# *SECURITY ASSISTANCE LEGISLATION AND POLICY*

## Revisiting the Legislative Veto Issue: A Recent Amendment to the Arms Export Control Act

By

Dr. Larry A. Mortsolf

### INTRODUCTION

On February 12, 1986, an unheralded, yet highly significant piece of legislation was signed into law. Identified as "An Act to amend the Arms Export Control Act (AECA) to require that congressional vetos of certain arms export proposals be enacted into law," Public Law 99-247 constitutes a Congressional action to correct a prior procedural defect involving the earlier legislative veto mechanism contained in the AECA.

This article addresses three interrelated topical aspects. The article begins with a review of the events surrounding the incorporation of the legislative veto into security assistance legislation in the mid-1970s. Following this review, the discussion turns to a second topic: that of the landmark 1983 Supreme Court Case, *Immigration and Naturalization Service v. Chadha,* which brought the legislative veto constitutionality issue to the forefront. Finally, the article examines the amendatory language and possible impact of Public Law 99-247.

### EVOLUTION OF THE LEGISLATIVE VETO MECHANISM

#### *Constitutional Framework*

Any serious discussion of the legislative veto must necessarily be preceded by a reference to the United States Constitution. The Constitution provides that all legislative authority resides with the Congress. However, as the federal government has expanded, the Congress has delegated some of its authority to the Executive Branch. For instance, Congress has traditionally given the President broad authority to cope with international emergencies.[1] Similarly, through the Foreign Military Sales Act enacted in 1968, which was retitled as the AECA in 1976, the Congress delegated authority to the President to sell and transfer defense articles, services and training. The ultimate authority for such arms sales resides in Article I, Section 8, of the Constitution, which assigns Congress the power to regulate commerce with foreign nations (which includes by implication the commerce in defense articles, services, and training); and Article IV, Section 3, which indicates "The Congress shall have Power to dispose of and make all needful Rules and

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Regulations respecting the Territory or other Property belonging to the United States . . . ." This latter provision relates to the passage of title of defense articles. In fact, according to one specialist in American public law, "Conceivably Congress could have regulated arms sales and transfers by firms and private purchasers without involving the President."[2] As a practical matter, Congress has sought Executive Branch involvement in such matters. Specifically, through the AECA, the Congress has delegated authority to the President to administer the arms transfer program subject to, and in conformity with, statutorily prescribed standards and conditions.[3]

With this Constitutional backdrop in mind, it is appropriate to define the term *legislative veto.* As the term was employed and was operative prior to the 1983 Supreme Court case which declared it unconstitutional, a legislative veto was a Congressional action, authorized by law, overturning administrative actions.[4] Generally, the legislative veto mechanism delayed an administrative action from 30 to 90 days, during which time Congress could vote to approve or disapprove it. Traditionally, the Congressional action took several forms--varying from a committee chairman's veto, or a committee veto, or a one-house veto (by simple resolution of either house), to a two-house veto (by concurrent resolution).[5] None of these legislative veto devices actually involved the formal enactment of laws (e.g., joint resolutions), which in themselves could be approved or rejected (vetoed) by the President.

In effect, the legislative veto was popular because it provided the Congress an opportunity to hedge on its bet. On one hand, Congress could delegate certain powers to the Executive Branch, while retaining the ultimate power to override specific administration decisions with which it disagreed. By its very nature, the legislative veto enabled Congress to become directly involved in numerous day-to-day affairs of the Executive Branch. This involvement was not always welcomed by administration officials. In responding to a question about the legislative veto mechanism relative to arms sales during his 1982 confirmation hearing, Secretary of State George Shultz implied that the Congress had perhaps gone too far in micro-managing the Executive Branch. Shultz indicated, "I would prefer to see legislation which provides substantive guidance to the Executive and contains procedures for effective oversight by Congress, without involving Congress directly in the execution of the laws it has enacted."[6]

Although those associated with security assistance management naturally tend to associate the legislative veto with the AECA, it is pertinent to mention that the legislative veto procedure was first passed into law in 1932. This statute allowed President Hoover to reorganize the structure of the Federal Government subject to Congressional review. It stipulated that President Hoover's proposals would not be put into effect for ninety days, during which time either house of Congress by a simple resolution could "veto" the proposal. During World War II, the device was applied to foreign affairs and national security statutes. In 1974, the legislative veto was first incorporated into arms transfer legislation. All told, over 200 statutes, collectively containing over 350 legislative veto provisions, were passed prior to 1983.[7]

### *Nelson-Bingham Amendment*

For a period in excess of six years after the initial version of the Foreign Military Sales Act (FMSA) was enacted into law, there was no statutory requirement for the President to report the substance of prospective arms sales to the Congress, nor did the Congress exercise the right in the form of a legislative veto to disapprove a sale. Of course, the Congress could then, as now, have adopted a special bill or joint resolution, subject to presidential veto, prohibiting the sale.

In the summer of 1974, pressures began to build in Congress for greater control over prospective arms sales agreements. Complaining that the American public first learned of the 1973 sales to Persian Gulf countries only after the American media picked up on a foreign press report, Senator Gaylord Nelson was critical of the way several high-dollar value arms sales were transacted "without Congressional and public debate, discussions, or deliberations."[8] Senator

Nelson, together with Representative Jonathan Bingham, co-sponsored what was popularly referred to as the *Nelson-Bingham Amendment.* This amendment, which ultimately was enacted as Section 36(b) of the FMSA, provided that any government-to-government sale under foreign military sales (FMS) procedures over $25 million could be blocked by the passage of a concurrent resolution of disapproval within 20 calendar days following the notification of such proposed sale to Congress.[9] Such concurrent resolutions would require only a simple majority vote in each House, without Presidential approval. On December 30, 1974, through the amendatory language of the Foreign Assistance Act of 1974, the *Nelson-Bingham Amendment* formally took effect.

### *Additional Controls*

In 1976, the issue of arms sales to foreign countries was the focus of even greater congressional attention and debate. In an effort to strengthen the legislative veto provision, as well as incorporate other controls such as a $9 billion annual ceiling on worldwide U.S. arms sales, the Congress in the spring of 1976 enacted further legislation. This measure, however, was vetoed by President Gerald Ford on May 7, 1976, at which time he stated that the bill included ". . .a number of unwise restrictions that could seriously inhibit [his] ability to implement a coherent and consistent foreign policy." Additionally, President Ford was critical of the legislative veto related provisions, noting in his veto message:

> This bill contains an array of objectionable requirements whereby virtually all significant arms transfer decisions would be subjected on a case-by-case basis to a period of delay for Congressional review and possible disapproval by concurrent resolution of the Congress. These provisions are incompatible with the express provisions in the Constitution that a resolution having the force and effect of law must be presented to the President and, if disapproved, repassed by a two-thirds majority in the Senate and the House of Representatives. They extend to the Congress the power to prohibit specific transactions authorized by law without changing the law and without following the constitutional process such a change would require. Moreover, they would involve the Congress directly in the performance of Executive functions in disregard of the fundamental principle of separation of powers.[10]

In the aftermath of the presidential veto, the Congress adopted some concessions in a restructured bill, yet still retained several provisions which were initially objected to by President Ford. Nevertheless, on June 30, 1976, President Ford signed into law *The International Security Assistance and Arms Export Control Act of 1976,* which, *inter alia,* changed the title of the FMSA to the AECA, and further modified the legislative veto provision affecting arms sales. Section 36(b) of the AECA was adjusted to require notification in the instance of $7 million of major defense equipment, as well as the $25 million of defense articles and services initially required by the 1974 legislation. The period for Congressional review was increased from 20 to 30 calendar days, and the amount of information that the President had to supply to the Congress in connection with such proposed sale was substantially increased. Commercially licensed sales exceeding the $7 million and $25 million thresholds were also made subject to advance notification, but not to the legislative veto.[11]

In later years, the legislative veto provision was extended to commercial sales (less those sales to NATO, NATO members, Australia, Japan, and New Zealand), selected third country transfers, and leases. In 1981, the dollar thresholds for those items subject to Congressional notification and legislative veto were increased to $14 million for major defense equipment and $50 million for defense articles and services. These were the essential AECA statutory parameters when the Supreme Court issued the *Chadha* decision in the summer of 1983.

## THE EFFECT OF *IMMIGRATION AND NATURALIZATION SERVICE V. CHADHA*

### *The Constitutionality Issue*

Up to the time of the *Chadha ru*ling by the Supreme Court in 1983, the Executive Branch had never been confronted with a successful concurrent resolution of disapproval relative to an arms sale, third country transfer, or a leasing arrangement. In fact, the sale of five Airborne Warning and Control System (AWACS) aircraft to Saudi Arabia in 1981 represented the first time that the issue ever came to a two-house vote. In October, 1981, the House of Representatives voted 301-111 and the Senate 48-52 for a resolution of disapproval. Failing to obtain a Senate majority in support of the resolution, the AWACS sales proceeded.[12] Thus, despite presidential doubts as to the advisability and constitutionality of the legislative veto with regard to arms sales, the issue was never fully tested in the U.S. Supreme Court.

Then, on June 23, 1983, the Supreme Court spoke, albeit in the form of a 7-to-2 divided opinion. The obscure case titled *Immigration and Naturalization Service v. Chadha* had absolutely nothing in common with the AECA except for a legislative veto issue. *Jagdish Rai Chadha*, a foreign national whose U.S. student visa had expired, had contested Congress' legislative veto of a favorable Justice Department ruling which would have allowed him to remain in the United States; the impact of the legislative veto was that he would have to be deported. As the case developed, there was an appellate court ruling in *Chadha's* favor in 1980, and the Supreme Court affirmed the appellate court's decision in 1983.[13] Whereas the *Chadha* decision dealt with the unconstitutionality of a one-house legislative veto provision, the Supreme Court on July 6, 1983 further ruled that a two-house legislative veto provision contained in the *Federal Trade Commission Improvements Act of 1980* was unconstitutional as well.[14] As a result, the consensus appeared to be that the legislative veto, in whatever form, was unconstitutional.

Through the *Chadha* case, which is depicted as being one of the more important legal decisions in American history, the Supreme Court endorsed the Constitution's scheme for the separation of powers. Chief Justice Warren E. Burger noted that Article I of the Constitution states that bills shall be approved by both the House and the Senate and then be presented to the President for his approval. The legislative veto clearly ran afoul of these requirements and hence was unconstitutional. Burger acknowledged that the constitutional process, with its checks and balances, might appear to result in "clumsy, inefficient and even unworkable processes," yet "we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution."[15]

### *Aftermath of the Chadha Decision*

The *Chadha* decision was hailed as a major victory for the Executive Branch, inasmuch as presidents had long viewed the legislative veto as an incursion upon executive authority. Several members of Congress, on the other hand, were disturbed by the *Chadha* ruling. It was noted that by striking down the legislative veto, the Supreme Court had taken from Congress one of its major tools to influence foreign policy. Moreover, the effect of the ruling was widespread in that dozens of budget, rulemaking, and foreign affairs and national security related laws contained legislative veto provisions, e.g., the War Powers Resolution, the Nuclear Non-Proliferation Act, DOD Authorization Acts, etc.[16]

The question within Congress soon became: now that we have the *Chadha* decision, where do we go from here? Initially, there was significant discussion relative to the legal issue of *severability*--"whether the unconstitutional legislative veto provision can be isolated or severed from the delegated authority to which it is annexed or whether the two are so inextricably intertwined that both [e.g., legislative veto and the AECA to which it was affixed] must fall."[17]

The severability issue could theoretically be resolved in one of two ways. In the words of Senator Robert Byrd:

> If our "veto" power has been removed, and if that "veto" is "separable" from the rest of the statute, then that would mean that the Executive now has total, unrestricted authority to engage in any and all arms transfers it chooses. And Congress would be without any role whatsoever.
>
> On the other hand, an argument could be made that our now invalid "veto" powers cannot be "separated" from the rest of the Arms Export Control law. If that were so, then that would mean that the entire statute is invalid. And that, in turn, would mean that the President is now without any authority to engage in any arms transfers.[18]

The severability issue was one of the more complex legal aspects of the *Chadha* case. By its very nature, it caused a certain degree of alarm and consternation within and outside the Congress.

Although an intriguing issue, judicial interpretation of severability was not provided, and the Congress and the President both continued to function as if the AECA was a fully operative law despite their recognition of the unconstitutionality of the legislative veto. Further, with respect to the AECA and other foreign affairs and national security statutes, the Executive branch tried to mollify any fears which the Congress may have had following the *Chadha* ruling. In this regard, Deputy Secretary of State Kenneth Dam, in July 1983, testified before the Senate Committee on Foreign Relations:

> Under the *Chadha* decision, we believe that the procedures for legislative vetos in several sections of the Arms Export Control Act are not valid, but that the reporting and waiting periods remain. The Court decision in no way alters the elaborate structure of reporting, consultation and collaboration that the Executive Branch and the Congress have worked out over recent years to ensure effective Congressional oversight.[19]

While the Reagan Administration was trying to assure the Congress that the *Chadha* decision was not going to lead to Executive Branch excesses or cut Congress out of the consultative process, at least one member of Congress offered an alternative approach to the control and oversight aspect. Senator Robert Byrd offered a bill which incorporated a joint resolution of *approval* mechanism. Under the Byrd proposal, for all proposed FMS and direct commercial sales having a value of $200 million or more, the Congress would have to affirmatively vote to approve the sale within thirty calendar days; otherwise the sale would not proceed. The Administration's position relative to the Byrd amendment was that "it would be unwise" for three reasons: (1) the President would no longer be able to use arms transfers in combination with other policy instruments because he would never know whether he would be able to deliver on what he would propose; (2) the proposal would slow things down to an unacceptable degree; and (3) it is doubtful whether the Congress would be inclined to devote the time to respond to such sales 15 or 20 times a year, as would be required.[20]

As events transpired, the Executive Branch has not yet had to contend with the Byrd proposal as a matter of law. Rather, with the enactment of Public Law 99-247 earlier this year, which essentially provides for joint resolutions of disapproval rather than joint resolutions of approval, the Byrd proposal may now be a moot issue.

## PUBLIC LAW 99-247

### *Legislative History*

The legislative history printed at the end of the sliplaw report for Public Law 99-247 is brief and merely makes reference to *Congressional Record* entries on specific dates. These were the dates during which the legislation was considered and passed by the Senate and the House of Representatives, respectively.[21] In chronological sequence, Senate Bill Number 1831 *(S.1831)* was considered and passed by the Senate on December 19, 1985. Senator Alan Cranston, speaking for favorable consideration, stated that "the pending measure is neither complicated nor controversial. It amounts to what is really a one-word change in law--changing 'concurrent' to 'joint' in the legal reference to the types of arms disapproval resolutions which enjoy expedited procedures."[22]

On February 3, 1986, the then approved Senate bill *(S.1831)* was similarly considered and passed by the House of Representatives. Representative Dante Fascell, Chairman of the House Committee on Foreign Affairs, initially rose in support of the measure. Fascell described the bill as "a legislative fix to the concurrent resolutions of disapproval that have been rendered unconstitutional by the *Chadha* decision."[23] On February 12, the measure was signed into law by President Reagan.

### *Substance of the Public Law*

There are two major features of Public Law 99-247. With respect to the first feature, as can be seen in Figure 1, the major thrust of this statute is to substitute the term "joint resolution" for "concurrent resolution," relative to Congressional objections to proposed transfers advanced by the Executive Branch. The distinction between the two terms is significant. A "concurrent resolution" is not normally legislative in character but is used merely for expressing facts, principles, opinions, or other information by the Senate and House of Representatives. It is not the equivalent of a bill, and is not presented to the President for approval. A "joint resolution," on the other hand, becomes law in the same manner as a bill, and accordingly is presented to the President for approval.[24] If a joint resolution, which requires a simple majority in each house for passage, is vetoed by the President, the Congress can override the presidential veto with an extraordinary two-thirds majority. Accordingly, the drafters of Public Law 99-247 considered that the joint resolution mechanism satisfies the "separation of powers" and the "presentment" requirements of the Constitution, i.e., the stipulation that new laws be presented to the President for approval. Thus, P.L. 99-247 appears to be a sufficient response to the deficiencies outlined in the *Chadha* case.

**Figure 1**
**Revisions Contained in Public Law 99-247, February 12, 1986**

| Transfer Authority and AECA Section | Prior Language | Revised Language |
|---|---|---|
| Third Country Transfers [Sec. 3(d)(2)] | -Concurrent resolution | -A law prohibiting |
| Foreign Military Sales [Sec. 36(b)] | -Concurrent resolution | -Joint resolution |
| Commercially Licensed Sales [Sec. 36(c)] | -Concurrent resolution | -Joint resolution |
| Leases of Defense Articles [Sec. 63] | -Concurrent resolution | -Joint resolution |

Note: The above prior and revised language entries reflect the essential changes but not the full phrases and contextual aspects contained in Public Law 99-247.

A second major feature of Public Law 99-247 involves the incorporation of "expedited procedures" attendant to joint resolutions. The following excerpt from the *Congressional Record* provides the basic background relative to the need for this particular aspect of the recent legislation:

> The AECA provides for expedited procedures for concurrent resolutions. However, since the 1983 Supreme Court *Chadha* decision, which declared the legislative veto unconstitutional, Congress has employed joint resolutions of disapproval to oppose particular arms sales. While concurrent resolutions are subject to expedited procedures, joint resolutions are not. This is not a special problem in the House because the Rules Committee can bring to the floor legislation in an expedited manner. However, there is a problem in the Senate because there is no Rules Committee and consideration of important joint resolutions related to arms sales can be subject to delay through filibuster.[25]

In response to the above procedural aspect, essentially what Public Law 99-247 did was to apply the earlier expedited procedures for concurrent resolutions to joint resolutions within the context of Section 36 of the AECA. This involves the following actions. First, the House of Representatives is to expedite and treat as "highly privileged" the consideration of joint resolutions. Second, it shall be in order in the Senate to move to discharge any joint resolution from committee cognizance if such committee has not reported the resolution at the end of five calendar days.

While the joint resolution mechanism is clearly incorporated into selected provisions of the AECA, a clarification is in order. It was not necessary for the Congress to mention the joint resolution in the AECA in order to employ it. Rather, Congress effectively put the Executive Branch on notice that it would use a joint resolution, accompanied by expedited legislative procedures, as a means of expressing disapproval, should the circumstances so arise. However, Congress did not expand or limit its authority to use the joint resolution, or any other appropriate procedural device, by the present wording of the AECA.

### *Application of Joint Resolution*

Within months after Public Law 99-247 became effective, the Congress proceeded to use the joint resolution mechanism in reaction to an arms sale notification submitted by the Executive Branch. The formal notification was transmitted to Congress on April 8, 1986, and the substance of the notification letter appears in the *Congressional Record* for that date. Identified as Transmittal Number 86-29, the notification related to the Departments of the Army, Navy, and Air Force proposed Letters of Offer to Saudi Arabia for defense articles and services estimated to cost $354 million. The package included AIM-9L and 9P4 Sidewinder missiles, Harpoon missiles, and Stinger missiles.[26]

Up to the time of this particular notification, Congress had never exercised its statutory power under Section 36(b), AECA, to block a sale. However, in an action outside of the AECA resolution-of-disapproval framework, Congress in 1983 included a sales prohibition in Section 765(c) of the DOD Appropriations Act, 1984 (Public Law 98-212, approved December 8, 1983). This action prohibited the sale of AN/SQR-19 Towed Array Sonar systems to Spain, a sale that had already been made after completion of the Section 36(b) notification and for which production had already begun. The prohibition was itself repealed by Section 109 of the DOD Authorization Act, 1985 (Public Law 98-525, approved October 19, 1984). Moreover, President Reagan postponed a major defense sale to Jordan last October based on the likelihood of Congressional legislators opposing the sale; the postponement thereby negated any formal legislative action. Accordingly, when both houses of Congress voted on May 6-7 for a joint resolution of disapproval relative to the proposed Saudi sale, it represented the first time this specific Section 36(b), AECA, provision was employed.[27]

At initial glance, the degree of Congressional opposition to the proposed Saudi sale was substantial. The Senate approved Senate Joint Resolution 316 by 73-22 on May 6. The following day, the House of Representatives approved the same resolution on a 356-62 vote.[28] Then on May 21, President Reagan vetoed the Congressional resolution. Shortly before the veto action, the Saudi government withdrew its request for the Stinger Missiles portion of the sales package. It was thought that the removal of the request for Stingers would improve the chances against any attempted override of the veto.[29] In his veto message, the President referred to the rise of religious fanaticism and violence in the Middle East, and added that turning down the sale would send "the worst possible message" about America's dependability and courage.[30]

On June 5, the Senate, by a single vote (66-34), sustained President Reagan's veto of the aforementioned joint resolution. Following the vote, Senator Richard Lugar, Chairman of the Senate Foreign Relations Committee, observed, "We have established the ability of the president to make an arms sale to a moderate Arab state."[31] Furthermore, President Reagan indicated that the vote "confirms America's commitment to a security relationship that has served both the United States and Saudi Arabia well over the past 40 years."[32]

While the current Saudi sale, now in the amount of about $265 million, is clear to proceed, the point remains that Congress today has a constitutional mechanism in the form of a joint resolution to oppose arms sales, and Congress has at least on one occasion utilized this device. The passage of time can only foretell the degree to which this device will be used, and the resultant effect on the conduct of U.S. foreign policy.

## SUMMARY AND CONCLUSION

While only about a page and a quarter in length, Public Law 99-247 has already proved to have broad implications and its application has resulted in dozens of pages of commentary in the *Congressional Record.* The essence of this statute was to substitute the term *joint resolution* for *concurrent resolution* within the context of FMS and commercial sales, third country transfers, and leases.

The Congress has, within the AECA, used the joint resolution mechanism to respond to the constitutional question raised in the landmark Supreme Court Case, *Immigration and Naturalization Service v. Chadha*, 1983. Shortly after the joint resolution device was incorporated into the AECA, Congress passed a joint resolution of disapproval in connection with a proposed sale to Saudi Arabia, which further generated a presidential veto of the resolution.

All in all, Public Law 99-247 takes its place as a single event in the continuing saga of the struggle for control over foreign affairs, a contest long involving the Congress and the President. The incorporation of the joint resolution mechanism into the AECA clearly signaled Congress' intention to oversee and guard its delegated authority. Similarly, the use of the Presidential veto of the joint resolution depicted Presidential resolve to use defense sales as a foreign policy tool, despite the lack of a full Congressional-Executive consensus with respect to the merits of a particular sale.

## NOTES

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3. Ibid.

4. Peter Woll and Robert H. Binstock, *America's Political System*, 4th ed. (New York: Random House, 1984), p. xviii.

5. Louis Fisher, *The Politics of Shared Power: Congress and the Executive* (Washington, DC: Congressional Quarterly Press, 1981), p. 92.

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9. Celada, p. 343.

10. Gerald R. Ford, "Veto of Foreign Assistance Bill, May 7, 1976,"*Presidential Documents*, Vol. 12, No. 19, 1976, pp. 828-829.

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12. I. M. Destler, "Reagan and Congress--Lessons of 1981," *The Washington Quarterly*, Vol. 5, No.2, Spring 1982, pp. 3-14; *Reagan's First Year*. (Washington, DC: Congressional Quarterly, Inc., 1981), p. 45.

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15. Elder Witt, "Legislative Veto Struck Down: Congress Moves to Review Dozens of Existing Statutes," *Congressional Quarterly Weekly Report*, June 25, 1983, pp. 1266-1268.

16. Ibid, pp. 1263-1266.

17. Celada, p. 334.

18. Robert C. Byrd, U.S. Senator, Statement of Impact of Chadha Ruling, U.S. Congress, Senate, Hearings, *Legislative Veto: Arms Export Control Act*, 98th Cong., 1st sess. (Washington, DC: U.S. Government Printing Office, 1983), p. 11.

19. Dam, p. 20.

20. Byrd, p. 12; Dam, pp. 27-28.

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22. *Congressional Record-Senate*, op. cit., pp. S18161-S18162.

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## ABOUT THE AUTHOR

Dr. Larry A. Mortsolf is the Deputy for Consultation and a Professor at DISAM. He holds a PhD in Political Science from the University of Cincinnati and an MS in Logistics Management from the Air Force Institute of Technology. Prior to coming to DISAM, he served several years with the U.S. Navy and was recently selected for promotion to the rank of Captain, Supply Corps, in the Naval Reserve.