comprehensive review of the rule of law lessons learned compiled by the Carnegie Endowment for International Peace, as well as established procedures and best practices used by the Department of State, the Department of Justice, and USAID. Once this research is complete and submitted to peer review, DOD should publish the results, and, if appropriate, draft doctrine for incorporating the rule of law findings into strategy documents, operational planning, and stabilization and reconstruction practices.

Specific Recommendations Regarding El Salvador:

- The U.S. should broaden its approach against illegal immigration and transnational street gangs beyond reliance upon the rule of law in order to address threats to U.S. national security stemming from these two phenomena.
- The U.S. approach to transnational threats originating in El Salvador should incorporate all elements of national power, to include diplomatic, intelligence, military, economic, financial, information, and legal capacity.
- Possible actions that should be taken under consideration to curb illegal immigration from El Salvador and to disrupt transnational street gangs include:
 - 1) Designate MS-13 as a terrorist organization and use appropriate legal measures to freeze member/organizational assets.

- 2) Authorize SOUTHCOM to assist the GOES and ESAF to undertake a counterinsurgency campaign to dismantle MS-13 in El Salvador and neighboring countries in the SOUTHCOM AOR.
- 3) Issue a Presidential Finding authorizing the CIA, DIA, and DOD to conduct covert operations aimed at disrupting MS-13 and other transnational street gangs.
- 4) Place federalized National Guard units on the U.S.-Mexico border, and grant them unambiguous legal authority to use force to prevent illegal alien MS-13 and other illegal alien street gang members from entering the U.S.
- 5) Cut off the flow of remittances arriving in El Salvador from Salvadorans residing illegally in the U.S.
- 6) Cancel TPS for Salvadorans residing illegally in the U.S.
- 7) Tie continuing U.S. financial, economic and development assistance to tangible evidence of progress on the part of the government of El Salvador in curbing the flow of illegal immigrants to the United States.

Bibliography

Books, Journals, Magazines, and Conference Reports

- Arana, Ana. "How the Street Gangs Took Central America," *Foreign Affairs*, Volume 83, Number Three, May/June 2005.
- Bacevich, A.J., Hallums, James D., White, Richard H., and Young, Thomas F. *American Military Policy in Small Wars: The Case of El Salvador*. Cambridge, MA: Institute for Foreign Policy Analysis, Inc., 1988.
- Byrne, Hugh. *El Salvador's Civil War: A Study of Revolution*. Boulder, CO: Lynne Rienner, 1996.
- Carothers, Thomas, ed. *Promoting the Rule of Law Abroad: In Search of Knowledge*. Washington: Carnegie Endowment for International Peace, 2006.
- Carothers, Thomas. "The Rule of Law Revival." *Foreign Affairs*, Volume 77, Number Two, March/April 1998.
- Carothers, Thomas. "Promoting the Rule of Law Abroad: The Problem of Knowledge," *Working Papers, Rule of Law Series, Democracy and Rule of Law Project, Carnegie Endowment for International Peace*, Number 34, January 2003.
- Domash, Shelley Feuer. "America's Most Dangerous Gang," *Police: The law Enforcement Magazine*. 1 August, 2006.
- Harvard University, John F. Kennedy School of Government, *A Conference Report: Small Wars Symposium, The Case of El Salvador*. Cambridge: March 29, 1988.
- Joes, Anthony James. *Guerilla Warfare: A Historical, Biographical, and Bibliographical Source Book*. Westport, Connecticut: Greenwood Press, 1996.
- Krauss, Clifford. *Inside Central America: Its People, Politics, and History*. New York: Summit Books, 1991.
- Kleinfeld Belton, Rachel. "Competing Definitions for the Rule of Law: Implications for Practitioners," *Carnegie Papers, Rule of Law Series, Democracy and Rule of Law Project, Carnegie Endowment for International Peace*, Number 55, January 2005.
- LeoGrande, William M. *Our Own Backyard: The United States in Central America, 1977-1992*. Chapel Hill, NC: The University of North Carolina Press, 1998.
- Liddick, Donald R. *The Global Underworld: Transnational Crime and the United States*. Westport, CT: Praeger, 2004.

- Manwaring, Max G. "Street Gangs: The New Urban Insurgency," *Strategic Studies Institute*, U.S. Army War College. Carlisle, PA: March 2005.
- Montgomery, Tommie Sue. *Revolution in El Salvador: From Civil Strife to Civil Peace*. Boulder, CO: Westview Press, 1995.
- O'Neill, Bard E. *Insurgency and Terrorism: Inside Modern Revolutionary Warfare*. Dulles, VA: Brassey's USA, 1990.
- Popkin, Margaret. *Peace Without Justice: Obstacles to Building the Rule of Law in El Salvador*. University Park, PA: The Pennsylvania State University Press, 2000.
- Rosenberg, Tina. *Children of Cain: Violence and the Violent in Latin America*. New York: Penguin Books, 1992.
- Schwarz, Benjamin. *American Counterinsurgency Doctrine and El Salvador: The Frustrations of Reform and the Illusions of Nation Building*. Santa Monica, CA: Rand, 1991.
- Siegle, Joseph T., Weinstein, Michael M., and Halperin, Morton H. "Why Democracies Excel," *Foreign Affairs*, Volume 83, Number Five, September/October 2004.
- Smith, Peter H. *Talons of the Eagle: Dynamics of U.S.-Latin American Relations*. New York: Oxford University Press, 1996
- Smith, Gaddis. *The Last Years of the Monroe Doctrine, 1945-1993*. New York: Hill and Wang, 1994.
- Stratfor. *Mara Salvatrucha Gangs and U.S. Security*. Internet article. August 22, 2005.
- Washington Office on Latin America. *Blurring the Lines: Trends in U.S. Military Programs with Latin America*. Washington, DC: September 2004.
- Washington Office on Latin America. *Erasing the Lines: Trends in U.S. Military Programs with Latin America*. Washington, DC: December 2005.
- Washington Office on Latin America. *Sustaining Reform: Democratic Policing in Central America*. Citizen Security Monitor. A WOLA Briefing Series. Washington, DC: October 2002.
- Washington Office on Latin America. *Drugs and Democracy in Latin America: The Impact of U.S. Policy*. A WOLA Special Report. Washington, DC: November, 2004.

U.S. Government Publications and Documents

- U.S. Agency for International Development. *Achievements in Building and Maintaining the Rule of Law: MSI Studies in LAC, E&E, AFR, and ANE*. Office of Democracy and Governance, Bureau for Democracy, Conflict, and Humanitarian Assistance. Washington, DC: U.S. Government Printing Office, November 2002.
- U.S. Agency for International Development. *Democracy and Governance: Rule of Law*. USAID web site. Accessed at [www.usaid.gov/ourwork/democracy and governance](http://www.usaid.gov/ourwork/democracy%20and%20governance) on September 3, 2006.
- U.S. Agency for International Development. *El Salvador Overview*. USAID web site. Accessed at www.usaid.gov/pubs/bj2001/lac/sv on October 30, 2006.
- U.S. Agency for International Development. *Handbook of Democracy and Governance Program Indicators*. Center for Democracy and Governance, Bureau for Global Programs, Field Support, and Research. Washington, DC: U.S. Government Printing Office, August 1998.
- U.S. Agency for International Development. Bureau of Democracy and Governance. *Strengthening the Rule of Law and Respect for Human Rights*. Washington, DC: March 17, 2006. USAID web site. Accessed at [www.usaid.gov.ourwork /democracy and governance](http://www.usaid.gov/ourwork/democracy%20and%20governance) on September 3, 2006.
- U.S. Agency for International Development. *Central America and Mexico Gang Assessment*. USAID Bureau for Latin American and Caribbean Affairs, Office of Regional Sustainable Development. Washington, DC: April, 2006.
- U.S. Agency for International Development. *Central America and Mexico Gang Assessment: Annex 1: El Salvador Profile*. USAID Bureau for Latin American and Caribbean Affairs, Office of Regional Sustainable Development. Washington, DC: April, 2006.
- U.S. Agency for International Development. *USAID Mission El Salvador Data Sheet*. Washington, DC: October 2005.
- U.S. Agency for International Development. *U.S. Foreign Aid: Meeting the Challenges of the Twenty-first Century*. Bureau for Policy and Program Coordination. Washington, DC: January 2004.
- U.S. Agency for International Development. *Fragile States Strategy*. Washington, DC: January 2005.

- Congressional Research Service. CRS Report for Congress: “*Gangs in Central America.*” By Claire Ribando. Washington, DC: The Library of Congress, May 2005.
- U.S. Congress. House. *Presidential Certification on El Salvador. Hearing Before Subcommittee on Inter-American Affairs*, 97th Congress, Second Session, Feb 2, 23, 25 and March 2, 1982. Washington, D.C: U.S. Government Printing Office, 1982.
- U.S. Congress. House. *Presidential Certification on El Salvador. Hearings and Markup Before the Committee on Foreign Affairs and its Subcommittee on Inter-American Affairs*, 97th Congress, Second Session on H.J Res. 494, June 2, 22; July 29; Aug. 3. 10, and 17, 1982. Washington, DC: U.S. Government Printing Office, 1982.
- U.S. Congress. Senate. *Presidential Certification on Progress in El Salvador. Hearing Before the Committee on Foreign Relations*, Ninety-Eighth Congress, First Session, Feb. 2, 1983. Washington, DC: U.S. Government Printing Office, 1983.
- U.S. Congress. House. *U.S. Policy in El Salvador, Hearings Before the Subcommittees on Human Rights and International Organizations and on Western Hemisphere Affairs*, Ninety-Eighth Congress, First Session, Third Partial Certification on El Salvador, February 4, 28; March 7, 17, 1983. Washington, DC: U.S. Government Printing Office, 1983.
- U.S. Congress. House. *The Air War and Political Developments in El Salvador. Hearing Before the Subcommittees on Western Hemisphere Affairs of the Committee on Foreign Affairs*, Ninety-Ninth Congress, Second Session, May 14, 1986. Washington, DC: U.S. Government Printing Office, 1986.
- U.S. Congress. House. *Prospects for Peace in El Salvador; Hearing Before the Subcommittees on Western Hemisphere Affairs of the Committee on Foreign Affairs*, One Hundred First Congress, First Session, March 7, 1989. Washington, DC: U.S. Government Printing Office, 1989.
- U.S. Congress. House. *From Duarte to Cristiani: Where is El Salvador Headed ? Hearing Before the Subcommittees on Western Hemisphere Affairs of the Committee on Foreign Affairs*, One Hundred First Congress, First Session, July 13, 1989. Washington, DC: U.S. Government Printing Office, 1989.
- U.S. Congress. House. *Toward Peace in El Salvador: The Final Steps. Hearing Before the Subcommittees on Western Hemisphere Affairs of the Committee on Foreign Affairs*, One Hundred Second Congress, First Session, October 30 and November 6, 1991. Washington, DC: U.S. Government Printing Office, 1993.

- U.S. Congress. *Gangs in Central America*. Congressional Research Service Report for Congress. By Claire Ribando. Washington, DC: U.S. Government Printing Office, May 2005.
- U.S. Department of Defense, Office of the Secretary. *Quadrennial Defense Review Report*. Washington, DC: February 6, 2006.
- U.S. Department of Defense, Office of the Secretary. *Quadrennial Defense Review Report*. Washington, DC: September 30, 2001.
- U.S. Department of Homeland Security. *Immigration Enforcement Actions: 2004*. Office of Immigration Statistics, Management Directorate. Washington, DC: November, 2005.
- U.S. Department of Justice. International Criminal Investigative Training Assistance Program. *El Salvador Project Overview*. Accessed at www.justice.gov.criminal.icitap.elsalvador on September 3, 2006.
- U.S. Department of State. *El Salvador Freedom of Information Act Collection*. Declassified Reporting Cables and Memoranda on Human Rights in El Salvador, 1977-1991. Washington, DC.
- U.S. Department of State. *Bureau for International Narcotics and Law Enforcement Affairs Draft Strategic Plan, Fiscal Years (FY) 2006-2010*. Washington, DC: January 3, 2006.
- U.S. Department of State. *U.S. Mission to El Salvador. Mission Performance Plan FY 2006*. Washington, DC: November 2006.
- U.S. Department of State. *Transparency and the Rule of Law in Latin America*. John D. Farrar, Deputy Assistant Secretary for International Narcotics and Law Enforcement, Testimony before the House International Relations Committee, Subcommittee on the Western Hemisphere, Washington, DC, May 25, 2005.
- U.S. Department of State. *Transformational Diplomacy*. Fact Sheet. Office of the Spokesman. Washington, DC: January 18, 2006.
- U.S. Government Accounting Office. *El Salvador: Military Assistance has Helped but Not Overcome the Insurgency*. GAO/NSIAD-91-166. Report to the Honorable Edward M. Kennedy, U.S. Senate. Washington, DC: April 1991.
- U.S. Government Accounting Office. *Foreign Assistance: Status of Rule of Law Program Coordination*. GAO/NSIAD-00-8R. National Security and International Affairs Division. Washington, DC: October 13, 1999.

- U.S. Government Accounting Office. *Report on El Salvador*. Hearing before a subcommittee of the Committee on Appropriations, United States Senate, One Hundred First Congress, First Session, Special hearing. Washington, DC.: U.S. Government Printing Office, 1989.
- U.S. Government Accounting Office. *Foreign Aid: Efforts to Improve the Judicial System in El Salvador*. GAO/NSIAD-90-81. Report to the Chairman, Subcommittee on Western Hemisphere Affairs, Committee on Foreign Affairs, House of Representatives. Washington, DC: U.S. Government Printing Office, May 1990.
- U.S. Government Accounting Office. *El Salvador: Military Assistance Has Helped Counter But Not Overcome the Insurgency*. GAO Report to the Honorable Edward M. Kennedy, U.S. Senate. Washington, DC.: U.S. Government Printing Office, April 1991.
- U.S. Government Accounting Office. *Foreign Assistance: Rule of Law Funding Worldwide for Fiscal Years 1993-98*. GAO/NSIAD-99-158. GAO Report to Congressional Requestors. Washington, DC: U.S. Government Printing Office, June 1999.
- U.S. Government Accounting Office. *Aid to El Salvador: Slow Progress in Developing a National Civilian Police*. GAO Report to Congressional Requestors. Washington, DC.: U.S. Government Printing Office, September 1992.
- U.S. Government Accounting Office. *Foreign Assistance: U.S. Rule of Law Assistance to Five Latin American Countries*. GAO/NSIAD-99-195. GAO Report to Congressional Requestors. Washington, DC.: U.S. Government Printing Office, August 1999.
- United States Institute of Peace. Special Report Number 118. *Building Civilian Capacity for U.S. Stability Operations: The Rule of Law Component*. April 2004. Accessed at www.usip.org. on September 30, 2006.
- U.S. President. *International Crime Control Strategy*. Washington, DC: May 12, 1998.
- U.S. President. *The National Drug Control Strategy*. Washington, DC: February, 2005.
- U.S. President. *The National Security Strategy of the United States of America*. Washington, DC: March 2006.
- U.S. President. *The National Security Strategy of the United States of America*. September 17, 2002.
- U.S. President. *National Strategy for Combating Terrorism*. Washington, DC: September 2006.

U.S. President. *The National Strategy for Maritime Security*. Washington, DC: September 2005.

U.S. President. 2005. *National Strategy for Victory in Iraq*. Washington, DC: November 2005.

United States Southern Command. Sword Paper. *Civil Military Operations in El Salvador*. February 17, 1988.

Vita

Anthony K. Stapleton is a Foreign Service Officer with the U.S. Department of State. He joined the Foreign Service in 1993. He has served in Panama, the Philippines, El Salvador, Spain, and Washington. Prior to joining the Foreign Service, he was an intelligence officer in the U.S. Navy, and served on both active duty and in the naval reserve. Mr. Stapleton graduated from the American University School of International Service in 1988 with a B.A. Cum Laude in International Studies and a minor in History. He is married to Beatriz Isabel Stapleton, who is originally from El Salvador. They have a two year old daughter, Victoria Ann, who is systematically teaching her father the true meaning of the words patience and humility.

REPORT DOCUMENTATION PAGE		Form Approved OMB No. 0704-0188
Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing this collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports (0704-0188), 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a current OMB control number. PLEASE DO NOT RETURN YOUR FORM TO THE ABOVE ADDRESS.		
1. REPORT DATE (DD-MM-YYYY) 15-06-2007	2. REPORT TYPE Master's Thesis	3. DATES COVERED (From - To) 31-07-2006 to 15-06-2007
4. TITLE AND SUBTITLE The Rule of Law and the U.S. Quest for Security in El Salvador		5a. CONTRACT NUMBER
		5b. GRANT NUMBER
		5c. PROGRAM ELEMENT NUMBER
6. AUTHOR(S) Stapleton, Anthony K.		5d. PROJECT NUMBER
		5e. TASK NUMBER
		5f. WORK UNIT NUMBER
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Joint Forces Staff College Joint Advanced Warfighting School 7800 Hampton Blvd Norfolk, VA 23511-1702		8. PERFORMING ORGANIZATION REPORT NUMBER JFSC 25789
9. SPONSORING / MONITORING AGENCY NAME(S) AND ADDRESS(ES)		10. SPONSOR/MONITOR'S ACRONYM
		11. SPONSOR/MONITOR'S REPORT NUMBER(S)
12. DISTRIBUTION / AVAILABILITY STATEMENT Approved for public release, distribution is unlimited		
13. SUPPLEMENTARY NOTES		
14. ABSTRACT This paper examines U.S. efforts to promote the rule of law in El Salvador from 1977 to the present. The study begins with a discussion of the theoretical and practical meanings of the rule of law and follows with an examination of the centrality of the concept in U.S. strategic thinking. Separate case studies examine U.S. efforts to promote the rule of law in El Salvador in response to security threats ranging from human rights violations and insurgency to illegal immigration and transnational street gangs. The central argument of the paper is that under the rubric of the promotion of the rule of law, the U.S. has unsuccessfully sought to eliminate threats to U.S. national security by trying to remedy fundamental flaws in the Salvadoran government. As such, U.S. rule of law promotion efforts in El Salvador must be seen as failed attempts at nation-building. Using the U.S. experience in El Salvador as a reference point, the paper reaches the conclusion that promoting the rule of law is not an effective means of addressing threats to U.S. national security.		
15. SUBJECT TERMS Rule of law, U.S. foreign assistance, counterinsurgency, human rights, transnational street gangs, illegal immigration		

16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT Unclassified Unlimited	18. NUMBER OF PAGES 94	19a. NAME OF RESPONSIBLE P
a. REPORT Unclassified	b. ABSTRACT Unclassified	c. THIS PAGE Unclassified			19b. TELEPHONE NUMBER (<i>inclu code</i>) 757-443-6301

Standard Form 298 (Rev. 8-58)
Prescribed by ANSI Std. Z39.18