U.S. CRIMINAL JUSTICE REFORM ASSISTANCE IN COLOMBIA AND ELSEWHERE IN LATIN AMERICA

THE POLICY OF SPEND AND PRETEND

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Purpose

This document is intended to serve, first, as an executive summary of the Author's paper dated October 14, 2017 and entitled *U.S. Criminal Justice Reform Assistance in Colombia—the Policy of Spend and Pretend*, the purpose of which was to document and otherwise substantiate the misspending between 1991 to 2017 of U.S. taxpayer dollars and other resources by the United States in its assistance to the Colombian government (GOC) in judicial or criminal justice reform; characterized therein as the policy of ***Spend and Pretend.*** Second, it is hoped that this synopsis can serve as a springboard of concern to other countries in Latin America that have suffered and continue to suffer the same legal/fiscal phenomenon.

The Author

From 1979 through 2014 the Author litigated as defense attorney and prosecutor in the accusatory system. During the last 24 years, the Author has colaborated in the analysis, development and implementation of criminal procedure codes in various countries of Latin America, the Middle East, Central Asia and Europe. He has been put forward as an expert at the world level in comparative law and the development of criminal justice systems. Since his retirement from the Department of Justice and among numerous other writings, he has written and had published four books (in Spanish) that deal with comparative law and that serve as models in the analysis and development of criminal justice systems.[1]

[1] *Lo Inquisitivo hacia lo Acusatorio: Una Odisea (Manual Práctico del Derecho Comparado),* Kim R. Lindquist, Ediciones Jurídicas Andrés Morales, Bogotá, Colombia, 2015. (As indicated by its title, this book consists of a fundamental treatment of comparative law in distinguishing among accusatory and inquisitorial systems and the mixture of the two.) *Lo Mixto como Acusatorio: La Meta Incumplida,* Kim R. Lindquist, Ediciones Jurídicas Andrés Morales, Bogotá, Colombia, 2015. (This book is a refutation of the commentary to the criminal procedure code of Guatemala in the sense that the Guatemalan code constitutes an accusatory system. As such, the book has application to any mixed criminal justice system that pretends to be accusatory.) *La Meta Ilusoria del Sistema Mixto como Acusatorio: Fenómeno del Pasado y del Presente;* Kim R. Lindquist, Ediciones Jurídicas Andrés Morales, Bogotá, Colombia, 2016. (This work speaks in more detail about six Latin American countries with mixed systems (Guatemala, Colombia, Mexico, Honduras, Panama and El Salvador), to which other mixed systems are very similar but with distinct differences.) *Colombia: en Busca de la Justicia—el Caso Colmenares;* Kim R. Lindquist, Ediciones Jurídicas Andrés Morales, Bogotá, Colombia, 2017. (This book examines in painstaking detail a typical but high profile case of supposed homicide, and in so doing reveals the fundamental and pervasive defects of the Colombian mixed system. It takes concept to its very practical reality in demonstrating the fundamental deficiency of the mixed system.)

Structure and Methodology

Against the backdrop of what would seem to be a mutual proclamation by the governments of the United States and Colombia of their success in the latter's achievement of an efficient, efficacious and just accusatory criminal justice system—the result of years and millions of dollars of investment—the more recent but equally official proclamation by high officials of the GOC of its criminal justice system's abject failure will be examined in ironic juxtaposition.

The Author will then offer a succinct comparative law explanation for the current and historical failure of the Colombian criminal justice system (otherwise detailed in his above-referenced books).

The writing will then summarize at least a portion of the massive amounts of monies spent by the United States in supposedly helping Colombia reform its criminal justice system. Reciprocal reform spending by the GOC and similar investment by other foreign governments are not addressed, but constitute inferential emphasis of the amount of money spent in relation to reform results.

In the process the Author will indicate an otherwise obvious explanation as to why the process has fallen short; but at the same time why the two countries have had to officially claim success in spite of the contrary, grim reality.

The Official but Contradictory Proclamations

The Claim to Colombian Criminal Justice Reform Success

Background

As with so much of life, the present nature of the Colombian criminal justice system and its circumstances are explained by its past. Colombia's criminal law legacy is that of Spain and its Roman law inheritance: a criminal justice system steeped in legal codifications and written procedures that distance themselves from any notion of efficiency in time, efficacy in finding truth and justice in the process. In spite of its bureaucracy, the system functioned well enough to the satisfaction of the aristocracy of the Middle Ages and post-Columbus Latin America that maintained and perpetuated it; at least in terms of relatively small communities and crime numbers. However, it is ill-suited for the modern world and its related crime, both in sophistication and in numbers.

In the face of the abject failure of its inquisitorial system in recent modern times, Colombia sought remedy in the accusatory system and its superior procedural tools; tools that better guarantee efficiency, efficacy and justice. Accordingly, she turned primarily to her neighbor in the North for help by virtue of its accusatory form. The Author participated directly in this social phenomenon, being one of the first two DOJ prosecutors assigned to foreign system reform; the Author in Colombia (1994) and the other prosecutor in Bolivia (in the same year).

Initially, the general and logical U.S. response was that of training: teach the Colombians the U.S. system. However, that took place against an extremely entrenched and contradictory inquisitorial system and related functionary paradigm (both centuries in the making) manifested conceptually and paradoxically in the 1993 Colombian "accusatory" code; and without major comprehension of the distinction by either the trainers or the trainees. Accusatory concepts simply fell on inquisitorial ears and minds.

The Author and a select number of U.S. and Colombian colleagues associated with him in the endeavor immediately recognized the challenge and took significant steps to identify the comparative law context that would give meaningful bridge to the training and ultimate implementation. Nonetheless, given the extreme Colombian inquisitorial orientation in mentality and in practice, confirmed politically, academically and socially otherwise, even with a developing comparative law conceptual context the bridge to comprehension was fraught with resistance. Moreover, implementation seemed a hopeless dream.

In spite of the obstacles, great progress was made in mutual comprehension of concept, with an eye toward eventual implementation. Ultimately, however, entrenched politics, academic loyalty and historical practice thwarted any true comprehension and adoption of an accusatory system and its necessary tools. Rather, ignorant political and academic lip service was paid to the accusatory form, but with the system otherwise retaining legislatively and administratively every fundamental inquisitorial aspect and with all the same negative results. To be sure, the Colombian criminal justice system effectively emulated the Hollywood Western movie set: the building fronts lining main street bearing every appearance of authentic establishments and residences, but with the surrounding, empty desert revealed with the opening of any door. Colombia put on the accusatory façade, but with little accusatory substance.

In time, this paradox went largely unnoticed or unappreciated among U.S. trainers and Colombian trainees alike, together with their respective administrators. The trainers, well meaning and enjoying a respite from their normal work, but for the most part ignorant of the comparative law distinction between systems and the comprehension and implementation gulf the same represented, continued offering up the U.S. system concepts. ("This is the way we do it and if it suits you, great!") The trainees, in turn, by virtue of their comparative law ignorance and steeped traditions and enjoying a similar break from their routine work, would listen and participate; nod in real, superficial or feigned comprehension; obtain their respective certificates of attendance (the primary motive, for resume purposes); and return to their respective workplaces with no incentive, intention or ability to meaningfully implement any new accusatory concept or mechanism. Even those few who were able to see beyond their own tradition and that had a desire to change their practice were forced ultimately to concede defeat and defer to the immovable bureaucracy controlled by the politicians, the academics and the administrators.

As one of the ships passing in the systemic night, the U.S. had nonetheless an ongoing, dedicated budget—of enormous proportions given the drug trafficking nature of the Colombian phenomenon and its impact on the the U.S.—with an obligation to spend the money and, at least in theory, with the related obligation to bring and measure results. In the face of this administrative obligation, it was readily realized that the easiest way to spend the budget and measure results—at the same time meriting the bureaucratic blessing—was to put bodies in the classroom, involve

U.S. functionaries (prosecutors, police, judges and other lawyers) in the ongoing presentation of accusatory concepts, and count the bodies and money spent in reporting successful "training" of foreign functionaries—as if the exercise somehow achieved implementation as well, which it did not. Indeed, there was little conceptual change, let alone implementation of concept as practical mechanism. Of course, it is axiomatic that learning without implementation of things learned is no learning at all; as learning for the sake of learning without practical application only produces potential players of the game-show *Jeopardy* and not meaningful players on the world stage, whatever form that stage takes; hence, the moniker ***"spend and pretend."***

During the course of this ineffectual game of criminal justice reform *Jeopardy*—from roughly 1991 to date—and in muted confirmation of its conceptual and practical hollowness—the GOC proposed numerous legislative reforms in its supposed quest of the accusatory ideal, each one failing to achieve or even meaningfully approximate that ideal. Instead, cosmetic adjustments—mostly administrative in nature—perpetuated the essential inquisitorial identity of the system, with the same negative results the reforms were meant to overcome. The challenges and deficiencies of 2017 are essentially those of 1994—a legal *de-ja vu*. Nonetheless, the system continued to disingenuously tout itself as "accusatory," as if the administrators, politicians, academics and functionaries themselves needed the convincing more than the Colombian citizens.

While the GOC blindly represented its criminal justice system as "accusatory" in courtroom proceedings, in the press and in the classroom, the Americans were equally eager to confirm the same in necessary vindication of the massive support spending over the years. Indeed, to aver otherwise would be to admit failure, something the bureaucracy is incapable of doing out of sheer identity preservation.

U.S. Department of State

The U.S. State Department (DOS), in its own right and through the affiliated DOJ mouthpiece, proclaimed not only marked progress, but success. On its current website—though the material appears dated, but still relevant—and under the heading of *Justice Sector Reform*, the U.S. embassy in Colombia declares in part:

> In the area of Justice Sector Reform, JSRP focuses on reinforcing the recent implementation of a new Colombian Criminal Procedure Code and the introduction of an accusatory system. Support is given through ***extensive and intensive training*** to Colombian prosecutors, judges, investigators and forensic scientists. . . . [Emphasis added.]
>
> The new Colombian Criminal Procedure Code and its introduction of an accusatory system was a dramatic change for the Colombian criminal justice system because it involved:
>
> 1. Moving away from a written, closed and time consuming system toward an oral, transparent and more efficient system
> 2. Creating new roles for prosecutors, judges, defense attorneys and investigators
> 3. Placing emphasis on evidence being presented, confronted and judged at an oral, public trial

According to the Superior Judicial Council ("Consejo Superior de la Judicatura), on average the new system has reduced processing times by 76%.

As an integral aspect of the policy of ***Spend and Pretend***, these pronouncements are more propaganda than accurate reporting.

The reference to the "new Criminal Procedure Code" is undoubtedly that of the code of 2004 (la Ley 906). As addressed in synthesis hereafter but explained in detail in the Author's referenced books, that codification does little if anything to introduce and define "an accusatory system." Quite the contrary, it perpetuates conceptually the old inquisitorial system. As a direct result, the "dramatic changes" touted by the embassy have never occurred. The manifestations are multi-fold:

First, rather than "moving away from a written, closed and time consuming system toward an oral, transparent and more efficient system," the Colombian criminal procedure code has effectively retained its "written, closed and time consuming" reality and falls far short of an "oral, transparent and more efficient system." Indeed, it is an inefficient as ever.

Second, although bearing supposedly accusatory names, the Colombian functionaries in their entirety continue to function according to their ancient tradition without appreciating or approximating the accusatory roles they otherwise pretend.

Third, there is little emphasis on "evidence being presented, confronted and judged at an oral, public trial." Rather, the evidence continues to be "presented . . . and judged" almost entirely in written fashion prior to any supposed trial, with no meaningful confrontation either before or during its so-called "oral, public trial." Indeed, "oral" at "trial" is limited largely to the argument of lawyers based largely on the written record, with some witness confirmation or clarification.

It can be argued legitimately that the Colombian Criminal Procedure Code has taken some steps toward its accusatory ideal. However, with equal legitimacy it can be argued that, given the cultural zeal to retain the past, such steps are inadvertent at best and, therefore, largely ineffectual. Nevertheless, it is beyond debate that, given practical results, the Colombian criminal justice system remains far from the accusatory ideal it supposedly seeks; certainly far short of its nature as touted by the American embassy.

Finally, reality does not support the reported Colombian claim of a processing efficiency increase of 76%. In reality, processing time is worse than ever before, reflecting an almost total lack of efficacy in finding the truth. Moreover, as pointed out by the Author in his various works, Colombian justice in the process is illusory.

U.S. Department of Justice

Nonetheless, as an affiliated mouthpiece of the DOS, the DOJ heralds the same (dated but pertinent) message on the same DOS Colombia embassy medium:

> The U.S. Department of Justice (DOJ) developed its Justice Sector Reform Program (JSRP) as part of the U.S. Government assistance effort under Plan Colombia. It is a comprehensive assistance program for the Colombian justice sector with a particular emphasis on the Colombian Attorney General's Office.
>
> The program utilizes the depth and breadth of the U.S. Department of Justice's expertise to assist Colombia's efforts to strengthen its justice system and capabilities . . . .
>
> As of 2011, ***JSRP taught more than 2,600 intensive and specialized training courses completed by more than 100,000 judges, prosecutors, investigators and forensic experts***. . . . The Department of Justice has been providing assistance to prosecutors, investigators, forensic experts, protection personnel and judges since the mid 1990s and has been appropriated ***more than US$140 million*** since the inception of "Plan Colombia." [Emphasis added.]

The reference to a particular assistance emphasis by DOJ on the Colombian AG's office is fascinating, as that institution has done little over the years to promote an accusatory transition since the early days of DOJ assistance in the mid 1990s. Indeed, it remains steeped in the past and resistant to any meaningful change. Once again, this is demonstrated vividly in the Author's literary works.

The reference to the "depth and breadth of the U.S. Department of Justice's expertise" is telling. As referenced earlier, any such expertise is almost exclusively limited to the U.S. system, with little or no "expertise" as to the Latin American inquisitorial reality. Once again: "This is how we do it in our system. If it works for you, great!" The conceptual bridge remains uncrossed by student and teacher alike.

A more classic statement and confirmation of ***spend and pretend*** cannot be had than the boast that "[a]s of 2011, JSRP taught more than 2,600 intensive and specialized training courses completed by more than 100,000 judges, prosecutors, investigators and forensic experts", amplified with the attribution to the same of more than US$140 million dollars. The "pretend" aspect will become even more readily apparent as the failure of the system is detailed hereafter.

Related Reporting

The smoke and mirrors of ***spend and pretend*** perpetuate themselves in part by giving rise to reporting based upon the same. A good example is that of **Colombia Reports** and its article (published on the internet) entitled *Building rule of law is the key to Colombia's transformation,* written by Jeffrey Haire (August 15, 2010). It proclaims such things as:

> Colombia's dramatic turn in the last 15 years from a near-failed state, to a thriving, democratic leader in Latin America is currently the global template for rule of law and justice system development . . . .
>
> A progressive, professional police and prosecutorial force has gradually evolved in Colombia.

Referring to the ICITAP (International Criminal Investigative Training Assistance Program) and OPDAT (Office of Prosecutorial Development, Assistance and Training) of the U.S. Department of Justice, and referencing the U.S. Department of State and the U.S. Agency for International Development (USAID) as funding sources, the article proclaims:

> Underlying this modern Colombian justice system are comprehensive technical improvements [of] police and prosecutorial function, professionalism, and training provided by the United States and funded as foreign aid programs.

The article quotes "Assistant U.S. Attorney" Lanny Breuer in his May 18, 2010 statement to the U.S. Senate Sub-committee on Human Rights and Law:

> Mr. Breuer reported that ICITAP and OPDAT began their partnership with the Colombian government in the mid-1990s—each with a sole DOJ Police Advisor and Prosecutor.[2] Since that time, dozens of ICITAP advisors have followed [as well as] over forty prosecutors. . . . Breuer noted that one of the major achievements of the JSRP in Colombia has been their success in changing Colombia's prosecutorial system from a time-consuming, non-transparent, *inquisitorial* model based heavily on written statements, to a more streamlined and open *adversarial* model, based on oral courtroom arguments. . . .
>
> The success of Colombia's rule of law and justice system reforms can ultimately be measured by surveying the public confidence levels in police and judicial agencies, and the reduction in complaints of police abuse, corruption and human rights violations.

As has been alluded to already and as will be confirmed shortly, Colombia's criminal justice system is hardly a "global template for rule of law and justice system development;" nor can it be said that "[a] progressive, professional police and prosecutorial force has gradually evolved in Colombia" or that it constitutes a "modern justice system." Moreover, and contrary to Mr. Breuer's statement, Colombia's criminal justice system has ***not*** changed "from a time-consuming, non-transparent, *inquisitorial* model based heavily on written statements, to a more streamlined and open *adversarial* model, based on oral courtroom arguments." Quite the contrary, Colombia's system remains "a time-consuming, non-transparent, *inquisitorial* model based heavily, if not exclusively, on written statements."

With regard to Mr. Haire's claim of high public confidence levels in the system, one must question and even ask for the underlying research and data to justify the same. To be sure, the experience of the Author of over 20 years is diametrically to the contrary. Of the thousands of personal conversations the Author has enjoyed with Colombian citizens over the years, ***not one*** has expressed confidence in the system. Indeed, the unanimous expression is that the system does not function and is totally unresponsive to citizen needs. Worse yet, the vast majority of the system

[2] The Author was the sole prosecutor advisor and Carl Risheim the sole police advisor. Since that time, as will be addressed later in more detail, Risheim has done more to advance the ***true*** cause of system reform regarding police development than perhaps any other person, but ultimately to limited avail given the bureaucratic vagaries of the respective governments.

functionaries that the Author has interacted with are themselves of the same frustrated and even more confused opinion.

Regardless, it is this type of inaccurate and ill-founded reporting that helps allow the policy of ***spending and pretending*** to perpetuate itself.

The U.S. Agency for International Development

We conclude these preliminary observations with reference to the extensive March 12, 2010, report by USAID entitled *Assessment of USAID/Colombia's Justice Reform and Modernization Program.* Interestingly, it provides a fitting—though perhaps begrudging—transition from the glowing fiction of DOS and DOJ to the stark reality.

In preliminary significance to present remarks, the USAID recounts the Colombian criminal procedure code reform history in reiteration of its historically deficient nature and in reference to its six code changes since 1938. It continues in a cautious if not skeptical tone as far as achievement is concerned (pages 7 and 8):

> Although Colombia's movement toward an oral accusatory system began earlier, the three post-1991 codes made the greatest advances, culminating in Law 906 enacted in 2004. Given past history, it is likely that this will not be the last word on the subject, but the current code does advance changes begun earlier and, moreover, has probably had the greatest impact on actual practices. Still, the problems documented in the 1960s remain very visible. . . . For 70 years, Colombians have been attempting to draft the perfect set of rules, overlooking the need to improve the institutions that must apply them.

In grudging acknowledgement that the Colombian criminal justice system is still far short of the mark in spite of numerous reforms, here the Report reveals its orientation bias; namely, that the shortcoming has to do with system or institution management and not with a faulty code. In other words, it is the fault of the operators, not of the code or system they are meant to operate. In reality, the fault pertains to both.

Nevertheless, the report persists in this explanation. In offering up its purpose in helping Colombia reform her badly flawed system, including code advancement and implementation (referring to the current code or Law 906, toward which USAID paid out US$36 million (see p. 10)) and, at the same time, some of the programs shortcomings, the report reveals why that program, as well as the JSRP of DOS and DOJ, have failed. The Report states in part at page v:

> . . . The USAID program's principal flaw was in adopting the Colombians' assumption that simply implementing the new code would be sufficient. The problem is the new system's failure to meet public expectations as regards not only human rights guarantees, but also the investigation and prosecution of serious crime. This is more an institutional than legal issue, and will require attention to enhancing the ability of sector organizations to carry out their roles adequately.

The USAID program's flaw goes well beyond the Colombian assumption that the new code would be "sufficient" as an accusatory manifestation. USAID erroneously presumed as well that the new code promoted accusatory mechanisms adequate to bring about meaningful change, and that its failure is do to faulty management alone. However, management cannot be blamed when the code itself is not what it is supposed to and should be.

In confirmation of the persistent system failure, the Report provides some interesting statistics resulting from case measurement as to part of the system between 2005 and 2008. After referencing the minor case minority of private prosecutions and cases in *flagrancia*, the Report addresses the majority or serious cases (at page 15):

> . . . The "other" category, in which are included the more serious crimes (and which constitutes the majority of incidents attended by the prosecutors) reach the stage of charging for only two percent of the total, with only one percent reaching a verdict. Admittedly this category includes a good number of incidents which do not constitute crimes, or for which there is far too little information on which to base an investigation, but it also covers homicide, rape, robbery, and other more violent incidents. When these cases are adjudicated, they usually produce a guilty verdict, but the problem is that, given Colombia's high incidence of violent crime, too few of them get that far.

What the unofficial statistics show is an impunity rate of 98% with regard to the majority and most significant crimes. As shall be shown in more detail hereafter, the inclusion of cases that do not constitute crimes reflects a basic inquisitorial flaw in the system's inability to filter out such cases. The fact that many cases lack sufficient facts confirms the same and also demonstrates the premature charging that occurs (the *imputación*), another major inquisitorial flaw of the system. Next, a guilty verdict does not necessarily result from a just Colombian system. Indeed, because the system lacks the ability to adequately detect inadequate cases, many convictions occur as to innocent defendants or with insufficient evidence. Finally, Colombia's problem in few cases getting adjudicated has little if nothing to do with its high crime rate; which is no higher that many accusatory countries, including the U.S. Rather, it has to do with a code that does not contain the mechanisms necessary to allow the functionaries to properly adjudicate the cases.

In spite of the glowing façade of DOS and DOJ, and even given the misguided apology of USAID, deep within, most if not all question whether or not the so-called accusatory system really works at all. Indeed, there exists a current intellectual movement to abandon the so-called "accusatory" system in favor of a return to the old inquisitorial form. Of course, the paradox abounds; as the system has yet to achieve that accusatory status. Moreover, its own owners—and at the highest levels—have begun recently to publically and officially confess its failure.

Before broaching the contrary reality and in anticipation of the fiscal analysis to follow, it is revealing to underscore that the positive reporting by DOS and DOJ—and even USAID—on their ***current*** websites as dated. It corresponds generally to the years 2010 and 2011, just a few years after the Law 906 code—the final accusatory answer—went into effect. That current reporting of those prior years reflects the optimism necessarily extended to that code and the years duly allocated to the manifestation of its success. However, that success has not been forthcoming,

explaining the dated retention of report as opposed to current reality. The fiscal data to be addressed hereafter confirm the same.

Self-Induced Failure

In perpetuating their own myth, the USG agencies (USAID and INL) commonly hire so-called "system experts" from among Colombia's broken system in order to draft USG plans and strategies in dealing with the failed system; many of whom are not criminal justice practitioners or are otherwise completely lacking in practical experience. At best, these misguided "experts" only achieve ineffectual cosmetic remedies; and at worst compound and perpetuate the problems.

The Acknowledgement of Colombian Criminal Justice System Reality

The History of Colombian Criminal Justice System Reform

The reform history of the Colombian criminal procedure code is probably the most persuasive proof of its failure of accusatory goal. Rather than constituting a gradual but definitive movement over 46 years (1971 to 2017) toward an unquestionable accusatory code with all the accusatory tools associated therewith, it represents an accusatorily well-meaning but frustrated wandering in the fog of inquisitorial paradigm retention, ultimately falling well short of the accusatory mark; endless reform as the proof of failure. The reference to the various legislations does not detail their respective content or reach, as such would plunge this paper into an analytical complexity ill suited to its purpose. Rather, the end result constitutes the primary proof, with each successive legislation participating in the failure to reach the accusatory ideal. However, limited commentary is provided as to certain items.

That reform history is as follows:[3]

Legislation prior to and including Law 906 of 2004

The process begins essentially in 1971 with Decree 409—Criminal Procedure Code—adopted by means of Law 2 of 1982. Law 2 of 1984 created the specialized judges and established a special proceeding for the investigation and judging the crimes of kidnapping extortion, extortion and terrorism, centralizing the functions of investigating and ruling.

With Decree 50 of 1987, a timid transition from an inquisitorial process during the instruction [in which the instruction judge investigates, accuses, defends and judges] toward an accusatory system was attempted.

In 1991, the new National Constitution enters into operation, which creates the National Prosecutor General's Office.

Decree 2700 of 1991, that entered into operation beginning July 1, 1992, repealed Decree 50 of January 13, 1987. The spirit of this legislative change was that of adapting the criminal

[3] Special thanks is given to Serafín Varela Martinez, former Colombian police investigator and current lawyer, for this information; translated into English by the Author.

procedure process to the new Constitution and open the path to an accusatory tendency. [Unfortunately, the Constitution perpetuated the inquisitorial paradigm.]

Law 81 of 1993 modified Decree 2700 of 1991, creating the regional judges with jurisdiction over the various crimes established in the National Drug Statute (Law 30 of 1986) and consecrated the benefits for meaningful cooperation. [Procedural emphasis continues with the judges, as vestiges of the ancient inquisitorial instruction judge.]

Law 504 of 1999 created the specialized criminal circuit judges with their respective prosecutors at the initiation of their operation; that is, July 1, 1999. [The inquisitorial instruction judge is effectively retained, with the prosecutors as their investigative assistants.]

Law 600 of 2000, the New Criminal Procedure Code, commenced in authority beginning July 24, 2001. [A supposedly mixed inquisitorial/accusatory with an overwhelming retention of the inquisitorial form dominates, with the instruction fully in place during the investigation, with some wishful accusatory thinking in the trial phase.]

With the supposed purpose of achieving the transition toward an accusatory code, Legislative Act 03 of 2002 was promulgated, modifying article 250 of the National Constitution.

Law 906 of 2004, another New Criminal Procedure Code, implements in name the "Accusatory System" in Colombia, as manifested by the Colombian Congress tried to expound in their statement of motives. [With this code, the Colombians convinced themselves, but erroneously, that they had achieved the accusatory goal. Evidence of this error is seen in the plethora of subsequent modifications, all supposedly toward the accusatory ideal.]

Summary of Modifications of Law 906 of 2004

Since 2004, there have occurred approximately 107 separate legislative modifications of Law 906. Each modification is an attempt to achieve in some individual way a perceived need toward the accusatory model. The sheer number suggests the frustration of that effort.

Recent Official and Public Pronouncements of Reform Failure

As promised, and in stark contrast to the glowing American reports, recent pronouncements of system failure are telling.

Public Officials

On July 5, 2017, and ironically on the occasion of the celebration of the 25th year of the Colombian Department of Justice (*Fiscalía*), the Attorney General (*Fiscal General*), Néstor Humberto Martínez, publically and officially proclaimed the Colombian accusatory criminal justice system in virtual collapse ("*virtual colapso del sistema acusatorio"*). In support he referred to the massive congestion of cases and the related statistics of the ever increasing thousands of unrealized audiences; of charging hearings that take over a year to occur; and rulings that take between two and ten years to be rendered. In frustration he proclaimed:

> It is imperative, urgent, that we seek solutions . . . . In not doing it, the system will definitely collapse . . . .

Shortly thereafter, the Procurador General of Colombia (a legal and constitutional oversight figure without counterpart in the accusatory system), Fernando Carrillo, was quoted in an article entitled *The proposals of the Procurador to save justice* (*las propuestas del Procurador para salvar la justicia*), September 2, 2017. The question was put: *What urgent reform is needed for Colombian justice?* In response, the Procurador referred to the need for all Colombia to assume that responsibility, referencing specifically the need for reform of the "public ethic;" and that Colombian citizens are not going to wait. The next question was: *The last seven reform proposals of the government have fallen and those of the judicial branch are not consolidated. Who should lead out in the process?* In offering up the judicial branch in leadership, the Procurador proclaimed: "It is the hour for the reform of justice."

In the exchange between reporter and government official, there was no debate as to whether or not a reform is needed, nor as to its urgency. That is presumed. It is, rather, a question of how it should be done and who should assume responsibility; the same considerations that have persisted for years.

Related Reporting

In a related newspaper column (El Tiempo, September 3, 2017) and with specific regard to the failure of justice in Colombia, columnist Hugo Acero Velásquez posed the question: *Are the judges to blame?* In response to his own question, the author indicated in essence that all of the functionaries—judges, prosecutors, police and lawyers otherwise—are to blame. Once again, there was no suggestion that there is no blame to be meted out; rather, that someone must take responsibility and bring about the appropriate changes.

This column is but an echo of the numerous public writings and media pronouncements that proclaim that state of failure of the Colombian criminal justice system.

The Law 600/Law 906 Phenomenon

In pre-existing support of the foregoing we have the interesting phenomenon of the circumstances of the new code of 2004 (Law 906). Law 906 came about, in part, by virtue of the impossible congestion of unresolved cases that existed in relation to the existing Law 600. However, Law 600 was not abolished or replaced, with the existing cases assumed by the new Law 906, but simply sent down a separate path with its congestion of existing cases. All the pre-existing cases corresponding to Law 600 were retained within and pursuant to that code framework. In theory, those prior cases would continue to be worked according to that code. To date, there is little indication of any significant resolution of any of those cases. They would appear to be well beyond the back burner, and comfortably allowed to fall between the stove and the wall. Nonetheless, this would in theory allow Law 906 to enter with an empty slate in receipt of all new cases and no congestion to impede its application, the reasoning being that the new accusatorial code would adequately deal with cases as they came without any debilitating congestion.

In this regard, criminal justice-related statistics in Colombia are difficult to come by, whether accurate or not. A broken system is loath to quantify its failure.[4] However, the anecdotal but commonly expressed figures among the functionaries themselves shed valuable light on the topic, justified largely by the source being the functionaries themselves.[5]

It is said that the cases relating to the code corresponding to Law 600 at the time of the code crossroads numbered approximately three million. Although the figure is admittedly not precise to the case, all agree that the cases amounted to millions. There is also consistent report that the impunity rate—unresolved cases—in relation to the same was about 98%. That is, of 100 cases entering the system, only 2 got resolved.

Recognizing that the code corresponding to Law 906 entered into effect in 2005, the common report today—2017, and twelve years after its going into application effect—is that there are now about ten million cases unresolved, with the same impunity rate of 98%. The afore-quoted warning by AG Humberto Martinez would seem to substantiate this. That is, nothing has changed, the supposed accusatory Law 906 having failed miserably in its purpose. In addition, the other public and official pronouncements referenced previously would seem to confirm the same.

The Citizenry

Once again, there is debate as to whether or not the culprit is the code or the management of the same. However, there is no debate that the system has failed; and this contrary to all the glowing pronouncements of the Americans. Moreover, as already referenced, there exists ***zero*** confidence among Colombian citizens as to the system's efficacy. When the Author commonly inquires of people in the street as to their opinion of the justice system in Colombia, the answers vary from *What justice system?* to *It makes no sense to report a crime, because the system doesn't respond.* Once again, in thousands of citizen encounters over the 23+ years of his involvement in Colombia, the Author has received ***no*** citizen response that even remotely resembles a positive one.

The Author's Books

In response to all of the foregoing, the Author has taken up the sword in the form of his four published books and numerous related writings. Those works show vividly not only that the Colombian criminal justice system does not work as it should and could, they explain why. Of particular interest in this regard is the last published book, which takes the message beyond mere concept to a typical case in demonstrating in a supremely practical fashion how and why the system is broken. This will be taken up in more detail hereafter.

[4] In witting or unwitting avoidance of this institutional embarrassment, the Colombian criminal justice system counts investigative and prosecutorial activities—particularly arrests and *imputaciones*—instead of cases resolved.

[5] Caseloads personally reported by Colombian functionaries to the Author range from several hundred to over five thousand. It is common for a functionary to have well over one thousand cases assigned. Those same functionaries confirm the relative absence of case resolution in favor of procedural event reporting.

Interim Summary

The paradoxical conflict is thus brought together: While the Americans and many Colombian politicians, academics and bureaucrats claim victory in Colombia's quest for justice, that system itself, in all its fundamental aspects, proclaims the contrary. This, however, neither the Americans nor the responsible Colombians can readily admit, for to do so would be to confess the misspending of millions of dollars and pesos respectively.

A Primer on Colombia's Failed System

As referenced previously, the complexity of the situation is illustrated vividly in the Author's books. However, it can be reasonably synthesized for our purposes here in confirming the paradoxical conflict. The synthesis will be made by means of five conceptual criteria, distinguishing successively between the accusatory and inquisitorial forms in the process and employed specifically in the Author's fourth book referenced above. A general solution to the procedural dilemma posed by each criteria will then be posed.

It must be stressed that the shortcomings represented by the five criteria result from fundamental defects in the present code itself, not in the mismanagement of a code that otherwise possesses accusatory mechanisms.[6] Although it can be said that the code of Law 906, in contrast with that of Law 600, takes steps toward the accusatory form, those steps remain conceptual and illusory by virtue of the fundamental retention of the inquisitorial form. The accusatory mechanisms are simply not allowed to exists in practicality. The code masquerades as accusatory, but with the same inquisitorial reality and manifestation.

1. The Inability to Prioritize and Filter Out Reported Crimes

The Accusatory Form

With the report or detection otherwise of a crime, the accusatory form investigates first before formally receiving the report or detection as an official case; and without legal obligation to formally or officially receive the matter as a case. ***Ultimately, a case may be formally and officially acknowledged, but only <u>after</u> the investigation is completed and by means of the accusation by the accuser before a judge.*** This formal, official and judicial recognition of a case by the system is referred to as the exercise of of the penal action. In the accusatory system, the post-investigation accusation constitutes the exercise of the penal action.[7]

This chronology allows for two fundamental and necessary filtering mechanisms that prevent the unnecessary congestion of cases in favor of alternative conflict resolution. First, by preceding official case recognition with investigation the system is able to detect those cases that either do not constitute crimes or that have insufficient evidence to accuse a crime. Second, even

[6] In a separate and more detailed scholarly address of this phenomenon, the Author has identified 16 primary and fundamental impediments to the Colombian system achieving its supposed accusatory quest. Without individually identifying them, the five criteria addressed herein touch upon the overall impact of the same, but in a more consolidated fashion.

[7] In cases in *flagrancia,* the circumstances of *flagrancia* constitute, if you will, the completed investigation.

with the investigation revealing a crime with sufficient evidence to accuse, by not having recognized the case officially yet the system can implement policy priorities in determining what cases it can reasonably accommodate given its inevitably limited resources.

Thus, policy prioritization can occur both at the investigative as well as accusation junctures. For example, 100 cases are received for investigative consideration. The investigative entity, given its limited resources and in policy prioritization, declines investigation of 50. Of the 50 cases investigated, 25 are filtered out either because they do not constitute a crime or because there is insufficient evidence to accuse. Of the 25 presented for accusation and prosecution, 10 are declined in prioritization at the judicial level for similar resource considerations. Of the 15 that are accused, 10 are resolved short of trial by plea bargaining. Only five to to trial. The 85 cases filtered out over the course of the process must seek alternative resolution.

Of course, the figures are hypothetical and vary depending on the investigative and prosecutorial resources available. The key is that, by not officially recognizing the case until after the investigation, the system can achieve appropriate filtration in preventing the congestion of cases and in appropriately putting the onus on other social institutions (family, community, school, church, and business enterprises) in resolution of conflict. This allows the criminal justice system to achieve its real and limited social purpose; that is, of addressing only those few conflicts that elude the handling by those institutions more responsible for the same. It also helps discourage unnecessary or unwarranted complaint and criminal litigation.

The Colombian Inquisitorial Form

With the report or detection otherwise of a crime, the inquisitorial system formally receives and acknowledges the report or detection as an official case prior to any investigation. That is, the inquisitorial form exercises the penal action upon receipt of the report or detection otherwise of the crime.[8]

This contrasting chronology ***does not permit any filtering mechanisms*** that would otherwise prevent the unnecessary congestion of cases in favor of other social conflict resolution measures. Together with the excessive penalization of conduct, it puts the criminal justice system forward as ***the*** solution to social ills.

This has procedurally fatal consequences. First, by following official case recognition with investigation the system is not able to detect those cases that either do not constitute crimes or have insufficient evidence to accuse a crime. Second, even with the subsequent investigation revealing a crime with sufficient evidence to accuse, by having already recognized the case officially the system cannot implement policy priorities in determining what cases it can reasonably accommodate given its same inevitably limited resources. There can be no policy prioritization, whether at the investigative or prosecution junctures. Of 100 cases reported or detected, all 100 have to be formally and officially received and attended to by the system. The unavoidable result is the impossible congestion of cases. The key is that, by officially recognizing the case upon receipt of report or detection and prior to any investigation, the system cannot achieve appropriate

[8] In cases in *flagrancia,* the circumstances of *flagrancia* constitute the detection as well as the completed investigation that is not otherwise required prior to officially receiving and recognizing the case.

filtration in preventing the congestion of cases.[9] That congestion is inevitable, as evidenced by the Law 600/Law 906 crossroads experiment referenced above and its related failure.

The Solution

The solution to this problem is extremely simple: Move the exercise of the penal action—the formal, official and judicial recognition of a case—from the moment of report or detection of the crime to the accusation following investigation, thereby allowing for the appropriate investigative and prosecutorial filtration mechanisms.

2. The Misapplication of Functionary Roles

The Accusatory Form

In the accusatory system, the police investigate the crimes and the prosecutors accuse and litigate the results. The investigation is the exclusive province of the police, during which they can avail themselves of the legal counsel of the prosecutor. Upon accusation, the related prosecution is the exclusive province of the prosecutor, who is counseled regarding the facts by the police investigator. Each is trained fully in their respective responsibilities. Ideally, the two work as a team of equal professionals in horizontal fashion and in oral communication from the beginning of the investigation through trial.

In determining by investigation filtration if a crime actually exists or if the detectable evidence is sufficient to charge a crime, the police investigator and prosecutor utilize a legal mechanism that can be called the *Blueprint.* Just as the construction of a building requires a blueprint, so, too, does the construction of a criminal case require a blueprint. The legal *Blueprint* consists of the legal elements which make up a particular crime as it exists in a criminal code, each of which must be sustained factually. For example, murder in the first degree consists of the following legal elements: (1) Whoever (identity of the perpetrator) (2) intentionally (3) kills (4) another person (5) with malice aforethought and (6) with premeditation, is guilty of murder in the first degree. If the 6th element is not met by the facts, it is murder in the second degree. If neither the 5th or 6th elements are met by the facts, it is manslaughter. If addition, if any one of the other 4 elements is not sustained by the facts, there is no crime of homicide. With these elements as a guide for both police investigator and accusing prosecutor, a homicide investigation can quickly, efficiently and efficaciously determine if there is a crime or not and to what degree.

By virtue of the precise definition and distinction of roles and respective professional training, the oral-based teamwork between the two, and the utilization of the *Blueprint* in

[9] In a frustrated attempt at filtration, the inquisitorial system has instituted different procedures for removing a case from official status, the most prominent of which is collectively called *oportunidad* (or opportunity, meaning the opportunity to relieve the system of the burden related to the case prior to the full application of process). Unfortunately, because they participate in the same formal procedural bureaucracy already instituted with the exercise of the penal action, the procedures—if applied at all—do little to ameliorate the congestion. Their application is further thwarted by the very inquisitorial practice of *prevaricato*, which is the penalization of erroneous decisions made by functionaries. Given such in fear of *prevaricato*, those functionaries normally prefer putting the case through the entire process rather than making a decision subject to criminal prosecution. (One prosecutor told the Author: "In the morning I am the accuser; in the afternoon I am the accused."

determining the crime—all within the procedural context of the exercise of the penal action upon accusation following the investigation—the process is extremely agile, efficient and efficacious in finding the truth.

The Colombian Inquisitorial Form

In the inquisitorial system, the prosecutor investigates the crimes, as well as accuses and litigates the results. Indeed, the investigation is the exclusive province of the prosecutor, with the police playing a subservient, almost administrative role. Moreover, the investigation is ***the*** primary focus of the criminal process. The prosecutor determines operationally all investigative steps, assuming many, if not all, of them by himself or herself and leaving to the police the performance of the more ministerial tasks. The policeman is simply the prosecutor's assistant.

Because the prosecutor is trained professionally as a lawyer, he or she is poorly prepared to investigate. Even when the prosecutor has gain practical experience investigating over time, he or she tends to focus on that function and neglect the litigation demands of the case. When multiple prosecutors are assigned administratively in order to cover the two tasks, procedural efficiency and efficacy are lost.

By virtue of the fact that the police are relegated to a subservient and relatively menial role in relation to the prosecutor, their training is either neglected or, even with the finest preparation, is otherwise not given the opportunity to manifest itself. However well trained, the police investigator is forced to await the bureaucratic arrival of the written "work order" (*orden de trabajo*) from the prosecutor, which order details the tasks to be performed by the police investigator. Because the police must perform the prescribed tasks scrupulously, they must do so in a ministerial way and in non-creative compliance. Otherwise, they are subject administrative discipline and even criminal prosecution.[10] The compliance with the order is in writing and subject to the same bureaucratic impediments as the original order. This results in two types of police investigators: the lazy ones that simply wait and comply and no more, and the frustrated ones who know that they should be pressing forward with investigative autonomy.

Any "teamwork" between the two is a vertical one of professional inequality, dominated and dictated by obligatory written communications between the two. It is the very antipathy of the dynamic, horizontal, oral relationship between autonomous police investigator and litigating prosecutor of the accusatory form. As a result, it is a significant contributor to case congestion.

There is no determination by investigation filtration if a crime actually exists or if the detectable evidence is sufficient to charge a crime. Neither the prosecutor nor the police subaltern utilize any legal mechanism that even resembles or can be called the accusatory *Blueprint* as described above.[11] Rather, the functionaries think imprecisely in terms of general legal theories or

[10] The same *prevaricato* to which the prosecutors are subject.

[11] In 1995, the Author introduced in Colombia the concept and mechanism of the *Blueprint*. It was received initially with great enthusiasm. However, in spite of the Author's pleading and warning that it not be codified and thus relegated to bureaucratic obscurity, that is precisely what happened. The current Law 906 code, by means of its *programa metodológico*, warps and delutes the *Blueprint* beyond meaningful recognition or practical application. It is simply another useless piece of bureaucratic paper to be found in the official case file. The *Blueprint* is addressed in more detail below in relation to the fourth evaluation criteria.

factual hypotheses in investigating and prosecuting a crime. "Is there a homicide?" is the essential extent of the evaluation; as opposed to: "Do we have significant proof as to every legal element of the crime we are investigating?" The belief and practice are that the process of continuous investigation by all functionaries—judge, prosecutor and defense attorney alike—will ultimately reveal what needs to be known, without more. Again, there is no specific reference to the legal elements of the particular crime. Without such as a guide for both police investigator, prosecutor and judge, the process cannot quickly, efficiently and efficaciously determine whether or not there is a crime, or to what degree. The process becomes an interminable and formal bureaucratic exercise.

Because of the absence of a precise definition and distinction of roles and respective professional training, the writing-based communication between the two, and the lack of utilization of the *Blueprint* in determining the crime—all within the procedural context of the exercise of the penal action prior to the investigation—the process is extremely cumbersome, bureaucratic, inefficient and inefficacious in finding the truth. As already referenced, this only adds to case congestion.

The Solution

Correct the roles of the functionaries, particularly those of the police investigator and prosecutor, to conform to accusatory principles. Promote horizontal, oral teamwork between the professionals based on the utilization of the *Blueprint.*

3. The Premature and Imprecise Charging of Crimes

The Accusatory Form

In the accusatory system, the mechanism of binding the suspect to the process—the obligation to participate—is the accusation and associated arrest warrant or summons, ***which follow the investigation***. The accusatory form investigates first and accuses and arrests afterwards. This makes the accusation not only the mechanism of notice of the charges but also the mechanism of binding the accused to the process or obligating him or her to participate. This, in turn, allows a judge to determine the sufficiency of the accusation—by means of the same legal *Blueprint*—with the benefit of a completed investigation. The completed investigation also permits the judge to address with the same factual basis and benefit the issues of how to guarantee the ongoing presence and participation of the accused by means of either preliminary incarceration or terms and conditions of release pending trial. With the accusation based on the precision of the *Blueprint*, the accused has adequate notice of the charges and the corresponding ability to evaluate and defend against the same, together with the revelation by the prosecutor to the defense of the results of the investigation (the *discovery*).

With the accusation constituting the mechanism of binding of the accused to the process, the attorney for the defense does not formally intervene until the time of accusation. This frees the investigation from further procedural formality (motions and hearings) and publicity that otherwise arise with the intervention of the defense attorney. That investigative freedom and related secrecy are required in order to permit a thorough and protected investigation so that the prosecution can

comply with its heavy and exclusive burdens of proof at trial. Exclusion of the defense is ameliorated by the strict requirement of factual discovery by the prosecution to the defense upon accusation.

Because the accusation also constitutes the exercise of the penal action, with the investigation free of that formality and that of the procedural intervention of the subject of the investigation, the accused is brought into the process presumed innocent. From that fundamental presumption of innocence, the accused is endowed with the right to remain silent and, from that, the right to impose upon the prosecutor as the accuser the exclusive responsibilities of (1) presenting evidence at trial and (2) proving the accused guilt beyond a reasonable doubt as to each of the legal elements of the particular crime charged. If the prosecutor fails in either of those exclusive responsibilities or burdens of proof, the accused must be either absolved of the accusation or acquitted outright.

The Colombian Inquisitorial Form

In the inquisitorial system, the mechanism of binding or obligating the suspect to the process is the *imputación*, ***preceded*** by the associated arrest warrant (without possibility of summons), all of which occurs early in the formalized investigation with only some factual indication of the author of the crime required. The inquisitorial form arrests and binds first on minimal and incomplete evidence in order to complete the investigation afterwards; ***it arrests in order to investigate***.

The *imputación* then becomes the deficient mechanism of notice of the charges as well as the mechanism of binding the accused to process or obligating him or her to participate; all based on an incomplete investigation and its factual dearth. This, in turn, effectively deprives the judge to whom the *imputación* is presented of the facts associated with a completed investigation in determining the sufficiency of the charging mechanism. Moreover, neither the prosecutor nor the judge utilizes any notion of a *Blueprint* in legal and factual precision of the charges. The procedural application at this juncture is simply the acknowledgement that a crime is charged and which should be further investigated.

The incomplete investigation also denies the judge the ability to address preliminary incarceration or terms and conditions of release pending trial with any reasonable degree of factual basis and benefit. Without the accusation based on the precision of a *Blueprint*, the *imputado* has woefully inadequate notice of the charges and the corresponding inability to evaluate and defend against the same. Accordingly, there is no discovery to the *imputado* of a completed investigation. Indeed, this is the very purpose of the *imputacón,* namely, force the *imputado* to prove his or her innocence as ***the*** means of investigating further. Thus, the *imputado* is presumed guilty with an expectation that he or she prove his or her innocence, with no obligation that the prosecutor assume any exclusive responsibility of proving guilt. The prosecutor has no exclusive burdens of proof.

With the *imputación* constituting the mechanism of binding of the investigated to the process, the attorney for the defense formally intervenes early in the already formal investigation. This intervention serves only to further increase and escalate the procedural formality with all the related paperwork, hearings and audiences associated therewith. This increased procedural

formality bogs the process down immeasurably and turns investigations that should take days into those that take months and years. Moreover, all investigative secrecy is lost at the accusatory expense of the prosecutors and police, but is replaced with the inquisitorial notion that the best way to investigate is to arrest the subject and have him or her prove their innocence. Thus, the system frees the prosecution of any exclusive burden of proof, and shifts the same to the defense. Even the Colombian "discovery" prior to trial confirms the same, with that revelation being required of the defense as well as the prosecution.

To be sure, because the *imputación* follows the exercise of and is subject to the formality of the penal action, the *imputado* is brought into the process presumed guilty. From that fundamental presumption of guilt, the *imputado* is burdened with the obligation to prove his or her innocence, with no corresponding right to obligate the prosecutor to assume any exclusive responsibility as to either (1) presenting evidence at trial and (2) proving the accused guilt beyond a reasonable doubt as to each of the legal elements of the particular crime charged. The prosecutor only has the responsibility of showing guilt, while the *imputado* still has to prove innocence.

The Colombian *fiscalía* acknowledges on its official website that it takes over 1,000 days on average to move a case through the system, if it gets moved at all. In this regard, they continue to arrest as the primary means of investigating in hopes of getting a confession. In the process, the prosecutors are evaluated in terms of the number of written work orders (*ordenes de trabajo)* submitted to the police, as well as the number of *imputaciones*; while police investigators are evaluated in terms of the number of arrests. No one is measured in terms of quality of work. The focus is on statistics as to arrests and *imputaciones,* and not on cases resolved.

The Solution

Eliminate the *imputación* in favor of the accusation as the mechanism of charging and of binding the suspect to the case.[12]

4. The Inability to Detect and Remove Deficient Cases

The Accusatory Form

The accusatory system has multiple opportunities by means of which the process is compelled to detect and remove any legally or factually deficient case. This faculty is based upon the fundamental nature, purpose and constant use of the *Blueprint.* Those procedural opportunities are as follows: (1) In receiving the report of a crime, or in detecting the same, the police officer immediately applies the indicated *Blueprint* in making an initial evaluation and possible filtration of the case. (2) During the ensuing investigation the same application and evaluation are made constantly by police investigator and prosecutor alike in constant vigil of the sufficiency of the case. (3) In determining whether or not the investigation should result in a formal charge or accusation, the police investigator and the prosecutor—together with their superiors in many

[12] The irony here is that the Colombian code also contains the mechanism of the accusation—part of its artificial effort to adopt accusatory principles. However, in the presence of the *imputación* as the true mechanism of suspect binding, the accusation loses such a faculty and is, accordingly and inquisitorially, converted into a preliminary finding of guilt in absolute prejudice to the trial judge.

cases—make a definitive decision of sufficiency: Is there competent evidence as to every legal element of the crime (the *Blueprint*) that will permit not only an accusation but success at trial? (4) The accusation must be presented to a judge (of grand jury) for a preliminary judicial determination of legal and factual sufficiency, all based upon the *Blueprint.* (5) Subsequent to the acceptance of the accusation by the judge as legally sufficient (according to the *Blueprint*), the defense can challenge the adequacy of the accusation in terms of the *Blueprint* before the superior trial judge. (6) At trial and at the conclusion of the prosecution's presentation of evidence, the defense can challenge and the trial judge must evaluate, by means of the *Blueprint,* whether or not the prosecution has fulfilled its exclusive responsibilities of proof of (a) presenting evidence at trial and (b) proving the accused guilt beyond a reasonable doubt as to each of the legal elements of the particular crime charged. (7) Whether or not the defense presents evidence of innocence at trial, at the end of the presentation of evidence the defense can once again challenge and trial judge (or trial jury) must evaluate whether or not the prosecution has proven each and every legal element of the crime charged beyond a reasonable doubt.

This process of scrutiny as to precision and sufficiency of charging guarantees the filtration of unworthy cases in the efficiency, efficacy and justice of the accusatory system, thus ensuring the charging and bringing to trial of only worthy cases. It also ensures a higher degree of professional work product by police investigator and prosecutor alike.

The Colombian Inquisitorial Form

The Colombian inquisitorial system lacks such multiple opportunities by means of which the process is compelled to detect and remove any legally or factually deficient case. There is no fundamental purpose and constant use of the *Blueprint* in any of the seven accusatory manifestations or otherwise. (1) In receiving the report of a crime, or in detecting the same, the prosecutor applies no indicated *Blueprint* in making an initial evaluation and possible filtration of the case. (2) During the ensuing investigation there is no application and evaluation made by any police investigator or prosecutor in constant vigil of the sufficiency of the case. (3) In determining whether or not the investigation should result in an "accusation" (whether *imputación* or subsequent "accusation), there is no determination by police investigator and the prosecutor—or with their superiors—as to whether or not there is competent evidence as to every legal element of the crime (the Blueprint) that will permit not only a charging but also success at trial. Indeed, that is the supposed purpose of the inquisitorial trial. (4) Neither the *imputación* nor subsequent "accusation" is presented to a judge for a preliminary judicial determination of legal and factual sufficiency, whether based upon the *Blueprint* or not. The charging is a mere investigative formality. (5) The defense cannot subsequently challenge the adequacy of the accusation in terms of the *Blueprint* before the superior trial judge. (6) At trial and at the conclusion of the prosecution's evidence, the defense cannot challenge and the trial judge does not evaluate, by means of the *Blueprint,* whether or not the prosecution has fulfilled any exclusive responsibilities or burdens of proof of (1) presenting evidence at trial and (2) proving the accused guilt beyond a reasonable doubt as to each of the legal elements of the particular crime charged. As we shall see, such exclusive responsibilities do not exist with the prosecution at trial. Rather, upon the conclusion of the prosecution's evidence of guilt, the judge turns to the defense for its evidence of innocence. (7) Given such, at the conclusion of all the evidence, there is no additional determination by the judge as to whether or not the prosecution has proven each legal element of

crime charged beyond a reasonable doubt. Rather, the judge simply decides between the prosecution and the defense as to who has the strongest case.

There is no process of scrutiny as to precision and sufficiency of charging that guarantees the filtration of unworthy cases in the efficiency, efficacy and justice of an accusatory system. Rather, there is the process of perpetual investigation from report of crime to trial founded on general theory and hypothesis in total inefficiency, inefficaciousness and injustice. Thus, not only is it common practice for weak and deficient cases to be brought to trial, the prosecution has no incentive to investigate with precision. The procedural theme is: Everything to be determined later.

The Solution

Alter the code so as to provide for the seven moments of scrutiny based upon the *Blueprint,* but without codifying the latter into bureaucratic oblivion; applying the *Blueprint* as a practical tool that must be applied with the dexterity of informality.

5. The Absence of Due Process in Trial

The Accusatory Form

As referenced earlier, in the accusatory trial the prosecutor has the exclusive burdens of proof of (1) presenting evidence at trial and (2) proving the accused guilt beyond a reasonable doubt as to each of the legal elements of the particular crime charged. The accused has no obligation regarding presenting evidence or proving innocence at trial. Once again, these Due Process rights stem from the presumption of innocence and the corresponding right to remain silent. The accused may present evidence of innocence, but is not required to; and only does so after the court scrutinizes the prosecutor's evidence as admitted in determining whether or not the prosecution has presented significant evidence as to every legal element of the particular crime or crimes charged (the *Blueprint*; and the sixth opportunity for scrutiny referenced above).

The accusatory trial is oral in the primary sense of the oral testimony of witnesses through confrontation by means of the direct and cross examination by the lawyers. The argumentation of the lawyers is complementary and secondary. This immediacy of witnesses (*inmediación*) reflects the system's abhorrence for hearsay, whether in oral or written form. It is characterized by the refrain that a document or an absent person cannot be confronted or cross-examined. There is no official case file of written reports and expert witness findings. The authors of the reports or findings and those referenced by them as witnesses are the in-person focus of the trial.

The legal elements of the particular crime charged, or *Blueprint,* are the guiding and controlling mechanism throughout the trial in determining relevancy and, therefore, admissibility of evidence. The determination of admissibility is an integral part of the confrontation or the immediacy of witnesses as ***the only*** legally justifiable source of information and therefore cannot take place prior to trial by means of hearsay debate among lawyers. To be admissible, a testimony or physical object as testified to must have some tendency in logic to prove one or more of the legal elements of the crime charged. If not, it is excluded as irrelevant. Therefore, the *Blueprint* guides and dictates every aspect of direct and cross examination and related objections and lawyer

arguments or presentations otherwise. Guilt or innocence is determined in terms of whether or not the prosecution has proved beyond a reasonable doubt every single legal element of the crime charged, regardless of the absence or presence of evidence of innocence by the defense. Any such evidence is simply an aspect of the *Blueprint* evaluation. If just one legal element goes lacking in this regard, there must be an acquittal.

The impartiality of the trial judge is paramount in the accusatory trial, in order to avoid bias or prejudice. For this reason, the trial judge's only access to the evidence is by means of the witnesses or possibly factual stipulation between the parties. The judge has no access to any investigative report prior to trial, and the only judicial contact at trial is by virtue of possible disputed reference to the same in witness testimony.

The Colombian Inquisitorial Form

In the Colombian inquisitorial system, there are no exclusive burdens of proof in the prosecutor at trial. The prosecutor has the responsibility of proving guilt and the accused has the responsibility of proving innocence, with the judge deciding between the two as if in a subjectively judged athletic competition. Once again, this absence of Due Process rights stems from the presumption of guilt and the corresponding obligation to prove innocence resulting from the *imputación* early in the investigation. This duality of proof responsibility first manifests itself in what is called the *audiencia preparatoria* (preparatory audience) prior to trial, where the judge requires the prosecution to announce its evidence of guilt and the defense its evidence of innocence.

The inquisitorial trial is oral in the primary sense of the oral argument of the lawyers founded in the written reports and other documents of the official case file, with the testimony of some witnesses being complimentary and secondary in clarification. This de-emphasis of the immediacy of witnesses (*inmediación*) reflects the system's extreme reliance on hearsay, as a direct result of its primary reliance on written reports and documents. It violates directly the maxim that a document or an absent person cannot be confronted or cross-examined. Once again, this is because the system founds itself primarily on the official case file of written reports and expert witness findings. The reports and not the authors thereof remain the primary focus of the Colombian trial, with witnesses serving only to clarify or confirm the same in very limited fashion. Given such, witnesses in the Colombian trial are more for oral show than for procedural substance.[13]

As is the case previously in the process, there is no emphasis whatsoever on the legal elements of the particular crime charged, or *Blueprint,* as any guiding and controlling mechanism throughout the trial in determining relevancy and, therefore, admissibility of evidence. Rather, relevancy and admissibility of evidence are determined prior to trial in the preparatory audience and as the result of the hearsay representation of evidence by the lawyers. Thus, the determination

[13] A related resource as to this reality is the Author's PowerPoint presentation entitled *Accusatory Trial Techniques and the Mixed/Inquisitorial System—from the prosecutor's perspective: A Square Peg in a Round Hole.* The presentation explains how the accusatory trial techniques taught in Colombia by the USDOJ over the past two decades—and with the associated expense of millions of dollars—are largely inapplicable to that inquisitorial system given their nature as the exclusive product of an accusatory system. It is another aspect of classic *Spend and Pretend.*

of admissibility of evidence is ***not*** an integral part of the confrontation or the immediacy of witnesses as ***the only*** legally and accusatorily justifiable source of information. Instead, the inquisitorial form violates directly and fundamentally the accusatory form by dictating the determination of admissibility of evidence prior to trial by means of hearsay debate among lawyers.

To be admissible, a testimony or physical object as represented by the lawyers in pre-trial hearing must simply be determined to have some general nexus with the case according to equally general legal theories and factual hypotheses. There is no requirement that a testimony or physical object must have some tendency in logic to prove one or more of the legal elements of the crime charged. Therefore, the *Blueprint* plays no role in guiding or dictating any direct or cross examination. As a direct result, such examinations tend to ramble endlessly and involve as much or more irrelevant information as they do relevant, given the pre-trial determination of general source admissibility by the lawyers. Guilt or innocence is determined in terms of who presented the most persuasive evidence as between the prosecution and the defense, and has absolutely nothing to do with whether or not the prosecution has proved beyond a reasonable doubt every single legal element of the crime charged.

The Colombian inquisitorial form ignores completely the accusatory principle of impartiality of the trial judge in avoidance of bias or prejudice. Indeed, judicial partiality and bias and prejudice are the order of the day in the Colombian trial. Even before the trial the trial judge has complete access to the the official investigative file at the preparatory audience. Therefore, if and when a witness testifies at trial, that testimony is truly supplementary and secondary to the judge's pre-existing knowledge of the facts. When to this is added the extensive novel-like written accusation setting forth in detail all the findings of the investigation and to which the judge has equal access, the Colombian judge enters the trial inevitably given to at least a preliminary finding of guilt, and possibly having succumbed to those biases and prejudices generated by the same. The Colombian accused is most definitely presumed guilty not only at the moment of *imputación,* but upon accusation and trial.

The Solution

The Colombian preparatory audience must be abolished; the exclusive burdens of proof must be duly allocated to the prosecution as the accuser. The accusatory rule against hearsay must be observed at trial with a discontinuance of the use of the investigative file at trial and with due and exclusive emphasis of the testimony and confrontation of witnesses and the impartiality and neutrality of the trial judge. The *Blueprint* must control all aspects of the trial in the due determination of relevance and admissibility of evidence.

The Colombian Case of *Colmenares*

As referenced already, in his fourth published book the Author took a factually typical (but high profile) case of charged homicide to demonstrate the manifestation of each one of the foregoing procedural considerations. In this legal sense, the case is also very typical of the ills of the system; the case poster child of the failed system as publically and officially acknowledged by key senior functionaries as afore-referenced.

The facts of *Colmenares* are monumentally simple. A group of young adults were celebrating Halloween with eating, drinking, talking, dancing and partying otherwise. Several of them left the primary party location in the dark of the early morning hours. A young man, member of the group, was seen by two young ladies falling into a concrete drainage canal. He was later found in the same, having died from head injuries and drowning.

The prosecution claimed and charged criminally that the young man had been assaulted by unidentified assailants, resulting in head wounds that contributed to his death by drowning in the water of the canal; the young ladies having witnessed but not reporting the assault. The defense was that the young man accidentally fell into the canal, struck his head in the fall and subsequently died of drowning.

Without going into the merits of the respective positions, from an efficiency standpoint this case would have taken at most a few weeks if not days to investigate in an accusatory system. Even if that investigation would have determined the commission of a homicide, the related prosecution would have taken a few months at most. In contrast, the case of *Colmenares* in the Colombian inquisitorial system took over two years to investigate and nearly four years to try—over six years to adjudicate a case that should have taken no more than six months in a truly accusatory system. And it has not ended yet. In the Colombian system both parties have the right to appeal, resulting in the prosecution appealing this case. Moreover, the courts of review do not act strictly in an appellate capacity as in the accusatory form; they can, in effect, re-investigate and re-try the case. The ancient inquisitorial investigation (*instrucción*) lives on.

This absurd inefficiency is explained in fundamental part by, first, the congestion of cases derived from the exercise of the penal action upon receipt of the crime report. As essentially referenced by one of the prosecutors in complaining of overwork but diligence, nonetheless, in relation thereto: “This case was added to my already existing thousands of cases.”

It is explained secondly by the confusion of roles between the prosecutor and the police investigator and the inept vertical and written relationship that exists between the two. Investigative ineptitude by virtue of the bureaucratic paradigm was the order of the day (or years).

It is explained, thirdly, by the early *imputación* and the corresponding increase in procedural formality with the intervention of the defense during the subsequent investigation and the plethora of hearings necessarily associated with such procedural formality. As with the ancient inquisitorial instruction form, the investigation became a prolonged inefficient and inefficacious trial by arrest.

Fourthly, the *Colmenares* case is a classic example of the inability of the Colombian system to detect and remove deficient cases. From the standpoint of the legal elements of the crimes charged (the *Blueprints*), as manifested from the earliest moments of the case (at least by the time of the *imputación*) and according to the facts as officially proclaimed by the prosecutors, those prosecutors were completely incapable of proving those charged crimes according to the elements. However, the prosecutors could not see this because they were not considering—nor were they required to consider—the specific legal elements of the crimes they were charging in identifying

precisely the relevant facts. By virtue of their general legal theories and factual hypotheses they simply but inaccurately shouted "homicide," when in truth and in fact they could ***never*** prove that crime with the facts they had according to the *Blueprints* and according to their own factual admissions. Moreover, no judge at any moment ever required the same of them. The shout of "homicide" was judicially but shallowly heard and acknowledged as the case passed from phase to phase in its completely deficient state. ***Indeed, the prosecutors could never prove the crimes according to accusatory principles, but that made no difference. According to the inquisitorial form, the case had to be attended to and duly but bureaucratically passed from procedural event to procedural event, until trial; with no concern or consideration as to potential defects.*** Moreover, the defect was not even recognized or acknowledged at trial, the judge simply ruling that the defense evidence was stronger than that of the prosecution; that the evidence showed death more likely by accident that by homicide. Stated differently, had this case occurred in an accusatory system, it would never have survived the earliest stages of the investigation, but would have been filtered out as not constituting a crime, but death resulting from an accident. Even if it had somehow survived the investigation, it would never have passed muster with regard to the other six moments of case scrutiny mandated by the accusatory form. Ironically, accidental death is precisely what the Colombian judge ultimately found, ***but after more than six years of wasted time, energy, emotion and money.***

Finally, by virtue of the *imputación* as a premature and deficient charging and binding device, the young ladies charged in *Colmenares* were presumed guilty, with the responsibility of proving their own innocence. This they had to do not only at trial, but by means of the social media during the bulk of the preceding investigation made public by the premature binding of the accused by means of the *imputación*. This blatant violation of Due Process continued in the preparatory audience, where the Defense was required to propose and substantiate its evidence of innocence in refutation of that of guilt by the prosecution. The accused in *Colmenares* had no right to require of the prosecution the exclusive burden of evidence proof at trial; rather, the young ladies had to prove their innocence because they were presumed guilty.

This they did, and successfully, but in doing so another frightening reality of the Colombian inquisitorial system was revealed. Although the prosecution's own Legal Medicine opined that the cause of death was an accidental fall, the prosecutors rejected that expert opinion evidently in favor of outside pressure, probably from the family of the deceased. Consequently, they went out and found an expert who was willing to opine that the death was due to a homicidal blow, which the accused young ladies had theoretically seen and not reported. Given the duality of responsibility between prosecution and defense in proving guilt or innocence respectively, the defense had to go out and locate and fund experts who could refute the same. This was readily done given the facts, but was horrendously costly; which costs were mirrored by those of the defense team required to protect the young ladies from prison. In short, the defense cost a large fortune, one able to be borne fortunately by the two families of the accused. However, had they not been so endowed financially, these young ladies could never have mounted such a defense. Admittedly, financial and advocate inequality among accused is a factor in the accusatory system. However, even the poorest of accused have the benefit of a system that permits and requires even the most ordinary of functionaries to detect and act on legal and factual deficiency. In Colombia, however, where financial inequality is coupled with the inability of the system to detect case deficiency regardless of the financial demands of the particular case, other poor accused in these girls' shoes would

undoubtedly have been convicted and gone to prison. System inability to detect deficiency plus the presumption of guilt and the burden of proving innocence equates to procedural abuse and summons the specter of defective cases commonly going undetected and unprotected in Colombia; and innocent people, or people against whom the evidence is legally insufficient, going to prison.

The two accused young ladies in *Colmenares* were acquitted ***in spite of the system*** and only by the grace of wealthy parents, a capable and diligent defense team, and the integrity of a judge who was willing to perceive beyond what the system was wanting or requiring her to see. In this regard, having been involved in a number of homicide cases as a defense attorney and as a prosecutor, the Author believes that this case—without wealthy parents and with average, run-of-the-mill prosecutors, defense attorneys and judges—would never have made it to accusation or trial; thereby alleviating both the system and the people involved of such a travesty of justice.

Spending and Pretending—Some Data

Against this contradictory backdrop of success claim and confession (with supporting proof) of failure (at least in part by the Colombians), we are in a position to specify in some measure the ***spending and pretending*** that the contradiction represents. This shall be done by examining individually the years 1993 (with some reference to 1991 and 1992) to the present with regard to U.S. government dollars spent on criminal justice reform in Colombia in relation to official statements by the U.S. government as to its goals and/or results. That is, from the standpoint of the U.S. government: "We spent this much money on Colombian justice reform and these are our related goals and results." For our purposes, the two basic funding sources are INL of DOS and USAID.

The sources of INL information are three:

The annual International Narcotics Control Strategy Report (INCSR);

The International Narcotics Law Enforcement (INL) Congressional Budget Justification (CBJ); and

The International Narcotics Law Enforcement Affairs: Program and Budget Guide (INL PBG).

The CBJ and the INL PBG are relied upon primarily for the financial data, while the INCSR is looked to for the corresponding statements of purpose and achievement. Although the CBJ also contains commentary as to program purpose and achievement, the INCSR commentary addresses the same and in what the Author perceives as a more comprehensive treatment.

This data is additional to that already referenced above, particularly that corresponding to USAID and the US$36 million it dedicated to Law 906—the current and very flawed criminal procedure code. The Author has not identified USDAID funding of system reform according to specific years.

In relation to all of the information provided in this paper, it must be borne in mind that what has happened in Colombia is similar to that which has occurred in other Latin American countries. The policy of ***Spending and Pretending*** is the same.

With this in mind and in accuracy and fairness, there is a significant caveat to the overall message of this paper of failure and duplicity. When the Author first went to Colombia in 1994, he met Carl Risheim, who was then the head of the Colombia ICITAP office. He holds that same position presently. With his help, the Author immediately recognized in Risheim a vision beyond mere training. From the first moments of their professional alliance, Risheim preached practical application as the only acceptable goal; that training, as accurate and powerful as it must be, is meaningless without immediate and concrete implementation. Risheim has carried this paradigm and related resolve throughout Latin America in his role as not only ***the*** leading ICITAP figure and USDOJ expert, but the preeminent authority in the law enforcement field world-wide. The Author saw it again prominently in Mexico, where he once again worked closely with Risheim in the attempted reform of the Mexican criminal justice system (2008 and 2009). However, in Mexico, as in Colombia and elsewhere—as demonstrated by this paper—the various bureaucracies resisted the transition in favor of (1) pursuing and measuring achievement in an easier but much less effective way by the Americans; and (2) retaining the past and merely paying lip service to the future by the respective foreign governments. To Risheim's chagrin, the collective attitude has been: "Let's just train, count bodies and money and pretend we are getting somewhere."

In swimming against this popular bureaucratic current, Risheim has experienced significant success in Colombia as far as increasing the professional capabilities of the Colombian police. Their training has been exemplary with a specific eye toward practical application. However, in spite of that professional police improvement, the criminal justice system as a whole—dominated by the lawyer prosecutors—has effectively prevented the police from assuming their due accusatory role as the true investigator; all in favor of the ill-formed prosecutor domination of this responsibility in typical inquisitorial fashion. This factor alone accounts for a major portion of the failure of the Colombian criminal justice system.

In this regard, the prosecutor counterpart to Risheim and ICITAP is Brian Larson, an experienced Assistant United States Attorney from the District of Arizona and long time Resident Legal Advisor (RLA) of OPDAT in Colombia. In the Author's opinion, he, too, has a singularly clear vision of the Colombian criminal justice problem. In spite of his valiant efforts, he has also been made to swim against the current until he finally departed Colombia in 2016.[14]

Therefore, the Author pointedly removes Risheim and Larson from the criticism of this paper, as perhaps the staunchest opponents of and exception to the policy of ***spend and pretend.***

[14] There are perhaps others, both within ICITAP and OPDAT, who have made similar efforts in moving Colombia toward the accusatory ideal, while recognizing or sensing to one extent or another the ***spend and pretend*** reality involved. Because the Author does not have direct and personal knowledge of them, he cannot identify them as such. However, Paul Vaky of OPDAT comes to mind as an example.

The Yearly Evidence of *Spending and Pretending*

With the foregoing introduction, we now proceed to a documentation of at least a portion of U.S. taxpayer dollars spent in support of Colombia's frustrated quest for an accusatory system. The years documented are from 1993 to 2017, but with retrospective reference to 1991 and 1992.

1993

The Author has not found specific U.S. government spending amounts for this year. However, it was the year in which the DOJ began the process of having the Author remove to Colombia in order to start the Colombian reform support efforts in light of the new, "accusatory" procedure code of 1991. This constituted the very early days of DOJ's OPDAT. It also marked the early days of the new Colombian *Fiscalía General,* or the Attorney General's office. The 1996 report hereafter references $36 million dedicated to justice sector reform beginning in 1991.

The corresponding INCSR reads in part as follows:

> The GOC opened its new Prosecutor General's office July 1, an important step in criminal justice reform and in improving the prosecution of narcotics cases.
>
> Law Enforcement Efforts. All Colombian security forces engage in narcotics control operations to some degree. In addition to participating actively in operations "Support Justice" (detection and monitoring) and "Green Ice" (money laundering), security forces conducted thousands of routine operations throughout the year. Led by the CNP's Directorate of Anti-Narcotics (DAN), security services in 1992 arrested more than 1,700 suspects, seized or destroyed almost 39 mt of cocaine HCl and cocaine base, over 200 cocaine labs, more than 6,000 drums of ether, acetone and MEK, 110 airstrips, and over 30 aircraft.

Although the reports reflect the very early days of the reform effort by the respective governments, the success measurement trend is already set in terms of counting arrests and seizures as opposed to cases successfully resolved. The former is easily done administratively and statistically, but does not measure the ability of the system to actually resolve cases. This distinction is critical in our evaluation and appreciation of the phenomenon of ***spend and pretend.***

As a prelude to what follows and in further clarification of what has preceded, the accusatory system measures success in terms of case resolution. An investigation or prosecution means nothing unless each results in the respective case being resolved. In contrast, the inquisitorial system measures success in terms of procedural events realized, whether investigative or prosecutorial, without regard to case resolution. This is explained by the fact that the inquisitorial system has great difficulty resolving cases—for the reasons specified previously—and must thereby resort to alternative measurement in management justification.

1994

This is the year of the Author's first contact with Colombia as a prosecutor advisor, with the corresponding USAID budget still presumably in definition. Nonetheless, the initial focus was on training the new procedural code of 1993. In this regard, the Author must confess that, at this time, he did not appreciate the distinction and relationship between training and implementation—in talking concepts and in actually doing something with them as practical mechanisms. That realization was not long in coming however.

The corresponding INCSR read in pertinent part as follows:

> The USG helped the GOC improve its judicial protection system. Most USG support is for training and technical assistance. In 1993, 641 judges and prosecutors received training from USAID, and 921 investigators, forensic technicians, and others attended courses in Colombia and in the US offered by the International Criminal Investigative Training Assistance Program (ICITAP), a DOJ program financed by USAID. In May, DOJ conducted a one-week seminar attended by senior DOJ prosecutors and their Colombian counterparts responsible for the investigation and prosecution in Colombia of major Colombian traffickers. USAID also agreed to let the GOC use aid-generated funds to help finance local projects encouraging the voluntary eradication of opium poppy.

1995

Once again, the Author has no specific recollection or record of the funding amounts related to justice sector reform during this year. Regardless, as seen from the INCSR portions quoted hereafter, the justice sector deficiency was duly noted; against which training without due regard to implementation was the answer.

> The Colombian constitution prohibits extradition of Colombian nationals, thereby precluding US prosecution of most of the notorious trafficking leadership. Unfortunately, the GOC has not itself mounted successful legal actions against major narco-traffickers. Moreover, Colombia has continually permitted major traffickers to receive utterly unwarranted benefits for surrendering, has imposed on them sentences wholly out of keeping with the gravity of their offenses as provided in US provided evidence, and has entirely failed to force them to disgorge their ill-gotten gains. Indeed, despite the GOC's assurances that it would take steps to ensure that traffickers receive sentences commensurate with the seriousness of their crimes, including the forfeiture of criminally derived assets, it has done little to rectify the weaknesses in its legal system. Finally, Colombia has not been able to assure the safety of witnesses or their loved ones. For all these reasons, the United States had to suspend evidence sharing in new cases.
>
> * * *
>
> The USAID justice sector reform project (JSRP) assists the GOC in its long term efforts to restructure key sector entities, with special emphasis on the criminal justice system.

> The JSRP also seeks to improve the effectiveness of the judiciary and the office of the prosecutor general, to expand access to the judicial system, and to strengthen judicial protection capabilities. This is being accomplished through training, technical assistance, and a number of sub-projects being carried out in selected geographical jurisdictions.
>
> USAID has provided training to magistrates and judges on the provisions of the new (1993) criminal procedures code and sponsored short term visits to the United States and selected Latin American countries for members of the superior judicial council and the prosecutor general's office to give them the opportunity to observe effective court administration and demand reduction programs. In 1994, more than 2,300 judges, prosecutors, investigators and administrative support personnel benefited from training provided directly by USAID or under its cooperative agreement with the Colombian foundation for higher education (FES).

1996

Once again, without a specific budget reference, the pertinent portion of the INCSR reads as follows:

> Colombian justice sector entities are supported by ongoing projects, most notably the $36 million USAID Justice Sector Reform Project, which was authorized in August 1991. Project objectives are to decrease the backlog of pending criminal cases; to reduce the time required to process cases; and to expand access to the judicial system. Support consists of technical assistance and training managed by ICITAP and OPDAT. During 1995 ICITAP provided training for investigators and judicial police in subjects from crime scene investigation to judicial protection. OPDAT trained 60 prosecutors representing the most critical offices responsible for major prosecutions.

Not only is the US$36 million investment in reform specifically mentioned, it is extremely important to note the system defects singled out, namely: backlogged cases, processing inefficiency, and poor access to the system. Of course, these are the precise defects bemoaned by senior Colombian functionaries and the public in 2017.

1997

Relying upon the general USAID investment figures referenced in the prior year, the INCSR states:

> **Bilateral Cooperation.** USG agencies, including DEA, FBI, USAID, and training elements of the Department of Justice, work with GOC law enforcement and judicial entities to increase the effectiveness of the Colombian judicial system. They assist in developing and refining law enforcement capabilities, training host nation counterparts, and improving access, fairness and public perceptions of the justice system. For example, over 3,100 magistrates and prosecutors were trained in 1997. Training has had uneven results.

The general nature of the report suggests tentativeness in program progress. Again, training is the success standard. However, its reference is followed by the timid yet telling statement that "[t]raining has had uneven results." This undoubtedly reflects the fact that, by this time, the Author had learned that training without implementation was a waste of energy and money. Accordingly, he pressed for application beyond training courses, but was ignored or resisted by both governments. Ultimately, the Author was politely asked to return to his work as an Assistant United States Attorney in the U.S. He had learned a powerful lesson, however; that training courses were the easiest way for the Americans to justify budget expenditure in counting bodies trained and related money spent, but without meaningful results. He also learned that the Colombians, for the most part, were not adverse to the arrangement given their desire to retain existing legal tradition and practice, regardless of the defects. Since then, the Author has learned from first hand experience that the same American foreign policy is applied in other countries, with the same paradigm of the host nation. ***Spend and pretend*** is institutionally entrenched.

1998

Borrowing once again from the 1996 reference to $US36 million dedicated to justice sector reform, the INCSR made no specific reference to that reform, including training courses. This is perhaps explained by the general ineffectiveness of the same, if they did in fact occur. However, it did reference the following:

> In 1998, Colombia's Office of the Prosecutor General (Fiscalia) created a new special unit of prosecutors and agents dedicated to the investigation and prosecution of forfeiture and money laundering cases. However, despite intensive training, both in-country and in Washington, the new unit accomplished little in 1998. We have also received information about high turnover among prosecutors in this unit.

The notable observation is that intensive training of the unit resulted in little accomplishment. The explanation is two-fold. First, training without correlated implementation is worthless. Second, training to a defective system yields nothing. Rather, the fundamental defects have to be removed.

1999

With the same previous budgetary inference, the INCSR reads in pertinent part:

> **Bilateral Cooperation.** Judicial reform in Colombia moves forward, albeit at an extremely slow pace. USAID coordinates the USG's justice sector reform program in cooperation with the Department of Justice (OPDAT and ICITAP). This long-term effort is aimed at strengthening the administration of justice in Colombia through support and training for judges, prosecutors, and investigators. Since 1991, several thousand law enforcement officials have received training in basic investigative techniques and planning. Recently, OPDAT and ICITAP have focused on the development of task force units (teams of prosecutors and police) that are charged with investigating money laundering, corruption, narcotics and human rights violations. Human rights training is an important element of

> the program and has been provided in the United States to some program participants. USAID and OPDAT continue to support the judicial branch in a challenging effort to establish oral trials in a country that has traditionally relied on written evidence and the inquisitorial system to resolve cases.

Once again, the report is timid regarding any progress in system reform, falling back on the old bureaucratic standby of training "[s]ince 1991;" shorthand for classroom time but without any meaningful field implementation of the concepts supposedly treated there. The "challenging effort to establish oral trials" shows itself inept, with the goal illusory in favor of the retention of old inquisitorial form in the fictional resolution of cases.

Also, for the first time the INCSR references the number of yearly arrests in the narcotics realm as a supposed statistical measurement of success and progress. However, this is fallacious in the extreme. As referenced earlier in this paper, the inquisitorial system does not measure case resolutions by virtue of its relative inability to actually resolve cases for the reasons stated. Rather, it measures events, the most prominent of which is the arrest in conjunction with the *imputación* as the charging and suspect binding mechanism. This, of course, is deceptive in that the arrest and related *imputación* seldom result in a resolved case. Indeed, they are the institutional tongue-in-cheek substitute for the same. In this regard, it is common knowledge that in 2017 the police continue counting arrests and the prosecutors continue counting *imputaciones* as the artificial means of measuring system productivity.

Nonetheless, the yearly arrest count as reported in 1999 was as follows: 1991, 1,170; 1992, 1,700; 1993, 2,562; 1994, 2,154; 1995, 1,745; 1996,1,561; 1997, 1,546; 1998, 1,961.

2000

The 2000 INCSR now talks earnestly in terms of ***spending*** by means of the following:

> On July 13, 2000, President Clinton signed into law a comprehensive $1.3 billion assistance package in support of the Government of Colombia (GOC) "Plan Colombia," an integrated strategy focusing on the peace process, the economy, the counternarcotics strategy, justice reform and human rights protection, and democratization and social development. It supplements ongoing U.S. counternarcotics programs totaling $330 million that are already in place.

More specifically, according to the INL Congressional Budget Justification (CBJ) of 2002, a total of $3,129,000 were spent on the promotion of "democracy and the rule of law" in 2000. In conjunction with this expenditure, the INCSR relates prospectively:

> USAID coordinates the USG's justice sector reform program in cooperation with the Department of Justice (OPDAT and ICITAP). Its programs will expand under Plan Colombia. They will focus on strengthening the effectiveness, transparency, and fairness of the Colombian criminal justice system. . . .

The Report then continues the ***pretending*** aspect of its message with regard to meaningful systemic change when it says:

> Training elements of the Department of Justice (OPDAT and ICITAP) have provided training in the U.S. to about 400 prosecutors and investigators in money laundering, human rights, anticorruption, and antinarcotics issues. . . .

2001

The CBJ figures for rule of law promotion for 2001 are conflicting. The 2002 CBJ puts the figure at $4,400,000, while the 2003 CBJ refers to $850,000. This could be explained by expenditure category adjustments between the two years. Regardless, even the lesser amount is significant.

Interestingly, the INCSR replicated its historic training touting of the previous report, but with apparent full intention to continue that focus into the future. It reads:

> Training elements of the Department of Justice (OPDAT and ICITAP) have provided training in the U.S. to about 400 prosecutors and investigators in money laundering, human rights, anticorruption, and antinarcotics issues. This training, which continued in 2001, establishes the mechanisms for joint and coordinated investigations and is emblematic of the extraordinary bilateral law enforcement relationship.

It is difficult to know whether this refers to an "extraordinary bilateral law enforcement relationship" between Colombian prosecutors and police—a vitally important theme in system reform—or between law enforcement of the respective nations. The Author presumes the latter, because the former has never been attained. If indeed the former, then it proclaims patently the failure of the bilateral national training effort. Even if bilateral efforts between countries is contemplated in this report, it is largely fallacious, as the relative success of bilateral law enforcement operations between the two countries is due largely to special investigative units (SIUs) run primarily by U.S. law enforcement agencies. The fact that this example does not readily "rub off" on the Colombian counterparts as to independent action demonstrates vividly the impervious nature of the Colombian inquisitorial system.

Nevertheless, and true to inquisitorial form, arrests were again tabulated as the only empirical means of progress for the years 1993 through 2001 respectively as follows: 2,562; 2,254; 1,745; 1,561; 1,546; 1,961; (no figure for 1999); 8,600; and 15,832.

2002

According to the CBJ of 2002, the apparently projected figures for that year as to system reform were $5,000,000. The CBJ report for 2003 put that ***spending*** at $22,500,000; a probable expansion represented by the Plan Colombia monies. The 2004 CBJ confirmed the justice reform expenditure at $22,500,000 for the general Promote the Rule of Law Category, but with a specific sub-category of Judicial Reform Programs. However, there was no figure listed for that sub-category.

The INCSR training justification for such spending was reported as follows:

> The DOJ [ICITAP] and [OPDAT] are continuing their Justice Sector Reform Programs. DOJ continues providing training to prosecutors and investigators to enhance their ability to develop and successfully prosecute criminal cases. Over 2,500 people have received training, which has resulted in better-organized and more focused investigations and trial presentations, according to participants who have implemented the techniques in real cases. In 2002, ICITAP and OPDAT instructors trained Colombian instructors from the Prosecutor General's Office, the Colombian National Police (CNP) and the Technical Investigative Body (CTI) in forensics, prosecutorial techniques, interview techniques and crime scene management. DOJ provided training for specialized task forces units (human rights, money laundering, asset forfeiture, anticorruption, and counternarcotics) as well as for line prosecutors and police investigators. This training included instruction in the accusatorial system, the collection of evidence, stages and responsibilities of investigations and oral trials.

The training tune of ***pretending*** remains the same, but with the added claim of "better organized and more focused investigations" as reported by "participants who implemented the techniques in real cases." The reference to "implementation" certainly points in the right direction, but there is scant, definitive proof of the same in subsequent and real practice. Indeed, if such were true and substantial, there would have been no need for Law 906 and its crossroads with failed Law 600 to which these claims correspond (addressed in more detail hereafter).

In any event, the artificial statistical reporting of arrests remains the same, with a figure of 15,199 for the year.

2003

The CBJ report for 2003 seemed to project that year's ***spending*** at $40,000,000. However, the 2004 CBJ report put the Promote the Rule of Law expenditure at $23,500,000, with a specific Judicial Reform Programs figure of $7,500,000. The 2005 CBJ confirmed actual spending at $23,500,000 for Promote the Rule of Law and $7,500,000 for Judicial Reform Programs.

The INCSR justification reads in pertinent part:

> To ensure that the GOC's drug-related investigations and prosecutions conform to international standards, the [DOJ] trained nearly 400 prosecutors, judges, investigators and defense attorneys in their new roles in the framework of the accusatorial system. The USG supported the establishment of 15 oral trial courtrooms to facilitate Colombia's transition to an accusatorial system of justice. In addition, over 800 police personnel were trained in basic and advanced crime solving techniques. . . .

In the same ***pretending*** vein, the report talks of training of the CTI in "accusatory system/oral trial techniques and the training of related prosecutors, judges and judicial police (CTI) in "Trial Advocacy preparation." Of course, if such training had application significance beyond the training itself, the system would subsequently reflect it. However, it does not to this day.

Interestingly, no arrest figure for 2003 was forthcoming in this report.

2004

The CBJ report for 2004 seemed to project that year's ***spending*** at $22,800,000 for the general category of Promote the Rule of Law, with $7,500 requested for Judicial Reform Programs. The 2005 and 2006 CBJ reports confirmed the respective $22,800,000 and $7,500,000 figures for actual spending.

The INCSR justification for the same year merely repeated the information of the 2003 report. Again, no arrest figure is provided.

2005

The CBJ report for 2005 put projected ***spending*** at $27,800,000 for general Promote the Rule of Law, with $6,000,000 for Judicial Reform Programs.; with the 2006 and 2007 CBJ listing actual spending at $27,379,000 for Promote the Rule of Law and $6,000,000 for Judicial Reforms Programs. The 2007 CBJ confirmed the same.

The INCSR report for the same year is general and vague, but in due confirmation of training ***pretending***:

> The USG, through the Justice Sector Reform Program and rule of law assistance, is helping the reform and strengthening the criminal justice system in Colombia. DOJ and USAID have provided training, technical assistance, and equipment to enhance the capacity and capabilities of the Colombian system and to make it more transparent to the public at large.

Once again, however, there is no offering of empirical proof of any such progress. Otherwise, arrests are put at 63,791 for the year; again, with no reference whatsoever to case resolution. Indeed, the case congestion would seem to continue unabated, with no indication to the contrary.

2006

The CBJ report for 2006 projected ***spending*** at $27,393,000 for Promotion of the Rule of Law and $6,000,000 for Judicial Reform Programs; with the 2007 CBJ listing $27,119,000 as actual spending for Promote the Rule of Law and $5,940,000 for Judicial Reform Programs. The 2008 CBJ referenced "Judicial Reforms Program" more specifically, without a general reference to Promote the Rule of Law, with actual spending noted at $5,940,000.

For this year, the International Narcotics and Law Enforcement Affairs: Program and Budget Guide (INL PBG) for 2008, referenced "Rule of Law and Human Rights" and its sub-category of "Justice System" as a specific budget item. The corresponding figure was $10,950,000.

The corresponding INCSR report is glowing, and in the appropriate application terms:

> The USG is assisting the GOC in criminal justice system reform through the implementation of a new criminal procedure code, as the country moves from the written inquisitorial system to an oral accusatory system. The first year of the implementation has demonstrated resolution of criminal cases in weeks or months rather than years. Over 60 percent of cases formally charged have resulted in convictions. Plea agreements have resolved large percentages of criminal cases. DOJ, USAID, and other USG agencies have provided training, technical assistance, and equipment. In 2005, the DOJ trained more than 11,300 police, prosecutors, forensic experts, and judges in the new accusatorial system and in specialized areas of money laundering, human rights, anticorruption, post-blast investigations, antikidnapping and judicial protection.

At this juncture, the Law 600/Law 906 crossroads have been reached. While the old cases go off down the soon-to-be-forgotten Law 600 procedural path, there is obvious optimism in the "new" accusatory code as to new cases. However, one must not forget that until this time the Law 600 code was touted as ***the*** accusatory system, but proved itself otherwise. Now we supposedly have the ***real*** accusatory code, not only with all the hopes that go with it but with the docket having been wiped clean of cases and theoretical case congestion. The claims of case resolution—as well as conviction rates—seem to confirm the ***new*** accusatory system claims. However, and very telling, there are no corresponding and authentic statistics or reports to substantiate the same. Rather, the claims seem to be at best anecdotal and, as such, more optimistic rather than realistic in anticipation of a code that really works; not to mention again that the functionaries received the initial cases with no other case load to hinder them. Given such, it is likely if not probable that they continued applying essentially the same practices under the auspices of a new code, but with the benefit of no hindering case load. The results could very well have been positive initially, as with an inquisitorial system applied in a small community with relatively little crime. In any event, absent some tangible proof of case resolution claim sustained in time, this report is nothing more than wishful thinking.

2007

The CBJ report for rule of law reform for 2007 put projected ***spending*** at $26,150,000, with the Judicial Reforms Program projected for $6,000,000. The 2008 CBJ contained only the more specific listing entitled "Judicial Reforms Program" and put the expenditure at $6,000,000; while the 2009 CBJ put actual spending at $6,754,000.

The INL PBG for 2008 provides no figures for 2007. However, the INL PBG for 2009 reports a 2007 expenditure of $23,180,000 under the category of "Rule of Law and Human Rights," which, according to related commentary, covers justice sector reform.

As far as the INCSR expenditure justification, the implementation proof sought in the commentary to year 2006 is not forthcoming. Rather, the report states in generality, and with the same training ***pretending***, the following:

> **Support for Democracy and Judicial Reform.** With USG support, the GOC expanded access to justice for conflict-impacted communities, creating a national system of 45 "justice houses." Through the Justice Sector Reform Program and rule of law assistance,

> the USG is helping reform and strengthen the criminal justice system in Colombia. DOJ, USAID, and other USG agencies have provided training, technical assistance, and equipment to enhance the capacity and capabilities of the Colombian justice system and to make it more transparent and credible. To date the DOJ Justice Sector Reform Program has provided training to 53,261 prosecutors, judges, criminal investigators, and forensic experts in Colombia.

Not only does the tune remain the same, but the same "training" lyrics are repeated over and over again. That monotony is telling when coupled with the absence of any statistical or empirical proof that the system is working as it should in efficiently and efficaciously resolving cases. The only statistics that are provided participate in the monotony, with historical arrests being listed by year, but with nothing for the year 2007.

2008

The CBJ for "Judicial Reforms Program" in 2008, without a general reference to Promote the Rule of Law, shows a ***spending*** request in the amount of $6,000,000. The 2009 CBJ lists no expenditure under the "Judicial Reforms Program," but shows $39,428,000 under a general "Rule of Law Program" category. The 2010 CBJ shows a total expenditure for "Attorney General's Office" and "Justice System Reform" of $25,293,000 ($18,838,000 and $5,455,000 respectively).

The INL PBG for 2008 showed a budget request of $11,111,000 under the "Justice System" category and $1,245,000 under the "Program Support (Rule of Law)" rubric with $1,245,000 for Program Support (Rule of Law) and $250,000 for Constitutions, Laws and Legal Systems. However, the INL PBG for 2009 indicated an expenditure of $57,760,000 under the category of "Rule of Law and Human rights," while the 2010 INL PBG showed a spending of $55,281,000 in 2008. According to the related commentary, this category included justice sector reform efforts.

The related INCSR stated in relation to this spending:

> **Support for Democracy and Justice Reform.** Through the [JSRP] and rule of law assistance, the USG is helping reform and strengthen the criminal justice system in Colombia. The transition to an oral accusatory criminal justice system began in 2005, and was fully implemented throughout the country on January 1, 2008. The JSRP has provided training and technical assistance to support the new roles of judges, prosecutors, and police investigators by focusing on practical "hands on" training including crime scene and courtroom simulations. Training elements include the collection and presentation of evidence, understanding the stages of the proceedings, advocacy techniques, and mock trials. The program has provided accusatorial system training to more than 64 thousand prosecutors, judges, criminal investigators, and forensic experts.

Although the "training" reference now takes on the description of "hands on," it is still just training. Indeed, beyond the reference to classroom training there is no concrete indication of any effective application of the concepts as mechanisms in actual cases. The ***pretending*** continues as the cases in the new Law 906 system accumulate without resolution and without any appreciable change in procedure. Moreover, arrest figures are repeated for years 2000 to 2007.

2009

The CBJ for "Judicial Reforms Program" in 2009 shows a ***spending*** request in the amount of $9,500,000, with no general rule of law figure. The 2010 CBJ lists the "Judicial Reforms Program," with sub-categories of "Attorney General's Office" and "Justice Sector Reform" and expenditures of $16,500,000 and $8,000,000 respectively for 2009, for a total of $24,500,000. The CBJ report of 2011 lists an expenditure of $24,500,000 for a total of the same two categories ($16,5000,000 and $8,000,000 respectively). The INL PBG showed a budget request of $20,606,000 under the "Rule of Law and Human Rights" category which, according to related commentary, covers justice sector reform. The INL PBG of 2010 indicated an expenditure of $36,967,000 in 2009, while the same report for 2011 lists a figure of $35,405,000.

The related INCSR repeated verbatim the information from the 2008 report, and added:

> . . . Additionally, the USG has helped to refurbish or build 45 physical courtrooms in urban areas and six virtual courtrooms in rural zones, and have either refurbished or equipped 15 public defender offices. Finally, the USG has assisted the GOC to construct 49 justice houses throughout Colombia that have provided formal and informal justice sector services to over 7.2 million Colombians.

In repeating the classroom training verbiage, the report perpetuates the true accomplishment ***pretending.*** Moreover, the reference to courtrooms, offices and justice houses only gives physical structure to the pretending. The USG can build and refurbish all the pretty buildings that money can build or buy, but when they are filled with a criminal justice system that does not work they are nothing more than a monument to the pretending. However, they make for good measuring criteria, as they lend themselves to an easy dollar count and wonderful, related photographs. Similar, but equally artificial, criteria are found with arrest numbers, with 54,041 being noted for 2008.

2010

The 2010 CBJ request lists ***spending*** for "Judicial Reforms Program," with sub-categories of "Attorney General's Office" and "Justice Sector Reform" and expenditures of $13,500,000 and $7,000,000 respectively, totaling $20,234,000. The 2011 CBJ report states $28,000,000 for a total of the same two categories ($20,000,000 and $8,000,000 respectively). The CBJ for 2012 refers to "Stabilization Operations and Security Sector Reform" as the primary category for "Judicial Reform Program," "Attorney General's Office," and other sub-categories. The figures for Judicial Reform and the AG's Office are $2,000,000 and $5,750,000 respectively, totaling $7,750,000 for 2010. The 2012 CBJ also refers to Rule of Law and Human Rights, with sub-categories for the DOJ-AG's office and DOJ-Justice Sector Reform and figures of $14,250,000 and $6,000,000 respectively, totaling $20,250,000; with a grand total of the four sub-categories of $28,000,000.

The INL PBG requests $24,053,000 for Rule of Law and Human Rights for the same year. According to the related commentary, this category includes justice sector reform efforts. The same 2011 report shows an actual spending of $38,850,000. The 2012 INL PBG does not contain

a specific Judicial Reform Programs category for 2010, but shows spending of $37,129,000 for Rule of Law and Human Rights.

In essentially repeating the information of 2008 and 2009, the INCSR for 2010 reported:

> . . . The U.S. is providing extensive assistance to reform and strengthen the criminal justice system and the rule of law in Colombia. The U.S. provided training and technical assistance to support the new roles of judges, prosecutors, forensic scientists, defense attorneys, and police investigators under the new accusatory system. The assistance focused on practical training, including crime scene management, investigation and prosecution strategy, interviewing witnesses, and courtroom proceedings. The program provided training to more than 60,000 prosecutors, judges, pubic defenders, criminal investigators, and forensic experts.

The building of physical and virtual courtrooms and the equipping of public defender offices are once again touted, with increased numbers reported. However, the training reporting "broken record" says nothing of any practical implementation of concepts taught. There is no indication whatsoever of any significant change in behavior and procedure by the respective functionaries, leading to significant resolution of cases. Indeed, case resolution is not broached by word or statistic. However, arrest reporting is readily provided for 2009 at 1,021,041. The ***pretending*** continues.

2011

The CBJ report for 2011 shows a total budget ***spending*** request of $14,400,000, with $11,400,000 for the AG's Office and $3,000,000 for Justice Sector Reform. The CBJ for 2012, referred once again to "Stabilization Operations and Security Sector Reform" as the primary category for "Judicial Reform Program," "Attorney General's Office," and other sub-categories. The figures for Judicial Reform and the AG's Office are $4,500,000 and $1,000,000 respectively, totaling $5,500,000 for 2011. The 2012 CBJ also listed Rule of Law and Human Rights, with sub-categories of DOJ-AG's Office and DOJ-Justice Sector Reform, with $11,500,000 and $3,00,000 respectively. The four categories totaled $$20,00,000. The 2013 PBG shows actual spending in 2011 of $21,000,000, with $11,500,000 and $3,000,000 for the AG's Office and general justice sector reform respectively.

The INL PBG requests the amount of $25,600,000 for 2010, under the category of Rule of Law and Human Rights, which includes justice sector reform according to the related commentary. The 2012 INL PBG is silent as far as 2011 actual spending. It would perhaps appear that bureaucratic enthusiasm is beginning to wane. The INL PBG for 2013 shows actual spending in 2011 of $31,079,000, under the category of Rule of Law and Human Rights, but with no specific reference to justice sector reform.

This year the INCSR makes no reference to classroom training, and only focuses on arrests of significant drug traffickers and guerilla members. They also list the 2010 total arrests at 61,021. While cases accumulate without meaningful resolution, the Colombian inquisitorial system—

masquerading as accusatory—continues to count arrests but ignores the case resolution that does not exist. The ***pretending*** matures.

2012

Though reflecting the prior two years, the CBJ for 2012 refers interestingly for the first time to "Stabilization Operations and Security Sector Reform" as the primary category for "Judicial Reform Program," "Attorney General's Office," and other sub-categories. The requested ***spending*** figures for Judicial Reform and the AG's Office are $1,000,000 and $4,500,000 respectively, totaling $5,500,000. The report also lists Rule of Law and Human Rights, with sub-categories of DOJ-AG's Office and DOJ-Justice Sector Reform, with $10,500,000 and $4,000,000 respectively. The four pertinent categories total $20,000,000.

The nomenclature "stabilization" would suggest a determination that the reform problem is solved and it is now just a question of tidying up the loose ends. The major fiscal emphasis on the AG's office as opposed to general reform would seem to state the same thing; focusing on the administration of a system that has proven itself operative as opposed to that operation itself. The figures themselves relate directly to the ***pretending.*** The 2013 CBJ shows actual spending in 2012 of $14,500,000, with $10,500,000 and $4,000,000 for the AG's Office and general justice sector reform respectively.

Nonetheless, priming the pump in an empty well continues with the INL PBG request for 2012 of $29,494,000, under the category Rule of Law and Human Rights which, according to the commentary, includes justice sector reform. The 2013 INL PBG showed actual spending in the amount of $26,104,000, but with no specific reference to justice reform. The 2014 INL PBG figures make no reference to specific, actual 2012 spending.

The INCSR for 2012 substantiates the tale of the figures. After boasting of Colombian President Santos' investment of $2 billion for the strengthening of the National Police, but with no reference whatsoever to American training and assistance, the report reads:

> Judicial impunity remains a major impediment to deterring violence. President Santos acknowledged that less than 10 percent of arrested [members if criminal bands] actually serve jail time. One former municipal security advisor estimated Bogota's conviction rate for homicide at less than 10 percent; other major cities appear to rank similarly. Lower conviction rates in rural areas are likely due to more limited investigative capacity and lack of protection for judges, prosecutors, and witnesses. In June, the news media widely reported on a perceived deterioration in public security while the Santos government defended its efforts to rein in violent crime effectively.

The proof is truly in the pudding. Massive spending continues by both governments in the face of pervasive indications of system failure. However, those indicators cannot be acknowledged by either entity, for to do so would be an admission of failure; which admission the respective bureaucracies are incapable of in light of the the historical spending. However, the ***pretending*** chickens are coming home to roost.

2013

The CBJ for 2013 ***spending*** requests $13,500,000 for general system reform, restricted however specifically to the AG's Office and Justice Sector Reform in the amounts of $10,500,000 and $3,000,000 respectively. Related report commentary in the PBG reads:

> . . . Increasing the administrative capability of the Colombian Prosecutor General's Office, along with building capacity within this office's Human Rights and Justice and Peace Units, will be the focal points of funding under this account.

System reform seems to have been abandoned in favor an administrative solution, with a focus on Human Rights and the Peace Process. In this regard, one must ask rhetorically: how can a country enforce human rights and achieve true peace if its criminal justice system is inept? It could be said that the ***pretending is now taking on institutional dimensions.***

The INL PBG for 2013 requests $26,146,000. The 2014 INL PBG contains no figures related to actual 2013 spending; nor does the report for 2015.

The INCSR of 2013 makes no reference whatsoever to criminal justice reform; nor are any statistics given to suggest progress or success. It would seem the bureaucracy is either subtly admitting defeat or has concluded that the system is now functional and is in need of only administrative tweaking.

2014

The Author was not able to locate any CBJ for 2014.

Moreover, the INL PBG for 2014 made no specific budget request related to justice reform. In related commentary, the report states:

> Programs will strengthen and expand the network of Justice Houses, conciliation centers, and alternative dispute resolution providers; support local institutions and organizations to meet justice needs of women and other vulnerable groups; assist public defenders and judges; build capacity at law schools; and support court administration reform. At the national level, they will support civil society in promoting justice sector reform, build capacity in the Public Defender's Office, and assist with the Superior Judicial Council with agrarian reforms.

The INL PBG for 2015 makes no specific reference to justice reform; nor does the 2016 report.

The vision seems to be that of continuing to construct or otherwise provide the Justice House buildings as ready proof of expenditure justification, but adroitly suggesting they will be filled with a system that does not function properly and, hence, the need for conciliation centers and alternative dispute resolution.

The 2014 INCSR seems to indicate the position of the U.S. bureaucracy as that of reform success. However, its tentative tone cannot be ignored. The report simply states:

> According to the Office of the Prosecutor General, judicial impunity declined in 2013, though serious challenges remain to achieving an efficient and fully-resourced criminal justice system. Nevertheless, Colombia enjoys a far more transparent accusatory system of justice than that of the previous inquisitorial system, where written documents, and not live witnesses or evidence, were determinative of case outcomes. Currently, most cases are resolved through plea agreements and in increasing number, through trials.

With regard to a supposed decline in impunity, the report obviously lays it off on the Colombian AG's Office, who apparently has no empirical basis for the general statement of decline. The Americans buttress that evaluative copout by indicating that "serious challenges remain to achieving an efficient and fully-resourced criminal justice system." They then justify themselves and their massive, historical spending habits by saying, in effect: "The system is not where it ought to be, but it is better." In non-specific support of the same the Americans throw up claims of greater transparency and greater emphasis in witnesses opposed to documents.

As portrayed by the Author in his various books and writings, these claims are illusory. To be true, there are now public trials that should, in theory, constitute greater transparency. Moreover, witnesses do indeed appear in many of those trials. However, the process continues to emphasize primarily the written documents of the case file—in spite of their hearsay nature—with witnesses existing only as a procedural formality at worst, or to clarify whatever discrepancies might be perceived in those documents at best. Investigative documentation remains front and center at these trials.

Moreover, although the public has theoretical access to such trials, their bureaucratic nature and the administrative vagaries otherwise associated therewith make them elusive and incomprehensible targets for any citizen wanting to see the system in action. Reading of documents prevails at the expense of witness access, with lawyer argument constituting largely the "oral" nature of the proceedings. Rather, that citizen turns to the social media as a means of learning what is going on, because that is where Colombian trials really take place. With the procedural emphasis on arrests and *imputaciones* as the primary charging and suspect binding mechanism, and with the case investigation being made public after the arrests and *imputaciones,* the true Colombian trial takes place in the media during the investigation; with the *imputado* obligated to prove through such media his or her innocence; for, to remain silent in the face of such abused "transparency" would be to acknowledge guilt.

In their ***pretending***, the Americans grasp at straws in a futile defense of the historically wasted dollars.

2015

Once again, there appears to be no CBJ ***spending*** report for 2015.

Moreover, as with 2014, the INL PBG does not specifically address justice reform; nor does the 2016 report with regard to 2015 spending.

The INCSR for 2015 simply but tellingly reads:

> The Attorney General's Office recently adopted reforms to reduce impunity through the implementation of new investigative methodologies and criminal prosecution strategies. However, serious challenges remain to achieving an efficient and fully-resourced accusatory criminal justice system.

Again, administrative remedies for a system fundamentally flawed will gain nothing. Moreover, the new "investigative methodologies and criminal prosecution strategies" necessarily involve the functionary role confusion that is an integral part of the broken system. It means that prosecutors, as inept investigators, will continue to be the sought-after solution, with the same inevitable results. Indeed, the woeful repetition of "serious challenges to achieving an efficient and fully-resourced accusatory criminal justice system" confirms that inevitable failure. The subliminal message seems to be: "We know we are pretending, but we just cannot admit it."

2016

Again, there appears to be no CBJ ***spending*** report for 2016.

Under the broader category of International Narcotics Control and Law Enforcement, the INL PBG does address "Rule of Law and Human Rights," together with Stabilization Operations and Security Sector Reform, requesting $7,500,000 and $3,000,000 respectively (totaling $10,500,000). No reference is made to actual spending in prior years. In this regard, a related commentary states:

> . . . The FY 2016 budget request represents a continuation of the gradual decrease in INCLE funds as the Colombian Government's own ability to support projects and programs increases.

The anticipated financial ability of the Colombians seems to suggest, also, a mutual determination that reform goals have been largely met.

Moreover, no specific reference is made to justice sector reform in the INCSR. The U.S. continues to throw good money after bad, but timidly. They continue ***pretending*** that success has been achieved in justification of historical spending, but with no further need of substantial spending.

2017

The Author was not able to locate any CBJ or INL PBG data for 2017.

The 2017 INCSR simply repeats the verbiage of the 2015 and 2016 reports.

In the face of overwhelming proof of the failure of the Colombian criminal justice system reform and its related U.S. funding, the policy of ***spend and pretend*** would appear to dictate diminished but equally obfuscating smoke coupled with a discreet silence.

Summary and Assessment of Spending Figures

What follows is a summary and assessment of the various figures addressed in the foregoing reporting. The Author has looked primarily to the CBJ figures, as they tend to be more specific regarding dollars spent on Justice Sector Reform, recognizing that more general Rule of Law figures include other programs more indirectly related to reform of the criminal justice system. Nevertheless, even the more general Rule of Law amounts are directed and dedicated to the fundamental change of the Colombian justice paradigm, thereby bearing fiscal responsibility for the criminal justice system which constitutes the essence of that overall justice paradigm.

The first column lists the years addressed in this study, totaling 27. Years 1991 and 1992 are not represented by a separate report category in the preceding material, but are referenced or otherwise accounted for in 1994 in relation to the $31 million dollars reported as having been made available in 1991.

The second column portrays those figures more specifically related to Justice Sector Reform. Years 1991 to 1999 constitute a guestimated yearly average in relation to the $31 million referenced in 1994.

The third section contains additional explanatory material.

The fourth column represents the more general Rule of Law figures.

The Author acknowledges that, given their documentary basis and the associated lack of complete precision with regard to dollars spent specifically on criminal justice system reform, the figures are estimates. However, given the total monies made available to Rule of Law generally and the pivotal significance of the criminal justice system in that regard as referenced, the Justice Sector Reform figures are probably fairly conservative.[15]

[15] One authoritative source, upon preliminary review of this document, states that the total figures are "***very***" conservative.

	Justice Sector Reform Specifically		Rule of Law Generally
1991	$3,000,000*		
1992	$3,000,000*		
1993	$3,000,000*		
1994	$3,000,000*	*$31M for justice reform from 1991 divided 9 times (1991-1999). Does not include reference in 2000 to $330M "in place"	$330,000,000
1995	$3,000,000*		
1996	$3,000,000*		
1997	$3,000,000*		
1998	$3,000,000*		
1999	$3,000,000*		
2000	$3,129,000	$1.3B Plan Colombia money dedicated	
2001	$4,400,000		
2002		No specific figure	$22,500,000
2003	$7,500,000		$23,500,000
2004	$7,500,000		$22,800,000
2005	$6,000,000		$27,379,000
2006	$5,940,000		$27,119,000
2007	$6,754,000		$26,150,000
2008	$25,293,000 +		$39,428,000
2009	$24,500,000	No general figure	
2010	$28,000,000	No general figure	
2011	$21,000,000	No general figure ++	
2012	$14,500,000	No general figure	
2013	$13,500,000***		
2014		No specific figures	
2015		No specific figures	
2016	$10,500,000	Projected	
2017		No specific figures	
	$202,699,900**		$518,876,000

**$8,813,039.13 average over 23 years (27 total years, less 4 years without actual figures)

***$160,487,000 from 2003 to 2013, averaging $14,589,727.30—actual spending related specifically to justice sector reform

+ According to website, as of 2011 $US140 million spent.

++ Additional quoted USAID expenditure on Law 906 code.

Final Words

Some Proffered Explanations

If the authoritative Colombian statements offered, the quantity of reform legislations portrayed, and the technical assessment of the Author as to the present status of the Colombian justice system are to be believed as valid indicators of the present deficiency of that system, then the wisdom of expending of $202,699,900 over 23 years, with a yearly average of $8,813,039—not to mention most precisely $160,487,000 spent over 11 years and averaging $14,589,727.30 and without apparent additional dollar figure buttressing)—has to be questioned. The unmistakable ***spending*** viewed against the backdrop of dubious progress at best, and manifest failure at worst, proclaims the related ***pretending.***

Whether reflecting naiveté, ignorance or abject disregard, this is perhaps best explained by the inevitability of budget expenditure founded on inextricable funding dedication. It really makes no difference. The bureaucracy simply lacks the ability or the desire to prudently assess and reconsider at appropriate intervals; and to meaningfully adjust or even terminate if needs be. Rather, the policy seems to be: "Here are the dedicated monies for a dedicated period of time. Spend them or lose them."

Politics, of course, are another common denominator; the mutual assurance of allegiance as to other related or unrelated needs. "It really doesn't matter that any substantive goal is achieved in this particular thing. That would be nice; but after all, it is ***their*** system. What is important is that the mutually personal and collective positions are otherwise secure;" the money-based guarantee of political security.

Paradigm and related comfort retention and maintenance are yet another aspect of the explanation of ***spending and pretending.*** "At the end of the day, I really do not want to change my way of thinking and behaving. Let us spend and act as if we were changing, but without really changing." To be sure, the need for perceived change—whether real or not—is the necessary political nuance to this factor; ending abruptly with administrations or tenures.

Regardless of the causal debate, the fact remains that significant U.S. taxpayer dollars were misspent—if not totally wasted—to the detriment of U.S. and Colombian citizens alike.

In rebuttal, it will be said that significant steps have been taken toward the accusatory procedural ideal and, therefore, the money has not been misspent or wasted. It is true that some steps have been taken ***toward*** an accusatory system, but they are far less than optimal and even inadvertent. Indeed, the fundamental retention of the historical inquisitorial paradigm has precluded any semblance of significant progress by means of those steps. Moreover, the decades involved and the millions spent cannot justify mere steps toward the goal, especially when the destination itself could have been achieved long ago were it not for the bureaucratic, political and personal comfort baggage involved.

The experience of the Author and similarly situated colleagues is a significant indicator of this reality. For 23 years or more they have participated meaningfully in and otherwise watched

and assessed the Colombian reform process, observing, offering and warning constantly of it falling short of the mark. Yet they have gone unheeded; neutralized by the same bureaucratic, political and selfish attributes. Reality is undeniable however: what the Author and his colleagues find today in Colombia as to criminal procedure and justice is essentially what they encountered in 1994 and earlier—but millions of dollars later.

Tough Times Ahead

It can be fairly said that public corruption is alive and well in Colombia; some would even say rampant. A cogent example of this reality is the recent arrest of the head of the Colombian anti-corruption unit in a U.S. Drug Enforcement Administration (DEA) operation. This corruption, of course, reflects directly the weakness of the criminal justice system. Although corruption exists even in those countries of accusatory systems, it takes on auras of impunity in those of inquisitorial processes.

Moreover, by means of its supposed peace process in attempting to end its half century civil war, Colombia has created an alternative justice system (JEP or *Justicia Especializada Transicional* (specialized transitional justice)) for the purpose of supposedly bringing justice to the former guerillas. However, significantly, the separate justice system will undoubtedly borrow from the ordinary system, including personnel steeped in that inquisitorial tradition; and this to deal with cases that for the most part will, from an evidentiary standpoint, be old and cold. In this regard, the ordinary system cannot effectively deal with cases of immediate occurrence, let alone with those where the evidence has long disappeared. The result for the alternative system is inevitable: a mere token gesture to justice regarding crimes that have wrenched the nation for decades and will continue to canker her for many more. Worse yet, as domestic civil war transitions to and bolsters already existing domestic and organized crime as another kind of war, this same system inevitability shall prove fateful.

Salt in the Wound

In closing, the Author addresses a programmatically unrelated but extremely relevant matter from the standpoint of USG myopia in relation to foreign criminal justice system reform assistance.

The Author has recently been involved with the Colombian military justice system (*justicia penal militar* or JPM). As part of that involvement and in addressing continued USG support funding through the United States Military (Southern Command), the Author recently summarized the nature and condition of the JPM project in promotion of such funding. That project is emblematic of the similar efforts within the ordinary Colombian criminal justice system otherwise reflected in this paper. That information is as follows:

> As the subject matter expert primarily responsible for the development and success of the Colombian JPM project, I provide these observations at this juncture of such a transcendental endeavor.

I am a former Federal Prosecutor and Defense Attorney of about 40 years' experience. I am also an international comparative law expert of nearly 25 years, having written four books on the subject with particular emphasis on Latin America and particularly Colombia.

In 2016 I was contracted by ICITAP of DOJ and SouthCom to spearhead this project whereby the Colombian JPM system transitions from an ancient inquisitorial system to a supposedly more modern accusatory system. I say "supposedly" because the new procedure code into which it is to transition is far from modern or accusatory. Indeed, it is patterned after the procedure code of the ordinary Colombian criminal justice system, which is far from accusatory and, as recently announced by the Colombian Attorney General, is in a state of collapse and failure. The JPM has thus been placed in the precarious and paradoxical position of implementing a code that has already proven itself a failure in the ordinary criminal context.

This dilemma was confronted by means of the formation of a working group (now known as the Grupo de Doctrina y Docencia (GDD)) consisting of the leading attorneys (prosecutors and judges) and police officials that make up the JPM. The purpose of the GDD was a more accusatory and functional interpretation of the JPM code, allowing for a practical, realistic and successful application of the same when the new system becomes operative without violating existing jurisprudence; thereby avoiding the failures of the ordinary system without its modern accusatory interpretation or application.

The system interpretation took the form of a Report of Conclusions (Informe de Conclusiones) crafted by the Colombian JPM functionaries of the GDD with my input and resulting from months of intense scrutiny and debate. The document is extraordinary and unique, the first of its kind in my experience in over 20 countries around the world. It identifies precisely and clearly the concepts and mechanisms that will permit the JPM system to truly achieve its purpose in justice, something that the Colombian ordinary system and others throughout Latin America have failed to achieve. It also presages further reform of the procedure code so as to permit a truly modern and accusatory application, a task the GDD eagerly desires to assume.

Perhaps most significant of all, the Report constitutes a Colombian voice as to their criminal justice system as opposed to foreign conceptual imposition, thereby achieving a special effectiveness in the intellectual conversion of all functionaries. Moreover, with the accusatory procedural interpretation as the foundation and chief cornerstone of the JPM structure, all other system institutions and entities (police, prosecutorial, judicial, defense) can be administratively defined and structured in turn. Indeed, without this accusatory interpretation as established throughout the system, such institutions will only replicate their ordinary counterparts in abject failure. Given such, the JPM serves as an example not only to the Colombian military and ordinary criminal justice systems but to the entire region and the world.

Regrettably, but as is so often the case, the JPM administrative component has not fully grasped the significance of these developments. Moreover, the postponement of the system implementation for another three years only permits further political and administrative

impediment in the immediate education of all JPM functionaries as to the accusatory interpretation and the concomitant structuring of the JPM institutions. Instead of this time period being thus positively exploited, I fear it will be squandered in political and administrative wrangling and inactivity.

The Colombian Defense Ministry and, in turn, the JPM administration, must be made to see the significance and extraordinary opportunity that this moment represents as proclaimed by their own most prominent JPM jurists. At the same time, SouthCom must recognize the same in support of its critical financial investment. If either fails to step up at this crucial time, not only will Colombia suffer but a priceless opportunity to influence the entire region will be effectively lost.

In 25 years of doing this work I have never seen the opportunity for the achievement of true justice so meaningfully defined and feasible. I would hate to see bureaucracy prevail, as it most often does, in denying what the Colombian and Latin American populaces are crying out for—peace through rule of law, and not just bureaucratic lip service to the same.

In spite of the foregoing, the Author learned only recently that the USG has, at present, declined further involvement in the project.[16]

And so we have it: On the one foreign justice sector reform hand the USG throws good money after bad; while on the other hand it appears to deny good money for a good cause. In this justice sector reform context, the USG bureaucracy lacks vision, the corresponding cost of which vagaries the U.S. taxpayer pays the price; but should not have to.

Not Just Colombia

The situation described herein is not unique to Colombia, but exists throughout Latin America. This is confirmed representatively by just those countries in which the Author has recently worked, namely the Dominican Republic, Guatemala, El Salvador and Mexico. *Spend and Pretend* is, indeed, pervasive.

Kim R. Lindquist

[16] Concomitantly with the news of funding declination, the Author was told that efforts among other USG officials are still underway in order to recognize and support the unique endeavor. The Author expressed appreciation for and hope in the information, but is not otherwise holding his breath.