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

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B-213137

January 30, 1986

The Honorable Bill Alexander
House of Representatives

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Dear Mr. Alexander:

This responds to your April 19, 1985, request that this Office update our legal decision B-213137, June 22, 1984 (published in unclassified form at 63 Comp. Gen. 422 (1984)). That decision addressed the propriety of the Department of Defense's (DOD's) use of operation and maintenance (O&M) appropriations for three categories of activities in connection with its conduct of joint combined military training exercises in Honduras: construction activities, training of foreign forces, and provision of civic and humanitarian assistance to Honduran civilians. In response to your request, we have reviewed actions taken by DOD in light of our previous recommendations concerning each of these three categories of activities. We have also reviewed the manner in which the Department has conducted exercise activities since Ahuas Tara II. Our detailed legal analysis is set out in the enclosure.

Our previous decision addressed the propriety of DOD's use of O&M appropriations, during military exercises in Honduras, for a variety of activities ordinarily funded from other appropriation categories. Specifically, we concluded that DOD had improperly financed foreign aid and security assistance activities through its O&M accounts. We also concluded that the Department may have misapplied O&M appropriations for exercise-related military construction, if costs of specific projects in Honduras exceeded $200,000 per project. We recommended that the Department make funding adjustments where necessary to reimburse its O&M accounts, or declare Antideficiency Act violations to the extent adjustments could not be made.

In conducting our review of DOD's implementation of our previous decision, we encountered a considerable amount of disagreement by DOD officials with some of our basic legal conclusions, particularly with regard to the treatment of exercise-related engineering activities as military construction. In light of these comments, we have reexamined our previous conclusions in some detail. As discussed in the enclosure, we reaffirm the legal conclusions reached in our previous decision. We have attempted to address the specific concerns raised by DOD officials, again particularly as to exercise construction activities.

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Based upon our current review, the Department's implementation of our June 22, 1984, decision has, in several respects, failed to meet our previous concerns. On the one hand, reimbursements made to DOD's O&M account for funds improperly used for training of Honduran forces respond to the objections raised in our previous opinion. On the other, we disagree with DOD's conclusion that all Ahuas Tara II construction projects cost under $200,000, and thus were properly financed with O&M appropriations. As is detailed in the enclosure, we find that determination to be based on a questionable application of military construction accounting principles, particularly those used to define the scope of individual construction projects. In addition, we question DOD's later modification of those principles in determining costs attributable to construction projects in subsequent exercises. With regard to civic and humanitarian assistance, we restate our earlier conclusion that such activities during Ahuas Tara II should have been financed with foreign assistance appropriations specifically provided by the Congress to the President for those purposes. Since our previous decision, the Congress has enacted additional funding authority for civic and humanitarian activities by DOD. We find DOD's interpretation of that new authority to be reasonable, although we remain concerned that the large scale of such activities may go beyond the levels contemplated by the Congress. Consequently, we recommend further clarification of DOD's authority in this area.

Because congressional authority is largely asserted through the appropriations process, the Congress places great significance on the rules that govern the use of appropriations by Federal agencies. It has devised specific measures to ensure that those rules are followed, and that, for instance, programs in one area are not supported by appropriations intended to be used elsewhere. E.g. 31 U.S.C. §§ 1301(a), 1341(a), 1532. In the present case, the cognizant congressional committees have also expressed concern over the Department's utilization of exercise O&M funds for activities within the scope of other funding sources. Thus, the House Committee on Appropriations has stated:

> "* * * [T]he Comptroller General ruled on June 22, 1984 that the JCS exercises in Central America clearly went beyond what [exercise O&M] funds are being appropriated for. For example, the Comptroller General found that funds appropriated for operation and maintenance of our armed forces were used for military construction projects, security assistance activities, and civic action and humanitarian assistance. The Committee believes such diversion of funding from properly appropriated purposes is

unwarranted and directs that the Department of Defense take such steps as necessary to prevent recurrence of such improprieties in the future." H.R. Rep. No. 1086, 98th Cong., 2d Sess. 40-41 (1984).

As the enclosure indicates, further action is required by DOD in order to meet the concerns of this Office, and of the Congress.

Sincerely yours,

for Comptroller General
of the United States

Enclosure

ENCLOSURE

DOD USE OF OPERATIONS AND MAINTENANCE APPROPRIATIONS IN HONDURAS

CONTENTS

DIGESTS

1. Under 10 U.S.C. § 2805(c), operation and maintenance (O&M) appropriations of the Department of Defense (DOD) may be used to finance minor military construction projects, but only to the extent that such projects cost $200,000 or less. In applying this $200,000 authority, DOD's own guidance provides that the various services may not treat clearly interrelated construction activities as separate construction projects. Based on this guidance, several O&M-funded military construction projects built in Honduras during the Ahuas Tara II military exercises appear to have exceeded the $200,000 O&M authority of 10 U.S.C. § 2805(c). In addition, DOD cost computations for O&M-funded construction after Ahuas Tara II have been understated, because of DOD's failure to include all costs attributable to that $200,000 authority.

2. DOD may not use its O&M appropriations to finance training of foreign forces in a manner comparable to that ordinarily provided as security assistance. Funding adjustments made by DOD for improper training of Honduran forces during the Ahuas Tara II military exercises respond to the principal concerns raised by GAO in 63 Comp. Gen. 422 (1984). After Ahuas Tara II, instances of O&M-funded training of Honduran troops by U.S. Special Forces during military exercises have continued. Those activities are authorized to be financed with O&M appropriations only to the extent that such training is not comparable to--nor is it intended as--security assistance. Although GAO does not have sufficient information to determine if these requirements have been met, further action should be taken by DOD, pending congressional clarification of the Special Forces role, to ensure that O&M-funded exercises are not used to finance security assistance activities.

3. Prior to enactment of specific authority in the 1985 DOD Appropriations Act, DOD had only limited authority to use its O&M funds for civic and humanitarian assistance, for which the Congress has separately established and funded programs under the Foreign Assistance Act. GAO reaffirms its conclusion in 63 Comp. Gen. 422 (1984) that, based on the broad scope and amount of O&M-funded assistance carried out by DOD during the Ahuas Tara II exercises, the Department exceeded its funding authority at that time. With regard to post-Ahuas Tara II activities, GAO finds DOD's interpretation of new funding authority in this area to be reasonable. Due to concerns about the continued large scale of such activities, however, GAO recommends further congressional clarification of DOD's authority.

I. DOD CONSTRUCTION ACTIVITIES IN HONDURAS

A. Background

During the Ahuas Tara II joint combined exercises in Honduras, DOD utilized exercise O&M funds for the construction (or upgrade) of three C-130 capable airstrips, two radar facilities, and four base camps at various locations in Honduras. Facilities were financed with O&M appropriations as "training" for engineering troops. Two of the airstrips were hard-packed dirt, and one was a paved extension to an existing airstrip. Base camps were primarily composed of wooden Central American Tropical (CAT) huts, 16 foot by 32 foot wooden structures with corrugated tin roofs, built from locally-purchased materials. In subsequent exercises, DOD has used O&M exercise funds to construct two additional airstrips and to upgrade facilities constructed during Ahuas Tara II. This exercise-related construction has been used to support a continuous U.S. military presence in Honduras, carrying out a variety of training and operational functions.

Our June 22, 1984, decision held that DOD should have accounted for the majority of construction activities in Honduras during Ahuas Tara II as military construction, rather than as operational expenses of the exercise. 63 Comp. Gen. 422, 433 (1984). Our holding was based on several factors. First, we noted that the previous decisions of this Office have construed 41 U.S.C. § 12 to require that DOD construction projects be specifically authorized by the Congress. The principal basis for our conclusion, however, was the appropriations law principle that funds from one category of appropriations may not be used for an activity falling specifically within the scope of some other category of appropriations (in this case, military construction appropriations). 63 Comp. Gen. at 427-28. Compare 31 U.S.C. § 1532 (prohibiting transfers from one appropriation to another except as specifically authorized by law). We stated that, while certain "minor construction clearly of a temporary nature" may be funded as operational expense, the majority of exercise-related construction in Honduras did not fall into that category. 63 Comp. Gen. at 436.

Although our June 1984 decision concluded that DOD should account for exercise-related construction as military construction, it also recognized that specific statutory authority in title 10 permits military construction projects under $200,000 to be financed with O&M appropriations, rather than with military construction funds. 10 U.S.C. § 2805(c). We

stated that, to the extent construction activities in Honduras fell within the latter authority, use of O&M funds was permissible.

In summary, we previously ruled that DOD construction activities in Honduras, as with any other military construction, could be O&M-funded if under $200,000 per project, and must be funded with military construction appropriations if over $200,000 per project. It is equally important, however, to note what the decision did not say. Although it is clear from our previous decision that we considered the airstrips, base camps, and radar facilities constructed during Ahuas Tara II to be subject to the funding rules generally applicable to military construction projects, we did not specifically delineate what other types of engineering activities should be considered as constituting military constructon projects. In addition, while setting out the general rule stated above, GAO did not make specific findings on whether individual projects were in fact under or over $200,000. In this regard, we did not specify the types of costs that should be counted against the $200,000 authority of 10 U.S.C. § 2805(c), or what activities constituted a single "project." Rather, in transmitting our decision to DOD, we recommended that the Department reexamine its accounting of exercise-related construction: to the extent that any projects exceeded the $200,000 authority of 10 U.S.C. § 2805(c), we stated that the Department should reimburse its O&M account with military construction funds, if possible, and if not possible, to report Antideficiency Act violations. We also recommended that the Department reexamine its funding of post-Ahuas Tara II exercise activities to ensure compliance with the rules set out in the decision.

Thus, by remanding the matter to DOD, we left it to the Department to address three issues: (1) what specific types of exercise-related engineering activities are considered military construction, subject to the funding rules specified in our June 22, 1984, decision; (2) what constitutes an individual construction "project," for purposes of applying the $200,000-per-project O&M authority of 10 U.S.C. § 2805(c); and (3) what types of costs should be included in applying that $200,000 authority.

The following discussion reviews how DOD has addressed each of these three issues, both for Ahuas Tara II construction, and for construction during later exercises. We also provide our views as to the adequacy of DOD's response.

B. Exercise Engineering Activities as Military Construction

The Defense Department's initial response to the Comptroller General decision was provided in a December 31, 1984, letter from Deputy Secretary Taft. According to Mr. Taft:

> "This Department concurs in your interpretation of the law regarding funding for public buildings and public improvements. The Services, under the oversight of the Assistant Secretary of Defense (Manpower, Installations and Logistics), have reviewed their operation and maintenance (O&M) costs for all the engineering activities in Honduras associated with both the Ahuas Tara I and II exercises. The results of this review show that there is no requirement to make any funding adjustments between O&M and Military construction appropriations, as all projects were costed at less than $200,000."

The construction projects identified in Mr. Taft's December 31 letter cover all but one of the engineering activities identified by GAO as military construction.[1/] Mr. Taft's letter thus indicates DOD's acceptance of GAO's identification of base camps, air strips, and radar facilities as activities that the Department should have accounted for as military construction. This is further reflected in DOD's application of standards delineated in Army Regulation (AR) 415-35 (October 15, 1983) to the activities so identified. That regulation, entitled "Minor Construction, Emergency Construction, and Replacement of Facilities Damaged or

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1/ The missing costs are those for the radar station at Cerro la Mole, described at 63 Comp. Gen. 422, 438 (1984).

Destroyed," establishes project costing principles for minor construction projects.[2]/

Notwithstanding the Department's apparent acceptance of GAO's treatment of Ahuas Tara II engineering activities as military construction (and the funding limitations imposed thereby), it is clear from our review of DOD's actions that those DOD elements primarily responsible for implementing that decision (particularly the U.S. Southern Command (SOUTHCOM) and the U.S. Forces Command (FORSCOM)) strongly disagreed with the concept of applying military construction accounting principles to exercise-related construction of any type. Thus, during the process of recomputing project costs for Ahuas Tara II, both SOUTHCOM and FORSCOM officials stated the view that any construction conducted during the exercise was merely an incidental result of troop training--an authorized O&M activity--and should not be subject to the accounting requirements of military construction projects. Both commands agreed to cooperate in compiling cost information, but objected to the application of AR 415-35 accounting principles to exercise-related engineering activities. Specifically,

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2/ In the ordinary case, military construction is accomplished by contract. In such cases, the determination of costs chargeable to a particular project is a straightforward one, based upon applicable contract costs. Where, because of the minor nature of the project or where justified on some other basis (including troop training) construction projects are not primarily performed by outside contractors, determination of costs chargeable to a particular construction project is more complicated. Such projects, overwhelmingly falling within the category of minor military construction, are normally subject to strictly-enforced authorization and funding controls, implemented through regulations such as AR 415-35 and DOD Directive 7040.2, "Program for Improvement in Financial Management in the Area of Appropriations for Acquisition and Construction of Military Real Property" (January 18, 1961, as amended). These regulations, designed to ensure that all military construction is financed from funds available for that purpose, provide guidance as to what constitutes military construction, how to determine project scope, and what types of costs should be included as attributable to a particular construction project. The specific standards established under these regulations are described in more detail where appropriate in the discussion that follows.

officials at FORSCOM argued that certain requisite elements for application of AR 415-35 (and thus of military construction accounting principles generally) were not present in the case of Ahuas Tara II construction, including the requirement that work be accomplished on a military installation.3/ Similarly, the SOUTHCOM staff judge advocate argued that no exercise-related construction in Honduras fell within the definition of "military construction" in title 10, principally on the grounds that no such construction took place in areas under U.S. operational control.

These dissenting views have not been formally expressed by the Department in its response to our June 22, 1984, decision. Nonetheless, it is important that they be addressed, not only to clarify our previous holding, but also to ensure that rules governing the funding of military construction projects are uniformly applied. As is indicated below, DOD's modification of ordinarily applicable funding rules in the case of exercise-related construction may reflect an attempt to accomodate the SOUTHCOM and FORSCOM positions.

As indicated earlier, our holding in 63 Comp. Gen. 422 (i.e., that DOD should have accounted for the majority of its construction activities in Honduras as military construction) was primarily based on the fact that the Congress specifically appropriates funds to the Department for the construction of temporary or permanent public works, military installations, and facilities. Id. at 433. We held that the construction of base camps, airstrips, and radar facilities in Honduras, even if built during the course of training exercises, fell within the scope of military construction appropriations and must be funded as such (except to the extent that use of O&M funds was specifically authorized under the $200,000 authority of 10 U.S.C. § 2805(c)). SOUTHCOM and FORSCOM apparently dispute our characterization of facilities constructed during Ahuas Tara II as military construction projects.

The Department's authority to carry out military construction activities (for which military construction appropriations are provided) is set out in 10 U.S.C. §§ 2801-08. According to section 2801 of title 10, U.S. Code, "military

3/ FORSCOM staff has also argued that exercise-related construction did not result in the creation of real property facilities. We note, however, that all the facilities described in our June 22, 1984 decision correspond to DOD facilities classes or construction categories, delineated in DOD Instruction 4165.3, October 24, 1978.

construction" is defined as including any construction, development, conversion, or extension carried out with respect to a military installation. The term "military installation" is a broad one, covering any "base, camp, post, station, yard, center, or other activity * * * in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense." 10 U.S.C. § 2801(b), (c)(2) (emphasis added).4/ Thus, construction activities, unless carried out "with respect to" an activity under U.S. military operational control, do not constitute military construction projects.

According to the SOUTHCOM staff judge advocate, all engineering activities during Ahuas Tara II took place in areas under Honduran, not U.S., control. Thus, U.S. personnel, while present to protect U.S. assets, had no authority to exclude Hondurans from project sites.

The concept of U.S. operational control is not defined in title 10 or its legislative history. In our view, however, the term should not be construed so narrowly as to exclude overseas facilities over which the U.S. military may, by formal or informal agreement with a foreign government, exercise a large measure of control, even though subject to certain rights of the host country. The exercise-constructed Joint Task Force Headquarters at Palmerola, for example, exists by agreement with the Honduran government. While the authority of the commanding officer may be subject to the conditions of that agreement (express or implied), it is in our opinion clearly a military installation within the meaning of title 10.

In addition, both the Congress and DOD have, in practice, applied the military construction label to facilities over which the U.S. exercises little or no day-to-day control, but which may serve U.S. contingency or follow-on needs. See e.g., H.R. Rep. 850, 98th Cong., 2d Sess. 13-14 (1984) (describing runway improvements at the Honduran Air Base of La

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4/ The legislative history of the Military Construction Codification Act, in which these definitions are set out, indicates that references to the Secretaries of the various military departments, and the Secretary of Defense, are intended to cover their designees as well. See H.R. Rep. 612, 97th Cong., 2d Sess. 15 (1982).

Cieba as a military construction project).[5]/ By comparision, many of the exercise-constructed facilities in Honduras have been used in follow-on exercises or non-exercise activities,

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[5]/ See generally the discussion of overseas military construction in our recent report GAO/NSIAD-85-158, September 30, 1985. There we stated:

> "The United States continues to develop and maintain foreign military bases. The trend in base construction overseas has been for the host country to own the real property and all improvements made by the U.S. government to that property. Once the United States completes construction of a base or makes other real property improvements, the foreign government normally takes title to them, and the United States has access to the property in accordance with a signed agreement. In some instances, the United States has exclusive base rights, while in others, the base is shared with armed forces of the host country. The U.S. government retains title to equipment, materials, relocatable structures, etc., which are not incorporated into the real property." Id. at p. 57.

indicating that, even at the time of construction, a more extensive use (follow-on or contingency) was contemplated.6/

6/ SOUTHCOM has presented a number of other arguments against the treatment of exercise-related engineering activities as military construction: (1) GAO's ruling categorized engineering units as the only armed services branch not permitted to use O&M funds for training; (2) GAO's reliance on 41 U.S.C. § 12 was misplaced, as that provision only concerns government contracts; and (3) applying military construction funding limitations to engineering support of combat units would jeopardize the success of those units in time of war or conflict.

To respond briefly: (1) GAO did not rule that engineering units were prohibited from using O&M funds for training, but rather that when that training results in the creation of military installations, it must be financed as military construction. This is not inconsistent with longstanding DOD policy. See e.g., AR 415-32, June 23, 1967 (regarding training of engineering units in the continental U.S. by assignment to projects within the Military Construction Program). On the other hand, there is nothing that prevents DOD from designating a portion of its overall military construction budget towards training of engineering units through exercise-related construction projects. (2) 41 U.S.C. § 12, prevents agencies from entering into contracts for public improvements except to the extent that funds have been specifically appropriated. GAO has in the past considered that provision to require specific authorization for DOD's construction activities even when performed by troop labor. See B-133316, January 24, 1961, discussed at 63 Comp. Gen. 422, 433 (1984). In the present case, some construction was in fact performed or supported by private contractors (i.e. airstrip paving at Trujillo, upgrade construction at Palmerola). Even where not, however, DOD's overall authority to carry out military construction projects is limited to those "as are authorized by law." 10 U.S.C. § 2802(a). (3) Congress has established broad authority in title 10 for the Secretary of Defense to undertake military construction projects not otherwise authorized in time of war or national emergency. 10 U.S.C. § 2808. In addition, the Secretary has considerable flexibility to carry out emergency and contingency construction. 10 U.S.C. §§ 2803-04. These authorities were not applicable in the situations under discussion.

Thus, it is still the view of this Office that exercise-related construction activities such as those described in our previous decision fall within the definition of military construction, and are therefore generally subject to financing rules applicable to military construction.7/

We do not mean to suggest, however, that every single engineering action in support of a military exercise constitutes a military construction project. We have previously recognized that "clearly minor and temporary" construction may be financed as operational expenses of an exercise. Thus, SOUTHCOM, FORSCOM, and Army engineers have attempted to differentiate between categories of construction activities through creation of a classification scheme. That scheme classifies as operational expenses "transitory" engineering activities (routine engineering activities performed in a field operating environment, such as perimeter security), and artifacts created incidental to exercises but intended to be later dismantled or abandoned (including CAT huts and airfields not intended for later use). The latter category, however, may not adequately take into consideration follow-on or contingency use by DOD. As indicated earlier, the majority of exercise-related construction during Ahuas Tara II resulted in the creation of facilities utilized later for exercise or other requirements, some on a virtually continuous basis.

A third category in the classification scheme designed by FORSCOM and SOUTHCOM is that of engineering activities resulting in the creation of an artifact intended for later use. This category is further subdivided, depending on whether the "artifact" is, or is not, in an area under U.S. operational control. If under U.S. control, the artifact is considered military construction; if not, the artifact is deemed to be civic/humanitarian assistance incidental to the exercise. As

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7/ We recognize the difficulty, under some circumstances, in applying these principles to other types of engineering activities. The construction of a "pioneer road" during the recent exercise Cabanas is not a military installation in the usual sense of that phrase. Nonetheless, it constitutes an activity under the operational control of the U.S. (during construction, and, after completion, during military exercises; actual control is, of course, under informal agreement with--and subject to specific rights of--the Honduran government). It is therefore our view that DOD is correct in its treatment of the Cabanas activity as a military construction project.

stated above, however, we disagree with SOUTHCOM and FORSCOM's strict interpretation of the concept of U.S. operational control, and thus consider the subdivision within this category to be largely unnecessary.

C. Project Scope

One principal consideration in accounting for military construction activities is the criteria used to determine what constitutes an individual "project." Because the $200,000 O&M authority of 10 U.S.C. § 2805(c) is limited to individual construction projects, the issue of how projects are defined is clearly an important one where, as in Honduras, construction is primarily funded through the O&M account.

According to 10 U.S.C. § 2801, a military construction project includes all military construction work necessary to produce a "complete and usable" facility (building, structure, or other real property improvement) or a "complete and usable" improvement to an existing facility. Army Regulation 415-35 also provides additional guidance on application of the concept of "complete and usable facility." For example, paragraph 2-4 warns against acquisition or improvement of real property facilities through a series of minor construction projects, or subdivision of projects to reduce costs to levels meeting the statutory cost limitation.

At the time of its most recent revision, AR 415-35 was supplemented by an explanatory statement issued by the Department of the Army. That statement, dated October 19, 1983, provided additional guidance on determining the scope of minor military construction projects.[8/] According to the statement, the new regulation--

> "* * * is not to be construed as authority to build what a reasonable person would consider a usable project by breaking it into quasi-

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8/ "Minor" military construction projects are those costing $1 million or less. 10 U.S.C. §§ 2805(a), 2828 note. They may either be "specified" (specifically authorized in an annual authorization act), or "unspecified" (authorized as considered necessary by the Secretary of Defense, within the limits of a lump-sum authorization provided by the Congress). Section 2805(c) of title 10 permits O&M appropriations to be used only for unspecified minor construction projects costing $200,000 or less.

> increments (i.e. an airfield cannot be broken into runway, parking apron, taxiway, control tower, navigation aids and maintenance hangar) under the guise they are complete and usable, stand-alone projects under $1 million. It is not feasible to prescribe absolute criteria for determining what scope of work would, under all possible circumstances, properly make up a separate minor construction project. However, actions at all levels of command to initiate and approve minor construction projects must be based on good judgment consistent with the new definition of a minor construction project. Commanders must insure that there is never a splitting of projects into increments solely to reduce the costs thereof below an approved threshold or maximum ceiling amount for unspecified minor construction projects * * *."9/

This guidance was further elaborated upon in an October 24, 1984, Department of the Army message:

> "Project incrementation occurs when construction of multiple projects is required to make a single facility or improvement to a facility complete and usable. An honest assessment of what constitutes a complete and usable facility or complete and usable improvement to an existing facility must be based on good faith, sound judgment and conformance with all requirements and limitations in AR 415-35. Consider the following examples: (A) An airfield exists and is in use. There are concurrent requirements for a new control tower and an addition to the hangar. Each is properly a separate project since each is independently complete and usable upon completion. Example (B): A new airfield is to be constructed where none now exists. One facility is dependent upon the

9/ This guidance is intended to discourage splitting of major military construction projects (over $1 million) to permit funding through the unspecified minor military construction account. It is equally applicable, in our view, to the splitting of minor military construction projects (under $1 million) to permit funding through the O&M account under the $200,000 authority of 10 U.S.C. § 2805(c).

other. Classification of each facility as a separate project would be improper. While each may be complete, such interrelated facilities are not, in fact, independently usable."

This latter guidance indicates that, where engineering plans contemplate the creation of a group of interrelated facilities at one time, those facilities should be considered together as one "project."

1. Ahuas Tara II projects. Mr. Taft's letter concerning the recalculation of construction costs for Ahuas Tara II engineering activities specifies the following as separate projects:

Location	Project	Cost
Aguacate	Airfield	159,000
	Base camp site prep.	8,000
	c/46th En Bn Cantonment	19,300
	Water supply pipelines	1,600
Choluteca	Terrain reinforcement	10,800
Tiger Island	Emergency airstrip	500
	Roads and site prep	3,000
	Base camp water well	1,700
Palmerola	MP TF Cantonment	22,000
	SIG TF Cantonment	38,100
	AVN TF Cantonment	55,500
	JTF Cantonment	54,000
	SPT Cantonment	79,800
	Hospital Cantonment	32,000
	JTF Command Bunker	2,600
	Personnel Shower	2,600
	Vehicle Washrack	700
San Lorenzo	Airfield	35,300
	Base camp site prep	16,400
	Base camp obstacles & serv	8,200
	Cantonment areas	159,000
	Dining facilities & water tower	13,300
	Electric distribution system	2,500
	Helipads	800
	Hospital	3,700
	POL berms	1,000
	Post exchange	3,300
	Base camp road upgrade	7,500
	Sewer line	4,500

		Water wells	600
Trujillo	-	3-319 Artillery Cantonment	142,000
		Airfield improvements	130,000
		SEABEE Cantonment	136,000

Even a cursory examination of this information reveals an inconsistency between the scope of projects as determined by DOD in Honduras and the established DOD guidance described above. In a number of cases, clearly interrelated facilities constructed during the same timeframe at one location are considered separate projects. For example, at San Lorenzo, barracks or cantonment areas are considered as separate projects from the post exchange and dining facilities constructed to service the personnel living in them. At Palmerola, five cantonment areas, all completed in December 1983 or January 1984--at a combined cost of about $250,000 in materials alone--were considered separate projects, apparently because they each were inhabited by personnel from different units (although all were under the command of the Joint Task Force commander at Palmerola).

2. Post-Ahuas Tara II projects. In at least one case, DOD's determination of construction project-scope for engineering activities after Ahuas Tara II also does not appear to follow the guidance of AR 415-35 and related instructions. In the recent exercise Cabanas, construction of a main road from San Lorenzo to Jocon was considered a project separate from the improvement of an existing road from Olanchito to San Lorenzo, even though the latter was integrally related to--and was in fact considered a necessary prerequisite for--construction of the former. Both of these "projects" were considered separate from a base camp constructed to support the entire effort. It thus appears questionable whether DOD's funding of Cabanas as several projects, each within the $200,000 O&M authority of 10 U.S.C. § 2805(c), is proper.

D. Types of costs

Another principal consideration in accounting for military construction activities is the problem of determining what types of costs must be considered attributable to a specific construction project, for purposes of applying the $200,000-per-project authority of 10 U.S.C. § 2805(c). As discussed below, DOD has not used a consistent approach in determining such costs.

1. Ahuas Tara II cost compilations. According to Mr. Taft's December 31, 1984 letter, reconstructed cost information for Ahuas Tara II engineering activities (as detailed in enclosure A of that letter) were determined in accordance with AR 415-35. Mr. Taft's letter states that costs listed "include materials, supplies, services, etc. as well as transportation of those items. Also included is the cost of maintenance and operation of government owned equipment."

As stated earlier, AR 415-35 implements DOD's minor construction authority, contained in 10 U.S.C. § 2805 (1982). It provides comprehensive guidance on approval and funding of all minor construction projects of $1 million or less. Paragraph 2-2 of AR 415-35 delineates the types of project costs that are to be included in calculating the overall cost of any given construction project; as a general rule, only "funded" costs are included. Among costs specified as "funded" are materials, supplies, services, installed equipment, transportation costs, costs of travel and per diem for troop labor, equipment use costs (maintenance and operation of government equipment, based on hourly rates included in the regulation), and site preparation costs. Among costs considered "unfunded" (costs provided and accounted for separately, sometimes referred to as "sunk" costs) are those from military personnel appropriations (i.e. troop labor), equipment depreciation, and planning and design costs. A similar delineation of funded and unfunded costs is provided in DOD Directive 7040.2, §§ J-K (January 18, 1961, as amended March 5, 1964).

Our review of construction cost data reported by DOD shows that only two categories of funded costs described in AR 415-35 (materials and equipment usage costs) have been considered by DOD for purposes of applying the $200,000 authority of 10 U.S.C. § 2805(c) to Ahuas Tara II construction. These two cost categories, however, constitute two of the largest of those identified in AR 415-35 as "funded." Other major cost categories, included in AR 415-35 but not counted by DOD, are transportation costs and costs of travel and per diem. Although AR 415-35 designates these categories as "funded," a large portion of such costs in the present case may be attributed to the overall exercise program, rather than to specific construction activities intended to support the program. Thus, much of the transportation costs for JCS-sponsored exercises are generally paid by JCS out of its own (O&M-Defense Agencies) appropriations. In light of these factors, we would not object to DOD's exclusion of transportation costs, and costs of travel and per diem, as "unfunded," at least with respect to JCS-directed exercises. We thus do not object to DOD's use

of only materials and equipment costs to compute construction project costs for Ahuas Tara II, as that method, while not in strict conformity with AR 415-35, reflects the majority of funded O&M costs directly attributable to exercise-related military construction projects. As stated previously, however, DOD's costs for Ahuas Tara II construction, even when counting only equipment and materials costs, appear to have exceeded the $200,000 per project limitation of 10 U.S.C. § 2805(c) in at least several instances.

2. Post-Ahuas Tara II cost compilations. In contrast to the Department's use of a "materials and equipment" standard for recomputing construction project costs for Ahuas Tara II projects, the method used to account for construction activities in later exercises shows an even greater departure from costing methods specified in AR 415-35. In fact, the major commands responsible for implementation of the Comptroller General decision have specifically exempted exercise-related construction from the cost accounting guidance of AR 415-35, based on their interpretation of guidance from the Joint Chiefs of Staff.

In November 1984, the Joint Chiefs of Staff issued a directive concerning the types of costs that should be considered attributable to exercise construction projects for purposes of a separate reporting requirement included in Section 123 of the fiscal year 1985 Military Construction Appropriation Act.10/ The directive limited reportable costs of construction activities to materials and POL (petroleum, oil, and lubricants), specifically excluding equipment maintenance, labor, and transportation costs. Although the JCS directive dealt only with the compilation of costs for purposes of section 123, it has been interpreted by SOUTHCOM and FORSCOM to apply as well to other aspects of exercise construction, including for the purpose of determining whether individual construction projects comply with the $200,000 O&M

10/ That provision states, "The Secretary of Defense is to inform the Committees on Appropriations and Committees on Armed Services of the plans and scope of any proposed military exercise involving United States personnel prior to its occurring, if amounts expended for construction, either temporary or permanent, are anticipated to exceed $100,000." Pub. L. No. 98-473, § 101(e), 98 Stat. 1877, 1882 (1984). According to the House Report, this provision was added because of DOD's failure to inform Congress of its plan for the Ahuas Tara II exercise. H.R. Rep. No. 850, 98th Cong., 2d. Sess. 13-14 (1984).

authority of 10 U.S.C. § 2805(c). Thus, according to the SOUTHCOM staff judge advocate, "JCS has determined that, with regard to exercise-related, O&M funded Army engineer activity, the accounting procedures of AR 435-15 [sic] do not apply." Other expenses are considered attributable instead to the conduct of training for U.S. forces.11/

By limiting attributable costs to materials and POL, DOD has further reduced the amount of O&M costs counted toward the $200,000-per-project authority of 10 U.S.C. § 2805(c). In actual application, DOD has taken other actions to reduce attributable O&M costs to an even greater degree. In exercise Cabanas, for example, DOD has charged only materials costs as attributable to the project, by arranging to have POL costs reimbursed by the Honduran government under an AID-approved Economic Support Fund project. Thus, a project which ordinarily would be considered to cost about $265,000 (including materials, equipment, and contractor costs and not including some $625,000 in unfunded costs) has been calculated at $133,626 (materials and contractor costs only), for purposes of 10 U.S.C. § 2805(c).12/

E. Conclusion

This analysis has reviewed the manner in which DOD has addressed three separate issues in implementing our decision of June 22, 1985, as it relates to exercise-related construc-

11/ On July 2, 1985, the Department of the Army announced its intention to amend AR 415-35 to formally incorporate this modification of allocable costs, for exercise construction activities.

12/ The Cabanas "project" discussed above is the main road from San Lorenzo to Jocon. As discussed supra, p. 14, we also question DOD's determination that interrelated construction activities during the Cabanas exercise constituted three separate projects. If such activities were all considered to be one project, applicable costs would be well over $200,000 in materials alone.

DOD's failure to include POL costs among Cabanas project costs appears to be in compliance with AR 415-35 § 2-2(b)(3), which includes among "unfunded costs" materials, supplies, and equipment obtained for the project on a cost-free basis. We note, however, that as of September 1985, DOD had not been reimbursed for POL costs by the Honduran government.

tion. First, on the question of what types of exercise-related engineering activities constitute military construction, we disagree with the view, expressed by officials at the U.S. Southern Command, that facilities not under exclusive U.S. control do not constitute military construction projects. Although we agree that not all engineering activities constitute military construction, the majority of military facilities constructed in Honduras and utilized by DOD for exercise, operational, or contingency requirements, under formal or informal agreement with the Honduran government, fall within this category. Second, in determining what constitutes an individual project, DOD officials have failed to follow established guidance that clearly interrelated construction activities be treated as part of the same military constuction project. It is our view that, using established guidance for determining project scope, several O&M-funded construction projects built during Ahuas Tara II exceeded the $200,000 authority of 10 U.S.C. § 2805(c). Third, it is our conclusion that DOD, in computing costs towards that $200,000 authority for post-Ahuas Tara II construction projects, has also failed to conform to established procedures.

According to officials at SOUTHCOM, the Department's departure from ordinary military construction accounting principles for exercise-related construction reflects an intra-agency compromise, intended to conform to GAO's basic holding that exercise-related construction projects be financed as military construction, but also to allow a degree of flexibility, in response to SOUTHCOM and FORSCOM's objections that exercise-related engineering activities do not constitute military construction. While we agree that some degree of flexibility is desirable, it is our view that such a goal may be accomplished within the funding system already established by the Congress.

It may be true that one effect of our relatively strict imposition of military construction accounting principles has been to limit DOD's ability to use its O&M account for any substantial amount of exercise-related construction. To require that DOD use military construction appropriations as the principal funding source for such activities need not, however, act as a major constraint on DOD's engineer exercise programs, as long as the Department ensures that funds are properly budgeted for such projects in its "unspecified minor military construction" account. Alternatively, the Department may wish to work with the Congress to establish a separate account within the military construction budget for military construction projects incidental to military training

exercises. Should DOD desire greater flexibility to use its O&M funds for such purposes, it should seek specific statutory authority to treat exercise-related construction projects as operational expenses. Such authority, however, should include safeguards to ensure that exercise-related construction is not used improperly to augment ordinary military construction appropriations.[13]/

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[13]/ See, e.g., the House Report on the 1986 military construction appropriations bill, which indicates that such an augmentation has taken place in connection with exercise-related construction in Honduras. H.R. Rep. No. 275, 99th Cong. 1st Sess. at 10-11, 26 (1985).

II. DOD TRAINING OF HONDURAN PERSONNEL DURING COMBINED EXERCISES

A. Background

During the Ahuas Tara II joint combined military exercises, a GAO field team observed U.S. forces providing a variety of classroom and field training to Honduran military personnel, including training in the use of artillery fire-direction practices, counterinsurgency techniques, and combat medic skills. All these training activities were carried out with exercise O&M funds, and justified on grounds that they were necessary for "interoperability" of forces, and that they provided a variety of benefits to the U.S. forces conducting them.

Our legal decision, 63 Comp. Gen. 422 (1984), addressed the issue of training incidental to combined exercise operations as follows:

> "Whenever combined military exercises are conducted, it is natural (and indeed desirable) that there be a transfer of information and skills between the armed forces of the participating countries. In addition, where there is a marked disparity of military sophistication between the two nations' armed forces, it is not surprising that this transfer is principally in one direction, i.e. to the benefit of the less-developed military force. In addition, as emphasized by the Defense Department, some degree of familiarization and safety instruction is necessary before combined-forces activities are undertaken, in order to ensure 'interoperability' of the two forces.
>
> "At the same time, where familiarization and safety instruction prior to combined exercises rise to a level of formal training comparable to that normally provided by security assistance projects, it is our view that those activities fall within the scope of security assistance, for which comprehensive legislative programs (and specific appropriation categories) have been established by the Congress. Where such extensive 'interoperability' training is in fact necessary, combined exercises should not be conducted without the formal training needed to equalize the participating forces."
> 63 Comp. Gen. at 441.

GAO went on to conclude that the activities observed in Honduras, even if performed to prepare Honduran forces for the exercise events in which they later participated, were comparable to training ordinarily carried out as security assistance, and should have been funded as such. The specific activities in question included: 3-4 weeks of 105 mm artillery training by a U.S. field artillery battalion to each of two Honduran battalions, neither of which had previous experience with such weapons; 5-week courses in combat medicine provided to 100 Honduran troops (thereby cancelling a proposed security assistance project); and basic and/or advanced classroom and field training provided to four Honduran battalions on mortars, fire-direction control, and counterinsurgency tactics (similar to security assistance-funded military training at the Regional Military Training Center in Trujillo, Honduras). We recommended that DOD reimburse its O&M account from security assistance funds to cover those activities improperly financed.

By letter of December 31, 1984. Deputy Secretary Taft informed GAO that "funding adjustments have been made in the amount of $110,000 for those activities identified in the Decision that exceeded [safety and orientation] requirements." Mr. Taft's letter also stated that DOD had provided guidance for future operations to address further concerns.14/

The principal legal questions to be addressed here are: (1) whether the Department's reimbursement of its O&M account from security assistance funds fulfills the requirements imposed by the GAO decision; and (2) whether actions taken by DOD subsequent to the Comptroller General decision have been consistent with the legal requirements as stated therein.

14/ In a letter to the Department, dated April 9, 1985, GAO noted that the guidance cited in Mr. Taft's letter of December 31 had not reflected the principal GAO conclusion with regard to exercise-related training of foreign forces: i.e. that the provision of "interoperability" instruction, if conducted at levels comparable to that provided as security assistance, may not be financed with O&M appropriations. Based upon our most recent review of current exercise activities there appears to have been little guidance provided to field personnel concerning the legal restrictions applicable to the training of host country forces.

B. Ahuas Tara II Reimbursements

Based upon Mr. Taft's letter of December 31, 1984, the Department appears to have accepted GAO's determination that some O&M-funded training provided to Honduran military personnel during the course of Ahuas Tara II had been in excess of that authorized. The funding adjustments made by DOD were reported to cover instances of artillery, counterinsurgency, and combat medic training corresponding to those described by GAO.

Although Deputy Secretary Taft reported funding adjustments of $110,000, it appears that the actual amount of adjustments was $105,245. That amount included $10,500 for combat medical training, $5,163 for Special Forces training, and $89,583 for artillery instruction. The adjustment was made by transferring unobligated fiscal year 1984 Honduras security assistance program funds to the Army O&M account.

DOD computed the funding adjustment based on an estimated number of U.S. personnel hours dedicated to training of Hondurans during Ahuas Tara II. According to cost records we reviewed, DOD determined that the following number of personnel provided training:

- 12 Special Forces personnel dedicated 15 workdays;
- 5 officers and enlisted personnel dedicated 3 hours per day over 55 days to combat medic training; and
- 67 officers and enlisted personnel provided artillery training over the course of the exercise.

The costs included by DOD were for military pay and allowances, per diem, and training support expenses. These costs were prorated to reflect the number of days, or hours within each day, dedicated strictly to instruction. According to DOD, officials, transportation costs of U.S. personnel were not included because the training was incidental to the exercise.

Because training was provided by DOD as part of a combined exercise, rather than in accordance with ordinary security assistance procedures, there is little documentation available to verify that costs were computed and prorated accurately. While it appears from our own observations during Ahuas Tara II that reported costs may be understated, the lack of documentation makes it difficult to determine a proper amount to charge for the training. The funding adjustments made by DOD, however, respond to the principal concerns raised in our June 22, 1984, decision.

C. Post-Ahuas Tara II Activities

We have been informed by various DOD officials in Honduras that interoperability and familiarization activities have continued to occur during the course of combined operations, but that no formal training of Honduran military personnel has been provided subsequent to the Comptroller General's June 22, 1984, decision. This Office has not had the opportunity to verify the accuracy of these statements through actual observation. On the other hand, officials at the Special Operations Command (SOCOM) have stated that Special Forces exercises in Honduras subsequent to Ahuas Tara II, in many cases, have resulted in the training of Honduran armed forces. There is substantial evidence to support this statement. "After action" reports for various Special Forces exercise operations, for example, are replete with references to training of Honduran battalions, training schedules and subjects, and sufficiency of classrooms.

While stating that Special Forces exercises in Honduras continue to involve training of Honduran military personnel, SOCOM officials have questioned the applicability of GAO's previous ruling to those specific training activities. Those officials note that part of the role of the Special Forces is to train indigenous forces, and that such a role would be severely restricted if operational funds could not be used to that end. Those officials have also stated that there are significant differences--both in nature and in intention--between exercise-related training of foreign forces and training conducted as security assistance. According to these officials, those differences are substantial enough that each should be considered to fall under a different funding category. As discussed below, we agree with the general principle advocated by SOCOM (i.e. that training of Hondurans during Special Forces operations may be sufficiently different from training provided as security assistance to warrant the use of O&M funds). We have, however, some reservations as to its application.

According to SOCOM, formal security assistance provided by Special Forces personnel involves small teams of instructors, selected from across the ranks of the Special Forces, to conduct relatively long-term, in-depth courses of instruction. The features of such a program are dictated by the training requirements of the host country, and are designed to meet that country's defense needs in specific areas. In contrast, where Special Forces conduct exercises to meet their own training requirements, they remain in the field for short periods of time and deploy as an integrated team of specialists. Any training of indigenous forces is considered a by-product, with

the primary objective of the activity being the training of Special Forces to fill their role as instructors of friendly indigenous forces, so that those forces may support combined field operations on a safe and effective manner.

It appears to be SOCOM's view that there are sufficient distinctions--in terms of timeframe, team formulation, purpose, and scope of training--to warrant separate treatment of training conducted as security assistance and that generally conducted incidental to Special Forces field exercises. While Special Forces teams exercising in Honduras have clearly engaged in training of Honduran military forces since issuance of our previous decision, it is SOCOM's view that training has not been at levels that would ordinarily occur in security assistance, primarily because the goal has been to create internal force support for specific U.S. operations, rather than to fill broader Honduran military requirements. In contrast, SOCOM officials have indicated their agreement that training of Honduran forces during Ahuas Tara II, as described in our previous decision, was indeed intended to fulfill specific Honduran security assistance requirements.

The conclusions reached in our June 22, 1984, decision were based upon an application of the fundamental appropriations law rule that general appropriations (such as O&M) may not be utilized to finance activities falling within the scope of other, more specific, funding categories. We concluded that the activities we observed during Ahuas Tara II fell within the scope of security assistance, for which specific appropriation categories have been established by the Congress. 63 Comp. Gen. at 442. For example, the Congress annually provides appropriations for international military education and training (IMET) under sections 541-43 of the Foreign Assistance Act of 1961, 22 U.S.C. §§ 2347-47b. See, e.g., Foreign Assistance Appropriations Act, 1985, Pub. L. No. 98-473, § 101, 98 Stat. 1884, 1895 (1984) ($56 million appropriation for IMET). IMET, by definition, includes "formal or informal instruction of foreign students in the United States or overseas by officers or employees of the United States, * * * [or by] orientation, and military advice to foreign military units and forces." 22 U.S.C. § 2403(n). Similarly, the Congress provides funds under the Arms Export Control Act for a variety of defense articles and services, the latter including formal or informal instruction provided to foreign nationals by "orientation, training exercises, and military advice." See 22 U.S.C. § 2794(5). Both examples show that the Congress has provided specific authorizations and appropriations for the training of foreign forces. Where other appropriations are provided to

carry out specifically-defined activities, O&M appropriations are not available to DOD to finance such activities. See 63 Comp. Gen. at 442.

In applying this rule, however, we agree with the Department that some effort must be made to distinguish between training provided as security assistance, and minor instruction provided incidental to other DOD operations. Notwithstanding the broad definitions of "training" under the (separately-funded) authority of the Foreign Assistance and Arms Export Control Acts, it would seem unlikely that the Congress intended to include therein minor training activities incidental to other U.S. operational requirements (rather than conducted to provide assistance to foreign governments). This point, that not all training activities fall within the scope of security assistance, was in fact recognized in our previous decision. There we concluded that minor amounts of interoperability and safety instruction did not constitute "training" as that term is used in the context of security assistance, and could therefore be financed with O&M appropriations. 63 Comp. Gen. at 441.

The Special Forces example raised by SOCOM also demonstrates that there are strong policy reasons for applying such a distinction. Training of indigenous military units is a fundamental role of the Special Forces; such training is provided as a means of utilizing indigenous forces as resources to achieve specific U.S. operational goals. To require that the host country utilize scarce security assistance funds for the limited training thereby imparted would be both impractical and unfair.

While thus recognizing the distinction raised by SOCOM, we reiterate the point made in our previous decision that training conducted incidental to combined exercises, when comparable to that ordinarily provided as security assistance to host country forces, must be financed from funds specifically appropriated for that purpose. As stated earlier, we have not observed individual Special Forces exercise operations since Ahuas Tara II. There are some indications, however, that the

broader training requirements of Honduran forces are playing a role in how those exercises are conducted.[15] In the same light, although we agree with SOCOM that there are a number of distinctions in both scope and purpose between training provided by the Special Forces under security assistance programs and that conducted solely to fulfill the Special Forces' own training requirements, there may also be substantial similarities. In Ahuas Tara II, for example, it was clear to GAO observers that Special Forces training of Honduran troops was conducted as a means of providing security assistance. In spite of these concerns about DOD's post-Ahuas Tara II training activities, we do not have sufficient evidence to conclude that those activities have crossed the line between operational support and security assistance.

D. Conclusion

Based upon the foregoing, we conclude that funding adjustments for improper use of O&M appropriations for training of Honduran forces during Ahuas Tara II respond to the principal concerns raised in GAO's June 22, 1984 decision. Subsequent to that decision, O&M-funded training of Honduran forces has been continued by the Department, but justified on the basis of a distinction between such incidental training and that normally provided as security assistance.

Although we generally agree with the legal distinction cited by DOD, we believe that further steps are needed to ensure that such training activities are not utilized as a means of providing security assistance to host country forces. Thus, we recommend that the Congress consider clarifying the role of the Special Forces by specifically authorizing them to conduct (and use operational funds for) limited training of foreign forces during the course of field operations (actual or training exercises), for purposes of ensuring indigenous support of U.S. operations. The Congress may wish to include controls to discourage the use of such training as a means of augmenting ordinary security assistance programs.

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[15] For example, one "after action" report for a post-Lempira Deployment For Training exercise (DFT) (August-November 1984) observed that the Honduran battalion "needs continued training by the same team for an extended period of time." There is also some evidence that DFT's are being conducted in series fashion to increase the readiness of specific Honduran battalions.

Until further action in this regard is taken by the Congress, however, we recommend to DOD that it establish procedures to ensure that exercise-related training of foreign forces, unless financed through the security assistance program, is limited to minor amounts necessary to meet U.S. operational requirements, and is not used as a method of providing O&M-funded security assistance.

III. EXERCISE-RELATED CIVIC AND HUMANITARIAN ASSISTANCE

A. Background

On October 12, 1984, the Defense Department was granted specific statutory authority to use operations and maintenance appropriations for the conduct of humanitarian and civic assistance activities "incidental" to authorized operations.[16]/ Much of the discussion that follows will focus on how DOD has interpreted that authority in its conduct of civic and humanitarian activities in Honduras since that time.

The legal rules applicable to actions taken before that date were described in our decision, 63 Comp. Gen. 442 (1984). There we stated that the Department's authority to conduct civic/humanitarian activities was limited in scope, consisting primarily of authority to carry out such activities on a reimbursable basis under the Economy Act. We concluded that the broad scope of O&M-funded civic/humanitarian activities conducted by DOD during the Ahuas Tara II exercises in Honduras had exceeded that authority. We therefore recommended that DOD reimburse its O&M account from other appropriate sources.

The following discussion first describes DOD's response to the GAO decision's conclusions on civic/humanitarian assistance, and provides our views as to the adequacy of that response. Following that, we have provided our views on current DOD activities in this area.

B. Ahuas Tara II Activities

Our decision of June 22, 1984 provided the following description of civic and humanitarian assistance activities conducted by DOD during the course of Ahaus Tara II:

16/ That authority was provided in section 8103 of the Department of Defense Appropriations Act, 1985, Pub. L. No. 98-473, § 101(h), 98 Stat. 1837, 1942 (1984). As a provision within an annual appropriations act, and without a clear indication of congressional intent that it be construed as permanent legislation, the authority provided would have expired at the end of fiscal year 1985. See B-208705, September 14, 1982. It has been extended under section 8072 of the current continuing appropriations resolution. See Pub. L. No. 99-190, § 101(b), 99 Stat. __ (1985).

> "During Ahuas Tara II, civic action and humanitarian assistance activities took place on an almost-daily basis. According to DOD, personnel of the 41st Combat Support Hospital conducted MEDCAP's (Medical Civil Action Programs) throughout Honduras over the course of the exercises, resulting in the treatment of over 46,000 Honduran civilian medical patients, 7,000 dental patients, 100,000 immunizations, and the treatment, under a veterinary program, of more than 37,000 animals. Medicines utilized for these activities were taken from U.S. Government supplies nearing the end of their shelf-life, or were donated (by the Honduran government or charitable organizations). In addition to this comprehensive medical aid, U.S. forces transported U.S.-donated medical supplies, clothing, and food to various locations in Honduras. In one case, a team of 15-20 Navy Seabees constructed a 20 foot-by-80 foot schoolhouse at the Village of Punta Piedra, using AID-supplied materials." 63 Comp. Gen. at 444.[17/]

We concluded that this broad range of activities fell within the scope of appropriations ordinarily provided by the Congress to the President for foreign assistance requirements, and that DOD's use of O&M funds for their conduct, without reimbursement, was improper.

In response, Deputy Secretary Taft stated in a letter dated December 31, 1984, that:

> "It is the DOD position that humanitarian assistance activities are permissible under current law when they are incidental to legitimate exercise activities and are conducted at no incremental cost to this Department. Activities conducted solely to accomplish an exercise mission or to support U.S. forces participating therein, but which nonetheless provide an incidental humanitarian or civil benefit, are also permitted. We recognize that the opportunity during Ahaus Tara II to respond to real human needs created an enthusiasm within

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17/ After-action reports for Ahuas Tara II state that approximately 200,000 immunizations were provided, not 100,000 as indicated in our previous decision.

> our armed forces to lend a helping hand at a level of effort that may have exceeded the limit of these sound principles. If any expenses were incurred, the sums involved were small. Normally, records are not kept to provide the kind of accounting detail required to identify such small sums comprehensively and accurately. Accordingly, we have issued guidance in this area, but anticipate few, if any, reimbursements. Further, legislation recently enacted by the Congress reflects the fact that it has never been the intent of Congress to preclude DOD from conducting incidental humanitarian activities."

In a letter dated April 9, 1985, GAO responded that the activities observed by GAO personnel during Ahuas Tara II went beyond a level of assistance that could be described as incidental, but were instead designed as major exercise activities in their own right. In addition, we noted that, with respect to reimbursements, this Office has previously concluded that all direct expenses of an activity for which reimbursement is required under the Economy Act must be included in determining the applicable amount of the reimbursement, whether the performing agency's expenses have increased or not. See 57 Comp. Gen. 674, 682 (1978).

Our most recent reexamination of this issue again leads us to conclude that the large scope and amount of activities conducted during Ahuas Tara II could not properly be characterized as merely "incidental" to DOD training exercises. First, the nature of civic and humanitarian assistance activities during Ahuas Tara II should be compared with those often undertaken as part of programs separately funded and carried out though the U.S. Agency for International Development (AID). While there are a number of differences in emphasis,[18/] there is a substantial amount of overlap between the various categories of activities carried

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18/ AID medical officials in Honduras, for example, have strongly criticized the Department's use of a rapid succession of short-term efforts to apply high-technology medical care, with little chance for followup. AID's programs are required to emphasize self-sustaining community-based health programs. See 22 U.S.C. § 2151b (c).

out by DOD and those ordinarily carried out as part of AID's health programs. See generally, Agency for International Development, Congressional Presentation for Fiscal Year 1985, pp. 49-57 (1984). Both programs, for example, have emphasized vaccination and immunization activities. Id. at 52. According to SOUTHCOM officials, civic assistance activities in Honduras have also been used to demonstrate techniques for improving water supply and sanitation conditions as a method of promoting health, not unlike similar AID programs. See id. at p. 53.19/

Several other factors support the view that Ahuas Tara II civic and humanitarian activities were not merely "incidental" to training operations in Honduras. For example, while SOUTHCOM officials have stressed that current medical humanitarian efforts are specifically tied to U.S. training requirements, it appears that no similar correlation was made during Ahuas Tara II. Assistance activities during that exercise were conducted under the premise that they would provide good experience for U.S. medical personnel involved, but after-action reports indicate that the program itself was primarily a civic action, rather than a training program.20/ Those reports indicate that training benefits were incidental to humanitarian activities, rather than the other way around. For example, the 41st Combat Support Hospital's after-action report describes the MEDCAP program as follows:

> "The AHUAS TARA II MEDCAP program was a truly unique and extremely successful humanitarian effort. It reached out to thousands of Hondurans in the remote and relatively inaccessible areas of the country and provided essential medical, dental and veterinary care. In

19/ We emphasize here, as we did in our previous decision, that we do not necessarily oppose DOD's civic and humanitarian assistance activities in Honduras; rather, our concern is to ensure that, if such activities are to be carried out, they are funded as intended by the Congress.

20/ Thus, SOUTHCOM used the term MEDCAP (Medical Civilian Assistance Program) to describe medical activities in Honduras during Ahuas Tara II. The Department now uses the term MEDRETE (Medical Readiness Training Exercise) to describe similar activities.

addition it provided an opportunity for US military medical personnel to gain invaluable training in tropical medicine." (Emphasis added.)

Finally, the large scope of DOD's civic and humanitarian activities during Ahuas Tara II itself counters the Department's contention that such activities were merely "incidental" to training operations in Honduras. As stated earlier, during Ahuas Tara II some 53,000 Honduran medical or dental patients were treated, 200,000 immunizations provided, and more than 37,000 animals treated. In contrast, this Office has previously interpreted the term "incidental" as referring only to minor activities related to a larger effort. See A-74262, July 14, 1936 ("incidental expenses").

C. Post-Ahuas Tara II Activities

Section 8103 of the Department of Defense Appropriations Act, 1985, provides that:

> "Of the funds appropriated for the operation and maintenance of the Armed Forces, obligations may be incurred for humanitarian and civic assistance costs incidental to authorized operations, and these obligations shall be reported to Congress on September 30, 1985: Provided, That funds available for operation and maintenance shall be available for providing humanitarian and similar assistance in the Trust Territories of the Pacific Islands by using Civic Action Teams." 98 Stat. 1942.

Although the statutory language authorizes humanitarian and civic action activities incidental to "authorized operations," the conference report on the 1985 Continuing Resolution states that the authority is limited to activities incidental to JCS directed or coordinated exercises overseas. H.R. Rep. No. 1159, 98th Cong. 2d Sess. 386 (1984). DOD internal guidance has conformed with the latter limitation.

The legislative history of section 8103 indicates that it was enacted largely in response to our June 22, 1984 decision. At the same time, the provision does not appear to have been intended to overrule that decision, but rather to ensure that it did not prevent DOD from carrying out otherwise authorized O&M-funded activities merely because they yield social, humanitarian, or civic benefits:

> "The Comptroller General recently issued a finding that recent humanitarian and civic assistance expenditures of Defense Department funds in connection with training exercises were in violation of section 1301(c) of title 31 of the United States Code. The Committee agrees that such activities should be carried out primarily by agencies of the Federal Government assigned responsibility. However, the Committee does not believe that Congress intended completely to foreclose Defense Department activities which yield social, humanitarian, or civic benefits. To the extent that such benefits are incidental to authorized operations, reasonable expenditures of this kind should be allowable." S. Rep. 636, 98th Cong., 2d Sess. 37 (1984).

As we stated in our April 9, 1985 letter to DOD, the legislative history of section 8103 shows that the provison was intended to create only limited authority within DOD. The Senate Committee's emphasis that "such activities should be carried out primarily by agencies of the Federal Government assigned responsibility" shows an intention that the term "incidental" be given its normal, limited meaning.

The exact nature of DOD's authority to use O&M funds for "incidental" civic and humanitarian assistance under section 8103 has apparently been the subject of considerable debate within the Department. According to the Staff Judge Advocate of SOUTHCOM, at least three interpretations have been proposed: First, under the most restrictive interpretation of the term "incidental," section 8103 authorizes DOD to conduct training activities that result in an incidental humanitarian benefit, but, conversely, DOD units may not use O&M funds for humanitarian activities not specifically related to their own training requirements. For example, if a unit is required for training purposes to dig five wells--which are subsequently used for civilian water supply--the civic benefit is "incidental" to an authorized O&M activity. The unit would not be authorized to dig a sixth well, if not specifically required to do so for training purposes.

According to the SOUTHCOM Staff Judge Advocate, a second view of section 8103 proposed within DOD is that it permits field personnel to use O&M funds to conduct minor humanitarian

or civic assistance unrelated to their own training activities, but only to the extent such activities are spontaneous. They may not be planned in advance. Thus, in the example previously given, the unit may not plan to excavate six wells if only five are required for training purposes. If, during the course of their work they are asked by villagers to excavate a sixth, they may do so as "incidental" assistance.

A third position, apparently the one officially taken by SOUTHCOM, is that even before enactment of section 8103, DOD had essentially that authority described above as the most restrictive view of that provision (i.e. that DOD field personnel on training exercises may undertake civic or humanitarian assistance activities if those activities are carried out to fulfill training requirements of the units involved). SOUTHCOM's position appears to be that section 8103 expanded this inherent DOD authority to permit participants in JCS-directed exercises to undertake minor amounts of civic or humanitarian assistance unrelated to their own training requirements (even if planned in advance). Major activities unrelated to unit training requirements would not be considered "incidental," based on a reasonableness standard.

As indicated in our April 9, 1985, letter to DOD, we agree with SOUTHCOM that--regardless of the separate authority provided under section 8103--the mere fact that O&M-funded activities create an incidental civic or humanitarian benefit does not require that they be financed from other appropriations. Where, however, the type and amount of activities are such that they fall within the scope of other appropriation categories (such as occurred during Ahuas Tara II), they must be funded from those other sources. Thus, with that caveat, we agree with SOUTHCOM that no funding violation results from bona fide training activities that result in a concurrent civic or humanitarian benefit.

In addition, SOUTHCOM's interpretation of section 8103 appears, in our view, to be a reasonable construction of that additional grant of authority. We believe, however, that the Department's application of a "reasonableness" standard to distinguish between "major" and "minor" assistance efforts (only the latter being authorized to be financed with O&M), should be made with attention to the legislative history of section 8103, which stresses the limited nature of the authority provided therein.

Having stated our general agreement with SOUTHCOM's interpretation of section 8103, we remain concerned that the large-scale of O&M-funded civic and humanitarian efforts that continue in Honduras may go beyond the limited authority intended by the drafters of section 8103. For example, the majority of patients treated at the Joint Task Force Field Hospital at Palmerola (established to provide medical support to the U.S. base and to provide field training to American medical personnel) are Honduran civilians. Hospital records show that, from February 23 to June 7, 1985, some 4,137 Honduran civilians were treated, compared to 2,697 U.S. military patients (inpatient, outpatient, and dental). In addition, U.S. medical personnel, conducting austere-environment medical readiness training exercises (MEDRETES) treated nearly 50,000 medical patients, 10,000 dental patients, and 13,000 animals in over 100 week-long visits to remote Honduran villages between July 1984 and May 1985. Virtually all of these activities are carried out without coodination with AID officials in Honduras, even though AID operates a $26 million health sector project, intended to assist the Honduran Ministry of Health develop and administer community-based health outreach programs. See note 17, supra.

D. Conclusion

Based on the foregoing, we reaffirm our previous conclusion that the broad scope and amount of O&M-funded assistance carried out by DOD during its Ahuas Tara II exercises exceeded DOD's funding authority at that time. With regard to post-Ahuas Tara II activities, DOD's interpretation of new civic and humanitarian authority provided in the fiscal year 1985 Department of Defense Appropriations Act appears to be reasonable, although we remain concerned that the large scale of such activities may go beyond the level contemplated by the Congress. In light of these concerns, we would recommend that, if the Congress decides to continue (or to make permanent) the authority provided under section 8103, it (1) provide more explicit guidance as to the types of activities authorized, (2) retain the existing annual reporting requirement, and (3) consider requiring that DOD cooperate with AID. The latter requirement would increase the likelihood that DOD's activities are consistent with the needs of both agencies.

OCR FORM 3(1 85)

RELEASE OF GAO LEGAL DECISION OR OPINION

B9177

534458

DATE: 2/21/86
NO. 86-45

SUBJECT: Response to request for the update of decision B-213137, June 22, 1984, which addressed the propriety of the DOD's use of operation and maintenance appropriations for military training exercises in Honduras

B-NUMBER: B-213137 DATE: 1/30/86

ADDRESSEE: Rep. Bill Alexander

The above legal decision or opinion has been released as follows:

[XX] To anyone requesting a copy.

[ ] To the individuals listed below only (This is not a blanket release).

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Faustina G Mayo

Research Assistant
Office of Congressional Relations

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

B-213137

January 30, 1986

The Honorable Bill Alexander
House of Representatives

DO NOT MAKE AVAILABLE TO PUBLIC READING FOR 30 DAYS

Dear Mr. Alexander:

This responds to your April 19, 1985, request that this Office update our legal decision B-213137, June 22, 1984 (published in unclassified form at 63 Comp. Gen. 422 (1984)). That decision addressed the propriety of the Department of Defense's (DOD's) use of operation and maintenance (O&M) appropriations for three categories of activities in connection with its conduct of joint combined military training exercises in Honduras: construction activities, training of foreign forces, and provision of civic and humanitarian assistance to Honduran civilians. In response to your request, we have reviewed actions taken by DOD in light of our previous recommendations concerning each of these three categories of activities. We have also reviewed the manner in which the Department has conducted exercise activities since Ahuas Tara II. Our detailed legal analysis is set out in the enclosure.

Our previous decision addressed the propriety of DOD's use of O&M appropriations, during military exercises in Honduras, for a variety of activities ordinarily funded from other appropriation categories. Specifically, we concluded that DOD had improperly financed foreign aid and security assistance activities through its O&M accounts. We also concluded that the Department may have misapplied O&M appropriations for exercise-related military construction, if costs of specific projects in Honduras exceeded $200,000 per project. We recommended that the Department make funding adjustments where necessary to reimburse its O&M accounts, or declare Antideficiency Act violations to the extent adjustments could not be made.

In conducting our review of DOD's implementation of our previous decision, we encountered a considerable amount of disagreement by DOD officials with some of our basic legal conclusions, particularly with regard to the treatment of exercise-related engineering activities as military construction. In light of these comments, we have reexamined our previous conclusions in some detail. As discussed in the enclosure, we reaffirm the legal conclusions reached in our previous decision. We have attempted to address the specific concerns raised by DOD officials, again particularly as to exercise construction activities.