DEPARTMENT OF THE ARMY PAMPHLET 27–100–67

MILITARY LAW REVIEW

VOL. 67

Perspective

MILITARY JUSTICE IN THE WAKE OF PARKER V. LEVY

Article

SEX DISCRIMINATION IN THE MILITARY

Comment

LEGAL ASPECTS OF FUNDING DEPARTMENT OF THE ARMY PROCUREMENTS

HEADQUARTERS, DEPARTMENT OF THE ARMY WINTER 1975

MILITARY LAW REVIEW

The *Military Law Review* provides a forum for those interested in military law to share the product of their experience and research. Articles should be of direct concern and import in this area of scholarship, and preference will be given to those articles having lasting value as reference material for the military lawyer.

The *Military Law Review* does not purport to promulgate Department of the Army policy or to be in any sense directory. The opinions reflected in each article are those of the author and do not necessarily reflect the views of The Judge Advocate General or any governmental agency.

SUBMISSION OF ARTICLES: Articles, comments, recent development notes, and book reviews should be submitted in duplicate, triple spaced, to the Editor, *Military Law Review*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22901. Footnotes should be triple spaced and appear as a separate appendix at the end of the text. Citations should conform to the *Uniform System of Citation* (11th edition 1967) copyrighted by the *Columbia, Harvard*, and *University of Pennsylvania Law Reviews* and the *Yale Law Journal*.

SUBSCRIPTIONS AND BACK ISSUES: Interested persons should contact the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402. Subscription price: $7.65 a year, $1.95 for single copies. Foreign subscription, $9.60 per year.

REPRINT PERMISSION: Contact Editor, *Military Law Review*, The Judge Advocate General's School, Charlottesville, Virginia 22901.

This Review may be cited as 67 MIL. L. REV. (number of page) (1975).

Pam 27-100-67

PAMPHLET
No. 27–100–67

HEADQUARTERS
DEPARTMENT OF THE ARMY
WASHINGTON, D.C., *Winter* 1975

MILITARY LAW REVIEW–VOL. 67

PERSPECTIVE

MILITARY JUSTICE IN THE WAKE OF PARKER V. LEVY[1]*

Robinson O. Everett**

June is an important month not only for weddings but also for pronouncements by the Supreme Court on important matters of military criminal law administration. On June 2, 1969, the Court held in *O'Callahan v. Parker*[2] that, at least within the United States and in peacetime,[3] a court-martial may not try a serviceman for conduct which is not service-connected. On June 25, 1973, the Court decided *Gosa v. Mayden*[4] which concerned the retroactivity, if any, of *O'Callahan*. Then, on June 19, 1974 the Court ruled in *Parker v. Levy*,[5] which involved an attack on Articles 133 and 134 of the Uniform Code of Military Justice[6] as unconstitutionally vague.

When these three cases are read together, the change of the Court's approach to military justice that has occurred in the past five years is striking. In *O'Callahan*, Justice Douglas, writing for the Warren Court, recognized the need for specialized military courts but reiterated the admonition from *Toth v. Quarles*[7] that because of "dangers lurking in military trials . . . free countries have tried to

---

* This article is an edited version of Professor Everett's remarks on the occasion of the Third Annual Edward H. Young lecture on Military Legal Education at The Judge Advocate General's School on September 17, 1974. The opinions expressed are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

** Professor of Law, Duke University School of Law.

1 417 U.S. 733 (1974).

2 395 U.S. 258 (1969).

3 *See* United States v. Keaton, 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969), where the Court of Military Appeals refused to give *O'Callahan* extraterritorial effect; *accord:* Hemphill v. Moseley, 443 F.2d 322 (10th Cir. 1971); Bell v. Clark, 437 F.2d 200 (4th Cir. 1971). An exception has also been created for petty offenses. United States v. Sharkey, 19 U.S.C.M.A. 26, 41 C.M.R. 26 (1969). An offense that occurs on a military installation is service-connected. Relford v. Commandant, 401 U.S. 355 (1971). For general discussions of *O'Callahan*, *see* Everett, *O'Callahan v. Parker—Milestone or Millstone in Military Justice?* 1969 DUKE L.J. 853; Nelson & Westbrook, *Court-Martial Jurisdiction over Servicemen for "Civilian" Offenses: An Analysis of O'Callahan v. Parker*, 54 MINN. L. REV. 1 (1969); J. BISHOP, JR., JUSTICE UNDER FIRE 91-101 (1974).

4 413 U.S. 665 (1973).

5 417 U.S. 733 (1974).

6 10 U.S.C. §§ 801-940 (1970) [hereinafter referred to as Uniform Code].

7 350 U.S. 11 (1955).

restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintain discipline among troops in active service." [8] The opinion noted that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law" [9] and referred to "so-called military justice" and "the travesties of justice perpetrated under the 'Uniform Code of Military Justice'." [10]

In *Gosa v. Mayden*, Justice Blackmun wrote for a plurality that included the Chief Justice and Justices White and Powell. While recognizing that military justice does not afford rights to grand jury indictment and trial by jury, the opinion of Justice Blackmun concluded that the absence of these protections does not require retroactive application of *O'Callahan*—a case which was described as "a clear break with the past." [11] Indulging in understatement, Justice Blackmun conceded that "the opinion in *O'Callahan* was not uncritical of the military system of justice and stressed possible command influence and the lack of certain procedural safeguards"; [12] but he added that "the decision there, as has been pointed out above, certainly was not based on any conviction that the court-martial lacks fundamental integrity in its truth-determining process." [13] At this point an interesting footnote states:

> There are some protections in the military system not afforded the accused in the civilian counterpart. For example, Art. 32 of the Code, 10 U.S.C. § 832, requires "thorough and impartial investigation" prior to trial, and prescribes for the accused the rights to be advised of the charge, to have counsel present at the investigation, to cross-examine adverse witnesses there, and to present exonerating evidence. It is not difficult to imagine, *also, the situation where a defendant, who is in service, may well receive* a more objective hearing in a court-martial than from a local jury of a community that resents the military presence.[14]

Mr. Justice Rehnquist concurred in the judgment in *Gosa* with an opinion announcing that "*O'Callahan* was, in my opinion, wrongly

---

[8] 395 U.S. at 264.

[9] *Id.* at 265.

[10] *Id.* at 266.

[11] 350 U.S. at 672. This is the same phrase employed by Mr. Justice Stewart in Desist v. United States, 394 U.S. 244, 248 (1969), which also involved a retroactivity issue.

[12] 413 U.S. at 680.

[13] *Id.* at 680-1.

[14] *Id.* at 681. For other comment on the safeguards available in courts-martial see Everett, *The New Look in Military Justice*, 1973 DUKE L. J. 663-697.

decided, and I would overrule it for the reasons set forth by Mr. Justice Harlan in his dissenting opinion" in that case.[15]

In *Levy*, Justice Rehnquist wrote an opinion that expressed the views of a five member majority. Captain Howard B. Levy, an Army doctor at Fort Jackson, South Carolina, was convicted by a general court-martial for violations of Articles 90, 133, and 134 of the Uniform Code and sentenced to dismissal, total forfeitures, and three years confinement.[16] His Article 90 offense concerned disobedience of an order to train personnel in dermatology in preparation for their possible assignment to Vietnam. The offenses under Articles 133 and 134 concerned statements made by Captain Levy in the presence of enlisted personnel and others, expressing his strong opposition to the Vietnam war. The Court of Appeals for the Third Circuit had found Articles 133 and 134 void for vagueness.[17]

In upholding the constitutionality of both Articles, Justice Rehnquist emphasized that "the military is, by necessity, a specialized society separate from civilian society" [18] and that "military law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." [19] The opinion then cited several Supreme Court precedents from the nineteenth century which applied the statutory provisions that were ancestors of the present Articles 133 and 134.[20] He continued:

> The differences noted by this settled line of authority, first between the military community and the civilian community, and second between military law and civilian law, continue in the present day under the Uniform Code of Military Justice. That Code cannot be equated to a civilian criminal code.[21]

The opinion adverts to a broader range of conduct regulated by the Uniform Code than is encompassed within civilian criminal codes but notes that the sanctions for minor offenses under Article 15 "are more akin to administrative or civil sanctions than to civilian criminal ones." [22] Because of the differences between military and civilian communities, the Court concludes that "Congress is permitted to leg-

---

[15] *Id.* at 692.

[16] 10 U.S.C. §§ 890, 933, 934 (1970).

[17] Levy v. Parker, 478 F.2d 772 (3d Cir. 1972).

[18] 417 U.S. at 743.

[19] *Id.* at 744, *quoting from* Burns v. Wilson, 346 U.S. 317, 140 (1953) (plurality opinion).

[20] 417 U.S. at 746-49.

[21] *Id.* at 749.

[22] *Id.* at 751.

islate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter." [23] Thus, the Court stated that "the proper standard of review for a vagueness challenge to the Articles of the UCMJ is the standard which applies to criminal statutes regulating economic affairs." [24]

In discussing the rights of service personnel, the Court made the following observations:

> While members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian community.[25]
>
> While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission require a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.[26]

Several features of the majority opinion in *Levy* are noteworthy. In the first place, the Court goes much farther than would seem absolutely essential to the disposition of the vagueness challenge to Articles 133 and 134. In light of the interpretation of those Articles by the Manual for Courts-Martial[27] and by the Court of Military Appeals,[28] the Supreme Court could have concluded that the scope of the articles was sufficiently restricted and clarified. To apply to

---

[23] *Id.* at 756.

[24] *Id.*

[25] *Id.* at 751.

[26] *Id.* at 758.

[27] *See, e.g.*, paragraph 213*b*, MANUAL FOR COURTS-MARTIAL, 1969 (Rev. ed.) [hereinafter cited as MANUAL], which makes clear that the first clause of Article 134 "refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense." Also, in Appendix 6, the Manual prescribes sample specifications for alleging violations of Articles 133 and 134.

[28] *See, e.g.*, United States v. Downard, 6 U.S.C.M.A. 538, 20 C.M.R. 254 (1955); United States v. Norris, 2 U.S.C.M.A. 236, 8 C.M.R. 36 (1953). Of course, long ago I contended that the Court of Military Appeals had not gone far enough in restricting the scope of the general articles. *See* Everett, *Article 134, Uniform Code of Military Justice—A Study in Vagueness*, 37 N. CAR. L. REV. 142 (1959).

punitive articles affecting important personal rights and liberties of servicemen the same standard of review which applies to criminal statutes regulating economic affairs seems unnecessary. But, the Court chose to do this very thing. Second, the Court chose to rely on several precedents from the last century which had been little cited in recent years. Those cases arose at a time when the civilian courts would interfere with a court-martial only if the court-martial lacked jurisdiction, a term that was narrowly construed and did not include loss of "jurisdiction" in the sense of *Johnson v. Zerbst.*[29] Third, the majority opinion did not reflect distrust of military justice manifest in *O'Callahan.*

Finally, although not referring to the all-volunteer Army, the reasoning of the majority appears to take cognizance of the movement away from the use of the draft. Possibly the Court felt that there may be more compelling constitutional reasons for protecting the rights of an inductee serving because of a "call" to duty than those of an enlistee, who freely chooses to enter military service and subject himself to military jurisdiction. In this regard, I am reminded of Justice Clark's suggestion in *McElroy v. Guagliardo*[30] that problems of military jurisdiction over civilian employees outside the United States could be solved by having the employees agree to the exercise of such jurisdiction as a condition of their employment.

In view of its majority opinion, what does *Levy* portend? In recent years there has been extensive comment on the civilianization of military justice. Indeed, two years ago Professor Delmar Karlen delivered the Young lecture on this very topic and obviously did not feel that the trend was entirely healthy.[31] I have written elsewhere about the extent to which military justice provides procedural safeguards that assure the same fairness of trial required in the civil courts.[32] Clearly the majority opinion in *Levy* refutes the position that civilianization of military justice is constitutionally required. Unfortunately, at the same time the *Levy* decision may reduce some

---

[29] 304 U.S. 458 (1938) (requiring appointment of counsel in federal prosecutions).

[30] 361 U.S. 281, 286 (1960). For my criticism of that approach *see* Everett, *Military Jurisdiction over Civilians,* 1960 DUKE L. J. 367, 407-9.

[31] Karlen, *Civilianization of Military Justice: Good or Bad,* 60 MIL. L. REV. 113 (1973).

[32] *See, e.g.,* Everett, *supra* note 14.

of the pressure for improvement of military justice that gave rise to the Uniform Code[33] and to the Military Justice Act of 1968.[34]

To what extent does *Levy* signify the expansion or restriction of *O'Callahan v. Parker*? Since Justice Rehnquist, who wrote the majority opinion in *Levy*, had previously stated in his concurring opinion in *Gosa* that *O'Callahan* was erroneously decided and should be overruled, there is a possibility that *O'Callahan* might be dealt a mortal blow. The delivery of the *coup de grace* would be all the easier, since Justice Blackmun, writing the plurality opinion in *Gosa*, had characterized *O'Callahan* as "a clear break with the past"—one of his reasons for not granting it retroactivity. The Court could say that, in overruling *O'Callahan*, it simply would be returning to earlier precedent, precedent that had been reaffirmed in *Levy*. As one might recall, the Warren Court in *Gideon v. Wainwright*[35] disposed of *Betts v. Brady*[36] by recognizing that *Betts v. Brady* was inconsistent with the earlier precedent of *Powell v. Alabama*.[37]

Instead of a full-fledged overruling of *O'Callahan*, however, I suspect that we shall witness, at least for the present, a gradual erosion of its holding—as the *Miranda*[38] rule is being nibbled away by such decisions as *Harris v. New York*[39] and *Michigan v. Tucker*.[40] *Gosa* has already limited the impact of *O'Callahan* by denying it retroactivity. I fully expect that the Supreme Court, recognizing the needs of the military community in an overseas milieu, will hold that *O'Callahan* has no extraterritorial application—as the Court of Military Appeals and other courts have held.[41] Similarly, the Supreme Court will probably follow the lead of the Court of Military Appeals and not extend *O'Callahan* to petty offenses,[42] where grand jury indictment and trial by jury are not constitutionally required in civilian courts. Petty offenses, incidentally, are the very types of offenses

---

[33] Act of May 5, 1950, ch. 169, § 1, 64 Stat. 108 (codified at 10 U.S.C. §§ 801-940 (1958)).

[34] Act of Oct. 24, 1968, Pub. L. No. 90-632, §§ 2-4, 82 Stat. 1335, *amending* 10 U.S.C. §§ 801-940 (1958), (codified at 10 U.S.C. §§ 801-940) (1970).

[35] 372 U.S. 335 (1963).

[36] 316 U.S. 455 (1942).

[37] 287 U.S. 45 (1932).

[38] Miranda v. Arizona, 384 U.S. 436 (1966) (right to counsel in custodial interrogation).

[39] 401 U.S. 222 (1971).

[40] 417 U.S. 433 (1974).

[41] *See* authorities cited at note 3, *supra*.

[42] United States v. Sharkey, 19 U.S.C.M.A. 26, 41 C.M.R. 26 (1969).

that frequently are dealt with by Article 15 nonjudicial punishment, a fact which is adverted to in Justice Rehnquist's opinion in *Levy*.[43]

What about cases involving marijuana and drug offenses, where the Court of Military Appeals has disagreed with some other federal courts on the existence of a "service-connection"? The Court of Military Appeals has taken the position that, because military efficiency might be adversely affected when a serviceman uses drugs, whether on or off a military base, service-connection exists.[44] Several federal courts have concluded otherwise. They have held that off-base use—and perhaps even sale—of marijuana and drugs is not sufficiently service-connected to invest a court-martial with jurisdiction.[45]

The Supreme Court has granted certiorari in *Schlesinger v. Councilman*,[46] a case which presents some of these issues. Captain Councilman was court-martialed for the sale off-base of marijuana to an enlisted man. The court of appeals ruled that service-connection was lacking.[47] However, the case may be decided by the Supreme Court not on the issue of jurisdiction of the court-martial, but instead on a procedural issue: the extent to which a federal court can intervene and enjoin a trial by court-martial.[48]

Based on *Levy*, one can argue that, since military justice is so dis-

---

[43] 417 U.S. at 750.

[44] *See, e.g.*, United States v. Sexton, 23 U.S.C.M.A. 101, 48 C.M.R. 662 (1974); Rainville v. Lee, 22 U.S.C.M.A. 464, 47 C.M.R. 554 (1973); United States v. Castro, 18 U.S.C.M.A. 598, 40 C.M.R. 310 (1969); United States v. Beeker, 18 U.S.C.M.A. 563, 40 C.M.R. 275 (1969).

[45] Cole v. Laird, 468 F.2d 829 (5th Cir. 1972); Councilman v. Laird, 481 F.2d 613 (10th Cir. 1973), *cert. granted sub. nom.*, Schlesinger v. Councilman, 414 U.S. 1111 (1973); Moylan v. Laird, 305 F. Supp. 551 (D.R.I. 1969); Holder v. Richardson, 364 F. Supp. 1210 (D.D.C. 1973).

[46] Councilman v. Laird, 481 F.2d 613 (10th Cir. 1973), *cert. granted sub. nom.*, Schlesinger v. Councilman, 414 U.S. 1111 (1973). [After this speech was given and edited for publication, the United States Supreme Court decided Schlesinger v. Councilman, 43 U.S.L.W. 4432 (U.S., March 25, 1975). (Ed. note)]

[47] Councilman v. Laird, 481 F.2d 613 (10th Cir. 1973).

[48] The applicability of the exhaustion of remedies in seeking an injunction against court-martial for a drug offense has also been raised by the petition for certiorari in Mascavage v. Schlesinger, 43 U.S.L.W. 3109 (U.S. May 30, 1974) (No. 1795). The Court of Appeals concluded that an injunction should not be granted. Injunctive relief with respect to a court-martial proceeding is also involved in McLucas v. DeChamplain, appeal filed, 43 U.S.L.W. 3046 (U.S. April 4, 1974) (No. 1346). *Cf.* Parisi v. Davidson, 405 U.S. 34 (1972) (granting injunctive relief); Noyd v. Bond, 395 U.S. 683 (1969) (applying an exhaustion requirement). *See also* Everett, *supra* note 3, at 894-95.

tinctive and is subject to different standards than those which apply to civilian criminal trials, there is a special importance in maintaining the doctrine of *O'Callahan*. In short, the serviceman who is tried by court-martial may not be entitled under *Levy* to the protections that even some severe critics of *O'Callahan* thought were required in courts-martial proceedings.

On the other hand, the apparent diminution of the Supreme Court's distrust of military justice and its increased perception of the uniqueness of the military community and of military criminal codes will probably lead to an expansive view of what is service-connected. Moreover, this is an area in which the Supreme Court may defer to the supposed expertise of the Court of Military Appeals[49] and the armed services themselves on the premise that they can better discern a service-connection than can an Article III court. As I have pointed out elsewhere, there is precedent in military law for a broad interpretation of service-connection.[50]

Parallel arguments can be advanced concerning the right of federal tribunals to enjoin trials by court-martial when a defendant claims that service-connection is lacking. On the one hand, the potential difference in procedural safeguards between courts-martial and civil courts may be so great in light of *Levy* that federal district courts should be allowed to intervene at an early stage to enjoin trial when, under *O'Callahan* or otherwise, military jurisdiction seems lacking. Contrariwise, it can be contended that, because of the unique needs of the military community and of the operation of the military justice system, federal civil courts should not be allowed to enjoin any trial of a serviceman by court-martial. *Noyd v. Bond*[51] is precedent for the requirement that the remedies authorized by the Uniform Code be exhausted before a service member is permitted entry into the civilian courts. *Parisi v. Davidson*[52] allowed a trial by court-martial to be enjoined, but may be limited to a special situation —a conscientious objector who has sought to obtain his administrative release from the armed forces prior to the occurrence of the events leading to the charges against him.

On balance, I expect that the Supreme Court will virtually preclude federal district courts from enjoining trials by courts-martial. Among my reasons for this expectation are these: the Court's less-

---

[49] Cf. Noyd v. Bond, 395 U.S. 683, 694-96 (1969).

[50] Everett, *supra* note 3, at 870-872.

[51] 395 U.S. 683 (1969).

[52] 405 U.S. 34 (1972).

ened suspicion of the quality of military justice; its reduced enthusiasm for *O'Callahan's* restriction of military jurisdiction;[53] the undesirability of adding further to the workload of the federal district courts; and a fear by the Supreme Court that enjoining trials by courts-martial might hinder the swift administration of justice, an important consideration in maintaining discipline in the armed services.

The majority opinion in *Levy* does not affirm that servicemen possess all the constitutional rights enjoyed by their civilian counterparts except those that are necessarily excluded by the needs of the military community. Furthermore, as to the important first amendment right of free speech—a right for which the Supreme Court has long demonstrated great solicitude—the majority in *Levy* provides a protection which is far less inclusive than that available to a civilian protesting restrictions on his free speech. Because of the unique needs of the military community and the importance of preserving the authority of military superiors, there may be reasons for permitting limitations on free speech in the military environment that would not be constitutionally permissible in the civilian community. But what of the other rights which, for civilians, are protected by the Bill of Rights?

Recently, the Army and Air Force concluded that under *Argersinger v. Hamlin*[54] a summary court-martial could not impose a sentence to confinement unless lawyer-counsel was made available to the accused.[55] The Navy took the opposite position and did not furnish counsel in summary courts-martial. The Navy's position was subsequently rejected by some federal courts.[56] In light of *Levy* how will the issue be resolved? In short, will the uniqueness of the military community be sufficient ground for a court to conclude that a serviceman's constitutional right to counsel is not the same as it is for his civilian counterpart?[57]

---

[53] *Cf.* Relford v. Commandant, 401 U.S. 355 (1971); Gosa v. Mayden, 413 U.S. 665 (1973).

[54] 407 U.S. 25 (1972).

[55] *See* Beronie v. Sizemore, 369 F. Supp. 340 (M.D. Fla. 1973) *modified*, 496 F.2d 1001 (5th Cir. 1974); Everett, *supra* note 13, at 676-77.

[56] *See, e.g.*, Beronie v. Sizemore, 369 F. Supp. 304 (M.D. Fla. 1973) *modified*, 496 F.2d 1001 (5th Cir. 1974). *Contra*, Middendorf v. Henry, 493 F.2d 1231 (9th Cir. 1974), *cert. granted*, 43 U.S.L.W. 3241, 3300 (1974).

[57] The Supreme Court will have the opportunity to answer these questions in Middendorf v. Henry, 493 F.2d 1231 (9th Cir. 1974), *cert. granted*, 43 U.S.L.W. 3241, 3300 (1974).

And what of other constitutional protections? Since various articles of the Uniform Code authorize the death penalty,[58] what effect does *Furman v. Georgia*[59] have on military trials and the right of a court-martial to impose a death sentence?[60] Another question still to be answered is whether a military accused's counsel has a right to discover whatever files are in the government's hands, regardless of any security classification or restriction upon use impressed on those files?[61]

As I have indicated, *Levy* may serve to emancipate military justice from some of the possible constitutional restraints to which many considered it subject. The extent of this emancipation may hinge on such imponderables as the occurrence of vacancies on the Supreme Court and the manner in which President Ford fills any such vacancies, *i.e.*, whether he chooses men who are conservative with respect to criminal law administration. However, no immediate retreat from some of the broad pronouncements of *Levy* seems likely.

If significant change in military justice is not to be required by the Supreme Court, Congress might still initiate changes. Frankly, however, this seems unlikely. Senator Ervin has been the congressional leader in seeking improvements of military justice. Early in 1962 and again in 1966 his Subcommittee on Constitutional Rights conducted important hearings on the rights of military personnel.[62] The efforts of Senator Ervin and his subcommittee were largely responsible for the Military Justice Act of 1968,[63] somewhat a "trade-off"

---

[58] *See, e.g.*, Articles 99-104, 10 U.S.C. §§ 899-904 (1970).

[59] 408 U.S. 238 (1972).

[60] The Supreme Court expressly reserved this question in deciding Schick v. Reed, 43 U.S.L.W. 4083 (U.S. Dec. 23, 1974). Only Article 106 of the Uniform Code, 10 U.S.C. § 906 (1970), which punishes "Spies," provides for a mandatory death sentence; and so, if *Furman* applies to courts-martial, it would virtually rule out capital punishment in military justice.

[61] Apparently this question has been presented to the Court in McLucas v. DeChamplain, *appeal filed*, 43 U.S.L.W. 3046 (U.S. April 4, 1974) (No. 1346), *prob juris noted*, argued 43 U.S.L.W. 3346 (1974). [After this speech was given and edited for publication, the United States Supreme Court decided McLucas v. DeChamplain, 43 U.S.L.W. 4453 (U.S., April 15, 1975). (Ed. note)]

[62] *Hearings on S. Res. 260 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. (1962); *Joint Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary and a Special Subcomm. of the Senate Comm. on Armed Services*, 89th Cong., 2d Sess., pt. 1 (1966). Both the 1962 and the 1966 hearings contain a wealth of interesting information about military justice as it then existed.

[63] Act of Oct. 24, 1968, Pub. L. No. 90-632, §§ 1-4, 82 Stat. 1335, *amending* 10 U.S.C. §§ 801-940 (1958). *See also* Everett, *supra* note 14, at 650-57.

between reforms which the Department of Defense desired to enhance efficiency in military criminal law administration and those reforms which Ervin and his colleagues insisted on to protect the rights of servicemen.

For the last two years, however, Senator Ervin has been occupied with the work of an entirely different congressional committee. Upon his retirement, no one is on the horizon who will be able to assume Senator Ervin's position of leadership in matters relative to military justice. One of the reasons for this situation is the fortuitous circumstance that Senator Ervin was not only Chairman of the Senate Subcommittee on Constitutional Rights of the Judiciary Committee but also a senior member of the Armed Services Committee.[64]

Furthermore, it is doubtful that, at this point in time, the Department of Defense has any military justice related legislative objectives important enough to justify another compromise resulting in further safeguards for military accused. Thus, some of the conditions which led to the enactment of the Military Justice Act of 1968 are lacking today.

Even so, a few relatively minor legislative or administrative changes in military justice may be in the offing. Several such changes were recently recommended by the Standing Committee on Military Law of the American Bar Association and in turn were approved by the American Bar Association's House of Delegates.[65] Former Judge Advocate General of the Army Kenneth J. Hodson took to the floor in opposition to the changes but was unable to obtain significant support for his objections to recommendations which the House of Delegates apparently viewed as rather technical.

One such change concerns the further expansion of the role of the military judge. The ABA Standing Committee on Military Law has recommended that the military judge be granted sentencing authority, except in capital cases and in those cases where the accused has requested before trial that he be sentenced by the court-martial members. General Hodson felt that in this context, granting sentencing authority to the court-martial members—the military jury—conflicted with ABA Standards of Judicial Administration that call for sentencing to be performed by the judge. Contrariwise, the standing committee felt that in light of the history of military justice and the various elections that have been provided to an accused, including

---

[64] The *1966 Hearings* were joint hearings. *See* note 62 *supra*.

[65] 43 U.S.L.W. 2085 (1974).

the election to choose an enlisted court,[66] it would be undesirable to deprive a military accused of the opportunity to be sentenced by a military jury. Even today, however, a high percentage of sentencing is done by military judges because the waiver of trial by court members is currently authorized,[67] and frequently exercised.

In broadening the sentencing authority of the military judge, one can only hope that provision would be made for the suspension of sentence and the deferment of confinement by the military judge. Moreover, in line with any increased sentencing power of military judges, the Manual for Courts-Martial should—and probably will—be changed to provide for presentence investigations and reports similar to those in civilian courts.

Because of the increasing professionalism and prestige of the trial judiciary of the various armed services, the power of the convening authority to overrule the military judge on some matters—such as denial of speedy trial—[68] should probably be reexamined by Congress. As a more uniform standard of performance develops among the military judges in the various armed services, I would hope that greater interservice use of the judges will develop. Of course, a military accused may not be content to be tried by a military judge from another service. This is especially true if the accused believes that the trial will be less fair or if convicted, a harsher sentence will be imposed than if he were tried by a military judge from his own service. The grounds for such concern on the part of an accused or his defense counsel, however, will diminish in the years ahead. In that event, whether from congressional sources or otherwise, suggestions will probably be forthcoming that interservice use of military judges should be authorized when it will lead to a speedier or more economical trial.[69] Similarly, there may be encouragement for interservice use of other trial personnel.[70]

At one point in time, Senator Ervin's Subcommittee on Constitu-

---

[66] UNIFORM CODE OF MILITARY JUSTICE art. 25(c)(1), 10 U.S.C. § 825(c)(1) (1970).

[67] UNIFORM CODE OF MILITARY JUSTICE art. 16, 10 U.S.C. § 816 (1970).

[68] UNIFORM CODE OF MILITARY JUSTICE art. 62(a), 10 U.S.C. § 862(a) (1970). United States v. Frazier, 21 U.S.C.M.A. 444, 45 C.M.R. 218 (1972); Priest v. Koch, 19 U.S.C.M.A. 293, 41 C.M.R. 293 (1970).

[69] Paragraph 4g(1) of the Manual fully authorizes interservice assignment of military judges.

[70] Of course, paragraph 4g of the Manual does contemplate that court-martial members—military jurors—should ordinarily be appointed from the accused's armed force.

tional Rights considered the desirability of authorizing civilians to serve as military trial judges, just as they may serve now on Courts of Military Review.[71] There was some precedent for the use of civilians in British military criminal law administration. No action was taken and as the law stands today, a civilian may not serve as the military trial judge in a court-martial proceeding. Congress should, I think, grant the military authority to use civilians in this capacity, although I doubt that such authority would ever be used.[72] On the other hand, The Judge Advocates General probably prefer that Congress remain silent and not grant such authority; if the use of civilians were authorized, it might lead to the widespread use of civilians as military judges.[73] At present the trial judiciary is functioning efficiently and it is doubtful that the authority to utilize civilians as military judges will be granted by the Congress.

Another recommendation of the ABA Standing Committee on Military Law would preclude the convening authority from reviewing a court-martial conviction with respect to the correctness of determinations of law and fact and automatically reviewing the appropriateness of sentence but would permit him to exercise clemency. On this recommendation there is some possibility of congressional action, since the increasing complexity of military justice suggests that some of the convening authority's present responsibilities in appellate review might better be performed by legally trained personnel. Indeed, under present statutory provisions, most convening authorities probably depend very heavily on their staff judge advocates with respect to actions on findings and sentence.

There have been proposals that random selection of court-martial members be employed, and I understand that the Army has experimented with this procedure in a project at one post. A proposed panel is selected at random from all military personnel on a post and submitted to the convening authority for approval or disapproval. The Navy, on the other hand, apparently believes that random selection of courts-martial members conflicts with the statutory requirement that the convening authority personally select the court members based on their maturity, experience, and similar criteria of

---

[71] Appellate military judges may be either commissioned officers or civilians. UNIFORM CODE OF MILITARY JUSTICE art. 66(a), 10 U.S.C. § 866(a) (1970).

[72] Professor Bishop has suggested that some military judges and military defense counsel might be civilians. J. BISHOP, JR., *supra* note 3, at 300-1.

[73] I understand that in the Navy, where civilians were once used extensively on the Article 66 Boards of Review, that such use was gradually phased out.

suitability to serve as court-martial members.[74] After the emphasis in *Levy* on the uniqueness of the military community and in view of some of the administrative problems that might be encountered in using random selection at small commands, it is seriously doubted that Congress will ever choose to require selection of court members in this manner. On the other hand, random selection of court members, even under current provisions of the Uniform Code, is permissible. The convening authority's decision to appoint court members in this manner is a permissible exercise of his personal discretion. If, however, the technique is invalidated by the Court of Military Appeals, legislation specifically authorizing the use of random selection will probably be enacted.

A recurring complaint against the military justice system concerns the independence of military defense counsel, and legislation to assure more fully the separation of defense counsel from command influence has been proposed. Recommendations of the recent Task Force on the Administration of Military Justice in the Armed Forces led to a requirement, imposed by then Secretary of Defense Laird, that each armed service develop plans for assuring such separation. The Army and the Air Force have chosen to separate defense counsel organizationally—and frequently geographically—from other military justice activities.[75] The Navy JAG, I understand, has used this requirement as justification for pulling most of its military justice activities out of the regular chain of command, but the defense counsel are not organizationally separated from other legal activities.[76] While there may be differences as to the relative efficacy of these two approaches, and although I am not sure that any of these plans have yet been formally approved by the Department of Defense, the mere fact that action has been taken will be sufficient to mute demands

---

[74] For the statutory criteria to be used in selecting court-martial members, *see* UNIFORM CODE OF MILITARY JUSTICE art. 25(d)(2), 10 U.S.C. § 825(d)(2) (1970); United States v. Crawford, 15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964). As to random selection *see also* Remcho, *Military Juries: Constitutional Analysis and the Need for Reform*, 47 IND. L. J. 193 (1972); Everett, *supra* note 14, at 700.

[75] The Air Force initially established a pilot project in which defense counsel operated independently of the office of the base staff judge advocate. Later the system was extended on a worldwide basis. The Army system is somewhat similar.

[76] The Navy has used its eighteen Navy Legal Services Offices as a means of separating defense counsel from command control. Under this system these Offices are under the command of The Judge Advocate General of the Navy, who wears another hat as the Chief of Legal Services. However, unlike the Air Force and Army approaches there is no effort to separate the defense counsel organizationally from lawyers performing other court-martial roles.

for further reform in this area. And those who wish to make no further changes can utilize to their advantage Justice Rehnquist's opinion in *Parker v. Levy*.

Closely related to military justice is the military administrative discharge—a subject I dealt with extensively in an article several years ago.[77] Senator Ervin has long pressed for new legislation to assure procedural safeguards in administrative discharge proceedings and, two or three years ago there was widespread expectation that some of his proposals would become law. This did not take place. At some future time Congress may require that a military judge preside over administrative discharge hearings, just as he presently presides over special and general courts-martial. This requirement might not only be enacted to provide further procedural safeguards in military administrative discharge proceedings but also to provide additional caseload for military judges.[78]

Similarly, it is possible that Congress may act to eliminate the general discharge. The general discharge, issued under honorable conditions and entitling the recipient to full veterans benefits, is something of an anomaly, since the stigma it may in fact create is inconsistent with the concept of discharge under honorable conditions.[79] I am not aware of any specific legislative authorization for the general discharge and believe that it could be eliminated administratively. However, in the absence of such administrative action, Congress may choose to eliminate the general discharge as a means of administrative separation from the service.

If the Supreme Court finally rules that *Argersinger v. Hamlin*[80] requires that counsel be furnished the accused in summary courts-martial if confinement is to be part of any adjudged sentence, the demise of the summary court-martial might be hastened.[81] In any event, the Air Force has already virtually eliminated use of the summary court-martial. The Navy remains as the principal defender of such a tribunal. In time, Congress may conclude that the summary court-martial is not essential to the operation of a system of military justice and should be eliminated.

There are some other areas in which Congress might enact enabling

---

[77] Everett, *Military Administrative Discharges—The Pendulum Swings*, 1966 DUKE L. J. 41.

[78] One must admit that some military lawyers have questioned the possibility that military judges would have any time available for performance of such duties.

[79] *See* Everett, *supra* note 77, at 43-4, 59-60.

[80] 407 U.S. 25 (1972).

[81] As indicated, *Levy* makes such an outcome less certain.

legislation concerning military justice matters. For example, specific legislative authorization for the use of military magistrates in any decision to release an accused from pretrial confinement and in granting authority for searches, seizures, and similar investigative action might be enacted by Congress.[82] Additionally, amendments to the Federal Rules of Criminal Procedure may provide models for legislative action or perhaps executive changes in the Manual for Courts-Martial.[83] For instance, the government might be granted the right to discover certain evidence in the possession of an accused as a condition for its use at trial and to be notified of alibi defenses, among others.

To return, however, to my basic theme, *Levy* promises to reduce or almost eliminate federal civilian court pressure for change in the administration of military criminal law. Similarly, major congressional action concerning military justice seems unlikely. Frankly, I doubt that the decisions of the Court of Military Appeals will, at this point in its history, require major changes in military justice.[84]

If change in military justice is to come, it will probably be in response to two internal pressures. One pressure is the requirements of an all-volunteer army. Theoretically, an enlistee by his enlistment contract may waive many of the rights he would possess as a civilian, but the fact remains that, except under the most desperate economic conditions,[85] persons will not enlist in the armed forces if they feel they will be unjustly treated by the administration of military justice.

A second internal pressure for the continuing reform and improvement of military justice results from the increased professionalization of the military lawyer. In a real sense, The Judge Advocate General's School helps contribute to this pressure. The judge advocates trained at the School are familiar with developments in judicial ad-

---

[82] The Army experimented successfully with a military magistrate program—first in Europe and later at Forts Bragg, Dix, and Hood (and has extended it Army-wide in commands with active confinement facilities).

[83] Similarly, the recently enacted Federal Rules of Evidence, Pub. L. No. 93-595, 93d Cong., H.R. 5463, January 2, 1975, may lead to changes in the evidentiary provisions of the Manual for Courts-Martial. (Since this speech was given several changes to the Manual have been prescribed by Executive Order No. 11835, 40 Fed. Reg. 4247 (1975)).

[84] Obviously the future actions of the Court will hinge on some new judicial appointments. However, I do not currently anticipate any revolutionary pronouncements by the Court of Military Appeals.

[85] Of course, this very type of economic condition may be rapidly approaching and is perhaps responsible for the success of the Armed Services in recruiting new members of an all-volunteer military establishment.

ministration, and they are not, I am sure, content to follow precedent merely for the sake of following precedent. Thus, innovations in military justice will be implemented by administrative action from within the system. Incidentally, it is well known that the concepts of the trial judiciary and the military judge began with an Army project in the early 1960's.[86] And there are many other examples of innovation by military lawyers.

Soon after his appointment to the Court of Military Appeals, Judge Paul Brosman wrote that the Court of Military Appeals was freer than most;[87] it was not shackled by the venerable precedents that bind many other appellate courts. Now, in June 1974, the Supreme Court has made clear that military criminal law administration is free from many of the constitutional restrictions that bind civilian courts in their administration of criminal law. How wisely that freedom is exercised will be determined largely by judge advocates, many trained here at The Judge Advocate General's School. Having observed the tradition of the School and its alumni from the days of its first commandant, Colonel Ham Young, to the present, I feel sure that military lawyers will meet this challenge with distinction.

---

[86] See Karlen, *How the Army Trains Its Judges*, 35 U. Mo. KAN. CITY L. REV. 271 (1966). Wiener, *The Army's Field Judiciary System: A Notable Advance*, 46 A.B.A.J. 1178 (1960).

[87] Brosman, *The Court: Freer than Most*, 6 VAND. L. REV. 166 (1953).

SEX DISCRIMINATION IN THE MILITARY*

Major Harry C. Beans**

This article addresses the current state of the law with respect to the utilization of sex as a basis for discrimination. It includes an examination of the evolving equal protection doctrine as it is applied to sex discrimination. In addition, the legislative efforts in this area, Title VII of the Civil Rights Act of 1964 and the Equal Rights Amendment, are analyzed in order to determine the present and future statutory measures directed at the elimination of sexual classifications. Against this background, military statutes and regulations that provide special treatment for either sex are reviewed. Finally, recommendations as to how the military might best achieve compliance with the statutory and constitutional requirements barring discrimination are presented.

I. INTRODUCTION

The military, the last foothold of male chauvinism according to many, is being forced to relinquish its mantle of male dominance and seek an image that includes a revolutionary utilization of women in all areas of military service.[1] Military leaders who have traditionally been free to maintain their own standards of enlistment and job qualification find this prerogative gradually eroding in the face of legislative and judicial action. These legislative and judicial actions by the Congress and the courts reflect a societal realization of the productive capabilities of women apart from their historically perceived place in the home.[2] The armed services, not oblivious to

---

* This article was adapted from a thesis presented to The Judge Advocate General's School, US Army, Charlottesville, Virginia, while the author was a member of the Twenty-Second Advanced Course. The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

** JAGC, US Army; B.A., 1960, Pennsylvania State College; J.D., 1970, American University. Member of the Bars of District of Columbia, U.S. Supreme Court and the U.S. Court of Military Appeals.

[1] For a general study pertaining to the issues underlying the women's movement, the following are recommended: KANTOWITZ, WOMEN AND THE LAW (1969); Brown, Emerson, Falk and Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women* 80 YALE L.J. 871 (1971) [hereinafter cited as *Equal Rights*].

[2] *See generally* GRUBERG, WOMEN IN AMERICAN POLITICS 4 (1968).

reality, have in the last two years opened many opportunities to women which heretofore were restricted to men.[3]

In spite of the measures taken to eliminate many of the distinctions between servicemen and servicewomen, there remain a considerable number of statutes and regulations that continue to differentiate between men and women. These statutes may well be discriminatory in nature. Some of these differentiations, it is argued, are based on "military necessity" and are rightfully required in order to maintain a necessary level of combat readiness. Other distinctions, however, must be eliminated as they are based on outmoded stereotyped reasoning and serve no purpose other than to relegate women to the military background.

The difficulty in determining which military regulations and policies are discriminatory has been complicated by two recent developments. The first was the passage of the Equal Rights Amendment (ERA) by Congress which has been submitted to the States for ratification.[4] The amendment, if ratified, will remove sex as a factor in determining the legal rights of men and women.[5] The second development was the Supreme Court's decision in *Frontiero v. Richardson*[6] in which the Court split evenly on the issue of whether sex is a suspect classification. A plurality held that a statutory classification based on sex was inherently suspect and must be subjected to strict judicial scrutiny.[7] Four concurring justices refused to consider a sex-based classification under this strict standard, preferring to rely on the less stringent "rational basis" test.[8] Because this issue remains unresolved, it is necessary to examine those areas of the military which retain distinctions between men and women under a variety of standards in order to determine the present and future legal effect of such classifications.

As a prologue to the examination of questionable military statutes and regulations, the constitutional and legislative routes that are

---

[3] *See generally* CENTRAL ALL-VOLUNTEER FORCE TASK FORCE, UTILIZATION OF MILITARY WOMEN (1972) [hereinafter cited as TASK FORCE REPORT].

[4] H.J. RES. 208, 92d Cong., 1st Sess., 117 CONG. REC. H. 9392 (daily ed. Oct. 12, 1971); S.J. RES. 8, 92d Cong., 2d Sess., 118 CONG. REC. S. 4162 (daily ed. March 22, 1972). The House approved H.J. RES. 208, 117 CONG. REC. H. 9392 (daily ed. Oct. 12, 1971). Senate approved S. 8, CONG. REC. S. 4612 (daily ed. March 22, 1972).

[5] *Equal Rights*, *supra* note 1, at 871.

[6] 411 U.S. 677 (1973).

[7] *Id.* at 688.

[8] *Id.* at 692.

currently used to attack sex discriminatory action on the part of the federal government and private employers must be considered. It is significant to note the evolvement in the constitutional field of an increasingly potent equal protection theory, the exact dimensions of which are still not clearly delineated. On the legislative side, Title VII of the 1964 Civil Rights Act[9] is analyzed as a prelude to ERA. Although Title VII, and its enforcement arm, the Equal Employment Opportunity Commission (EEOC), are not considered to be applicable to the uniformed members of the military departments, the methodology and philosophy of Title VII are instructive in discovering and eliminating those discriminative features found in the Armed Forces.[10] Finally, the ERA is studied in order to determine the potential limits of absolute equality of the sexes and its possible effect on the military.

This examination merely sets the stage for a critical assessment of the military statutes and regulations that may raise problems of sex discrimination. These laws are tested against present constitutional standards as well as future ERA applications. Finally, recommendations are made as to what action must be taken to bring the military in compliance with current nondiscrimination criteria, as well as the direction that must be followed in order to ameliorate the disruptive impact of ERA should it be ratified.

II. A CONSTITUTIONAL ANALYSIS

Judicial interpretations of the Constitution prior to 1950 reflected the generally accepted societal belief that women occupied a position subordinate to men in our then male-dominated society. The comment of Thomas Jefferson, while appearing almost heretical today, was the common view held in 18th and 19th century society:

> Were our states a pure democracy there would still be excluded from our deliberations women, who, to prevent deprivation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men.[11]

The Supreme Court's earliest exposition on the rights afforded women by the Constitution was simple: women, the same as blacks, occupied a "separate place" under the law. This view, no doubt

---

[9] 42 U.S.C. § 2000e-2(a)(1) (1970).

[10] On March 27, 1972 the Equal Employment Act of 1972 amended Title VII of the Civil Rights Act of 1964 and afforded coverage to employees of governmental organizations but did not include uniformed service members within such coverage. Pub. L. No. 92-261, 86 Stat. 103 (1972).

[11] GRUBERG, WOMEN IN AMERICAN POLITICS 4 (1968).

influenced by the romantic paternalism of the period, was perpetuated by the courts for nearly a century. This judicial philosophy was expressed by Justice Bradley in the case of *Bradwell v. Illinois* in 1872, which upheld a state statute excluding women from the practice of law:

> Man is, or should be, women's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization . . . indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.[12]

This more or less typical, "separatist" view of woman's place was imbedded in the judicial decisions classifying women with children, denying them adult roles in the community, and relegating their conduct to the male's guardianship. The earliest challenges to the different legal treatment of males and females were based on the privileges and immunities clauses[13] and due process clauses.[14] These challenges were not successful, and the "separatist" concept withstood all constitutional challenges until the middle of the 20th century.

Because basic civil rights, such as voting and the opportunity to practice law, were not considered among the "privileges" of United States' citizenship, they were subject to exclusive regulation by the states.[15] While the Supreme Court did review state regulation of these rights, the Court did so with a studied casualness, not allowing women to be relieved of the "legal protection" that they "needed" from the vices of the world.[16]

With respect to the due process argument, the Court's decision in *Muller v. Oregon*,[17] one of the first cases to carefully scrutinize the position of women under the Constitution, firmly established the "separate place" doctrine. In *Muller*, the constitutionality of a state

---

[12] 83 U.S. 40 (1872).

[13] "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2; *See also* U.S. CONST. amend. XIV, § 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ."

[14] "[nor shall any person] be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V; "[nor shall any State] deprive any person of life, liberty or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

[15] *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874) (voting); Bradwell v. Illinois, 83 U.S. 40 (1872) (admission to the bar).

[16] Muller v. Oregon, 208 U.S. 412 (1808).

[17] *Id.*

statute limiting the hours of employment of women was challenged. The Court, in upholding the statute's validity, stated:

> [I]t takes judicial cognizance of all matters of general knowledge—such as the fact that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil.[18]

The Court concluded that the regulation of hours of labor fell within the police power of the state and a statute directed exclusively to this regulation did not conflict with the due process clause of the fourteenth amendment.[19]

A. THE EQUAL PROTECTION DOCTRINE: PERMISSIVE STANDARD OF REVIEW

The *Muller* decision delayed for nearly 50 years the application of what was to become the most successful constitutional basis for an attack against using sex as a legal classification—the Equal Protection Clause.[20] The Court in *Muller*, in addressing the plaintiff's equal protection contention, dealt at length with the capabilities of women and their place in society. Noting that the sexes differ in body, strength and capacity, the Court held that "[t]his difference justifies a difference in legislation. . . ." [21] The Court expounded that ". . . history discloses the fact that woman has always been dependent on men. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present," [22] and then went on to point out that since ". . . healthy mothers are essential to vigorous offspring, the physical well-being of women becomes an object of public interest and care in order to preserve the strength and vigor of the race." [23] This explicit articulation of the justification for placing women in a separate category was to become a

---

[18] *Id.* at 420.

[19] *Id.*

[20] The fourteenth amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The fifth amendment due process clause is the equivalent protection against action by the federal government. Both of these constitutional provisions will be hereinafter referred to generally as the "equal protection clause." *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1954).

[21] 208 U.S. at 422.

[22] *Id.* at 421.

[23] *Id.*

rather formidable barrier to the future application of the equal protection clause to sex discriminatory statutes and practices. *Muller* firmly established that individual characteristics were less important than concepts of male dominance and of the ultimate role of women.

Forty years after *Muller* the Supreme Court again manifested this "separatist" theory in *Goesart v. Cleary*.[24] In *Goesart* several women challenged a Michigan statute prohibiting women from being bartenders on the basis that the arbitrary classification violated the equal protection clause.[25] Justice Frankfurter, in applying what is now referred to as the "rational basis" test, concluded that although the Constitution precluded "irrational discrimination as between persons or groups of persons in the incidence of a law," it does not require that situations "which are different in fact or opinion to be treated in law as though they were the same."[26] Hence, the Court held, that since the State legislature felt bartending by women —as opposed to men—created moral and social problems, preventive measures could be taken to neutralize such dangers.[27]

The significant feature of *Goesart* is that the party attacking the statute or classification has the burden of overcoming a strong presumption that the legislature's classification is valid. Under this standard of review, a statutory classification will be upheld "if any state of facts reasonably may be conceived to justify it."[28] When courts apply this standard, they seldom reject a statutory justification as impermissible; rather, they seek to perceive a purpose rationally furthered by the classification even if that purpose is, in all probability, not the reason for the classification.[29] This permissive standard of review, as construed in later decisions, in effect meant that sex discriminatory statutes could never violate the equal protection clause if any basis could be conceived of to justify the classification even if based on a stereotyped notion applied in the face of an evidentiary showing.[30]

---

[24] 335 U.S. 464 (1948).

[25] *Id.*

[26] *Id.* at 466.

[27] *Id.*

[28] McGowan v. Maryland, 366 U.S. 420, 426 (1961).

[29] *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1077-87 (1969) [hereinafter cited as *Developments—Equal Protection*].

[30] *See* Williams v. McNair, 401 U.S. 951 (1971); Hoyt v. Florida, 368 U.S. 57 (1961); *Developments—Equal Protection*, *supra* note 29, at 1079-81.

B. EQUAL PROTECTION DOCTRINE: STRICT RATIONALITY

As a result of the "rational basis" test's rather permissive standard of review, it was not until 1971 that the first sex-based legislative classification was invalidated by the Supreme Court.[31] In *Reed v. Reed*, a unanimous Court held that the equal protection clause was violated by an Idaho statute which, all other relevant factors being equal, required males be preferred over females in the administration of estates.[32] The Court, ostensibly applying the traditional "rational basis" test, sought to determine whether there was a rational connection between the classification and a legitimate governmental purpose. After balancing the administrative convenience of reducing the probate court's workload—the only state justification—against the character and the impact of the discrimination, the Court found that the state had failed to fulfill its burden of proof.[33] While the Court conceded that the objective of reducing the workload of probate courts was not without some legitimacy,[34] it found the preference for members of one sex simply to eliminate the need for hearings on individual qualifications was "arbitrary."[35]

In *Reed*, the Court, while appearing to apply the traditional permissive rational basis standard, actually applied a stricter standard of judicial review. Instead of blithely accepting the premise that men are generally more familiar with business matters than women, an assumption which would have reasonably satisfied the older permissive test, the Court found the premise arbitrary.[36] In so doing, the Court looked for a sustaining evidentiary base for the legislation, rather than merely hypothesizing in favor of the state.[37]

In *Reed*, the discriminatory feature of the statute focused on gender rather than on a specific sexual characteristic. This focus should not affect the standard of review. However, a specific sexual characteristic may provide a firmer basis upon which a state could justify a sex-directed statutory classification.

Federal courts in applying the "strict rationality" concept of

---

[31] Reed v. Reed, 404 U.S. 71 (1971).

[32] *Id.*

[33] *Id.*

[34] *Id.* at 76.

[35] *Id.* at 74.

[36] *Id.* at 76; *accord*, Eisenstadt v. Baird, 405 U.S. 438 (1972).

[37] *See* Gunther, *The Supreme Court, 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 21 (1972) [hereinafter cited as Gunther].

Reed have invalidated a number of statutes setting out pregnancy policies involving a variety of mandatory leave provisions, post delivery sick leave and benefit arrangements.[38] The central theme of these decisions seems to be that the courts will not accept an arbitrary cut-off date for terminating the employment of all pregnant teachers. For instance, in *Green v. Waterford Board of Education*[39] the court found that the purposes of the regulations, "concern for the [health and] safety of the teacher and her unborn child," continuity of instruction, and administrative convenience, are not served by a rigid sexually-orientated classification.[40] The court found that no reasonable basis was shown why the state should require all pregnant teachers to quit work at a specific time for health reasons while permitting males recuperating from heart attacks to continue to teach.[41] In *Heath v. Westerville Board of Education*[42] the court concluded that the rationale of *Reed* mandated that it strike down for lack of a rational basis a rule, purportedly for reasons of health alone, that treated all pregnancies alike rather than on a case by case basis.[43] The court in *Westerville* found that *Reed*

> . . . at the very least stands for the proposition that the Courts must not allow the state or its agencies to perpetuate old sexual stereotypes, in the guise of benign, protective statutes, where the state is unable to demonstrate a rational, nonarbitrary basis in fact for its regulation.[44]

In *La Fleur v. Cleveland Board of Education*,[45] the Supreme Court, while appearing to affirm the results in *Green* and *Westerville*, embarked upon a different line of attack on such regulations. In *La Fleur* a majority of the Court ignored the equal protection claim and found that the regulation violated due process. At the opinion's outset, the Court restated the proposition that the freedom of personal choice in procreation was a liberty protected by the due process clause of the fourteenth amendment. Hence, govern-

---

[38] Green v. Waterford Board of Education, 473 F.2d 629 (2d Cir. 1973); Heath v. Westerville Board of Education, 345 F. Supp. 501 (S.D. Ohio 1972); Pocklington v. Duval County School Board, 345 F. Supp. 163 (M.D. Fla. 1972); Bravo v. Board of Education of Chicago, 345 F. Supp. 155 (N.D. Ill. 1972).

[39] 473 F.2d 629 (2d Cir. 1973).

[40] *Id.* at 634.

[41] *Id.* at 635.

[42] 345 F. Supp. 501 (S.D. Ohio 1972).

[43] *Id.* at 506.

[44] *Id.* at 506.

[45] 39 L. Ed. 2d 52 (1974). The rule struck down required a pregnant school teacher to take unpaid maternity leave five months before the expected childbirth, with leave application to be made at least two weeks before her departure.

mental regulations that infringe on this liberty must be carefully scrutinized—including the particular interests the regulations seek to further—in order to determine whether such procedures and interests are justified.[46] The Court, in balancing the liberty infringed against the five-month mandatory termination date for pregnant teachers, determined that the irrebuttable presumption created by the regulation, namely that all pregnant teachers were not physically fit to teach beyond that date, was too broad.[47] The regulation, requiring teachers who were physically able to teach beyond their fifth month of pregnancy to be terminated, failed to further the state goal of preserving continuity of instruction. This goal could better be achieved by basing the termination decision on an examination of each individual case, and although that alternative might cause some administrative inconvenience to the school board, the inconvenience was insufficient reason "to make valid what otherwise is a violation of due process of law." [48] The Court did concede, however, that a school board could demand in every case "Substantial notice of [pregnancy] . . ." and require all pregnant teachers to cease teaching "at some firm date during the last few weeks of pregnancy." [49]

It is too early to assess the impact or limits of the *La Fleur* decision, but as Justice Powell articulated in his concurring opinion, it seems that equal protection analysis would have been the appropriate frame of reference.[50] Justice Powell contended that, rather than condemning all governmental maternity regulations as violations of a constitutional right to procreation, the particular regulation should have been held invalid under the rational basis standards of equal protection review.[51] Perhaps the greater significance of *La Fleur* is that neither the majority nor Justice Powell found that the regulation or the issues presented involved sex discrimination.[52]

It is reasonable to conclude that in the future when the Court is presented with maternity issues, regardless of whether the Court

---

[46] *Id.* at 60.

[47] *Id.* at 64. The Court's reasoning is strikingly similar to that of J. Arraj in Robinson v. Rand, 340 F. Supp. 37 (D. Colo. 1972).

[48] *Id.*

[49] *Id.* at 62.

[50] *Id.* at 67.

[51] *Id.* at 68. Justice Powell indicated that it made little difference whether the regulations constitute sex classifications or disability classifications, they both must rationally serve some legitimate articulated or obvious state interest. *Id.* at 68 n.2.

[52] *See id.*

applies a due process examination or the "strict rationality" test of the equal protection doctrine, the results will be similar. Under either standard the Court will balance the state's interest in administrative convenience and in instructional continuity against the right of the pregnant woman to be treated in a manner consonant with the particular circumstances of her health and job demands. An arbitrary state formulated standard which ignores individual considerations will undoubtedly fall under either standard of review.

C. A STRICTER STANDARD OF REVIEW

The "strict rationality" standard of review has placed an increasingly tougher burden on the government to justify sex distinctive statutes. Notwithstanding that increase, it can be persuasively argued that such laws should be tested by the ultimate weapon of the equal protection arsenal, the "strict scrutiny" or "compelling interest" test.[52] When a court finds that a statute affects a "fundamental interest" or employs a "suspect classification," the legislative purpose of the statute is subject to "strict scrutiny" to determine if that purpose is so "compelling" as to justify the suspect means.[54] When the court applies a strict scrutiny test, it is generally a signal that the law or regulation will be found unconstitutional.[55]

1. "Fundamental Interest" Standard.

It is not possible in examining the "fundamental interest" category to detect a common thread running through the judicial decisions as to what personal interests are "fundamental." The Supreme Court inferred in *Shapiro v. Thompson*[56] that all constitutional rights were "fundamental" and that any classification which served to penalize the exercise of those rights, unless shown to be necessary in promoting a compelling governmental interest, was unconstitutional.[57] In *Dandridge v. Williams*,[58] the Court narrowed the scope of the *Shapiro* definition of "fundamental interests" by excluding

---

[52] *See generally Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment*, 84 HARV. L. REV. 1499 (1971) [hereinafter cited as *Sex Discrimination*].

[54] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

[55] *See* Gunther, *supra* note 37, at 8.

[56] 394 U.S. at 634 (1969).

[57] *Id.* The Court found that a one year residency requirement before eligibility for welfare attached was an infringement on one's "fundamental" right to travel, and therefore violated the equal protection mandate.

[58] 397 U.S. 471 (1971).

from that category "state regulations in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights." [59] Interests that have been considered fundamental include voting,[60] procreation,[61] equal right to a criminal appeal[62] and the right to interstate travel.[63] Any statute or regulation, therefore, that classifies by trait is subject to a strict standard of review when such interests are infringed.[64] Because *Dandridge* appears to inhibit establishing a "fundamental interest" in the employment area, legal commentators consider the "fundamental interests" doctrine an unlikely vehicle of attack in sex discrimination cases except possibly in areas where procreation is involved;[65] it is the "suspect classification" category that seems to lend itself to sex discrimination confrontation.

2. *"Suspect Classification" Formula.*

The "suspect classification" formula dictates that certain classifications, such as those based on race[66] or alienage,[67] are by their very nature suspect. These classifications must be subjected to the most rigid scrutiny to determine whether or not they further a compelling state interest.[68] The burden of justification is placed on the state rather than on the party challenging the statute.[69] In order for such classifications to be sustained, the state must not only show that its avowed purpose could not be attained without the suspect classification, but it must also show that the public gain will overshadow the negative effects incurred by the classified group.[70] The only case found in which the Supreme Court sustained such a

---

[59] *Id.* at 484.

[60] *See, e.g.*, Harper v. Virginia Board of Education, 383 U.S. 663 (1966).

[61] *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

[62] *See, e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956).

[63] *See* Shapiro v. Thompson, 394 U.S. 618 (1968); Memorial Hospital v. Maricopa County, 39 L. Ed. 2d 306 (1974).

[64] The infringement of the "fundamental" right need not direct. For instance, a statutory one year residency requirement for indigents before free hospital care could be obtained was sufficient to chill interstate travel so as to invalidate the statute. Memorial Hospital v. Maricopa County, 39 L. Ed. 2d 306 (1974).

[65] *See* Roe v. Wade, 410 U.S. 113 (1973).

[66] *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 196 (1965); Loving v. Virginia, 388 U.S. 1, 11 (1967).

[67] *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944).

[68] 379 U.S. 184.

[69] *See* 388 U.S. at 9.

[70] *See Developments—Equal Protection, supra* note 29, at 1090.

suspect classification is *Korematsu v. United States.*[71] In *Korematsu,* the Court held that the exclusion of all Japanese-Americans from the West Coast was justified by the risks of wartime sabotage. In light of *Korematsu,* one can conclude that direct military exigencies might be considered a valid basis for the use of normally suspect classifications, although commentators doubt that the Court would condone again so drastic a measure as that undertaken in *Korematsu.*[72]

Another state action which may successfully withstand the challenge of the "suspect" standard is the use of a benign racial classification. States have implemented programs which attempt to remedy the effects of past racial discrimination. They have done this by giving special treatment to particular racial groups in education[73] and public employment. The courts may respond to an allegation of the unconstitutionality of such an action by concluding that the state's interest in extinguishing the effects of past discriminatory policies is sufficiently compelling to justify the classification.[74] Proponents of the benign racial programs argue that the Court's rationale in *Swann v. Charlotte-Mecklenburg Board of Education*[75] declaring that school authorities seeking to achieve racial balance need not be color-blind but may consider race as a valid criterion when considering admission, would sustain a racially distinctive regulation intended to ameliorate traditional segregationist policies.[76]

---

[71] 323 U.S. 214 (1944).

[72] *Developments—Equal Protection, supra* note 29, at 1090.

[73] *See, e.g.,* DeFunis v. Odergaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973), *cert. granted,* 414 U.S. 1038 (Nov. 20, 1973), *vacated as moot,* 42 U.S.L.W. 4580 (1974).

[74] *See Developments—Equal Protection, supra* note 29, at 1104-1119. *But see* DeFunis v. Odergaard, 82 Wash.2d 11, 507 P.2d 1169 (1973), *cert. granted,* 414 U.S. 1038 (Nov. 20, 1973), *vacated as moot,* 42 U.S.L.W. 4580 (1974), 4586 where Justice Douglas in dissenting stated that a "compelling" state interest can justify the usual policy practiced by the University of Washington School of Law. However, actual discrimination, whether "reverse" or not, is still discrimination. The equal protection clause cannot be used to create racial classifications no matter what their purpose. The equal protection clause does not have such an "accordian like" quality.

[75] 402 U.S. 1 (1971).

[76] *See* DeFunis v. Odergaard, 82 Wash. 2d 11, 507 P.2d 1169 (1973), *cert. granted,* 414 U.S. 1038 (1972), *vacated as moot,* 42 U.S.L.W. 4518, 4580 (U.S. April 23, 1974) (J. Douglas dissenting). Justice Douglas would allow applicants who are members of racial minorities to be placed in a separate classification. In this way, any subtle indetectable discrimination of the admission process against certain cultural differences will be eliminated. He would not, however, allow the state to "positively discriminate" in favor of racial minorities. *See* note 74 *supra* and authority cited therein.

The argument that sex is "suspect classification" has generally been based on the factual and moral similarities between sex and racial classifications.[77] Both classifications "create large, natural classes, membership in which is beyond the individual's control." [78] Members of both classes were formerly subservient to a paternalistic, white male head of the house,[79] an historical pact producing common parallels in the employment market: that women and blacks continue to hold the lowest paying jobs in the economy graphically demonstrates this historical pattern.[80] One feminist author, having considered the common denominators between blacks and women, concluded:

> In the final analysis, women are still hindered in their competition by the function of procreation; Negroes are laboring under the yoke of the doctrine of unassimilability which has remained although slavery is abolished. The second barrier is actually much stronger than the first in America today. But the first is eternally inexorable.[81]

Today, the once strongly held view of the superiority of the white race has given way to the concept that color has no bearing on ability. A similar evolution is occurring with respect to the once prevalent view regarding the inferiority of women. As a result, the argument is made that since both classes have been subverted by legislation and practices based on common, untenable, anachronistic notions, the remedy should be equally responsive.

Although the analogy between sex and race has undeniable validity, the physiological differences between men and women pose a unique problem to the judicial application of the "suspect" standard to sex classification. These sexual distinctions create three basic problem areas. One area deals with the procreative functions of women and attendant maternity related issues. It was discussed earlier.[82] The other two problems of foreseeable difficulty include (1) the societal mores that demand personal bodily privacy between the sexes,[83] and (2) the aggregate statistical differences[84] between the sexes.

---

[77] *See Sex Discrimination*, *supra* note 53, at 1507.

[78] *Id.* at 1507.

[79] G. MYRDAL, AN AMERICAN DILEMMA 1073, 1078 (1962) [hereinafter cited as MYRDAL].

[80] *Sex Discrimination*, *supra* note 53, at 1507.

[81] MYRDAL, *supra* note 79, at 1078.

[82] *See* pp. 26-28 *supra*.

[83] *See Sex Discrimination*, *supra* note 53, at 1514.

[84] *See Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1173 [hereinafter cited as *Developments—Title VII*].

Demands for personal bodily privacy will arise in reference to sexually separate dormitories at state universities or restrooms in public buildings. These problems may be solved by relying on the right to privacy doctrine enunciated in *Griswold v. Connecticut*.[85] A statutory distinction between the sexes to further privacy interests would be defensible under a compelling interest standard.[86] An alternative rationale might be found in the "separate but equal" doctrine of *Brown v. Board of Education*.[87] While *Brown* precluded "separate but equal facilities in racial situations where there is a potentially strong implication of inferiority," [88] no similar inference can be drawn in the use of the separate toilet facilities by the male and female sexes. There is, however, considerable room for the abuse of such a justification. Thus, when the motivation for segregated facilities is for reasons other than bodily privacy, it should be struck down under the *Brown* anti-segregation precept.[89]

Statutes that distinguish between sexes because of aggregate statistical differences will also cause problems should sex become a "suspect" classification. For example, it can be shown statistically that women live longer than men. Will this justify lower insurance premiums for women in a state supported insurance program? Where statistics support the conclusion that women are physically weaker than men, may a state prohibit the employment of women in jobs requiring the lifting of heavy weights?[90] Although there are numerous subtleties involved in such an inquiry, the crucial question is the future role of "administrative convenience." Courts will be compelled to balance the rights of the "suspect class" against the investigative costs incurred by the state in ascertaining how many women of that class could meet the sexual criteria.[91] The Supreme Court has to date rejected administrative economy and convenience as insufficient justification for distinctive treatment of a "suspect" class,[92] or for burdening a fundamental interest.[93]

It should be noted that the two strict standard of review categories—"fundamental interest" and "suspect classification"—are often

---

[85] *See* 381 U.S. 479 (1965).
[86] *Cf.* Roe v. Wade 410 U.S. 113 (1973).
[87] *See* Brown v. Board of Education, 347 U.S. 483 (1954).
[88] *Cf. Developments—Equal Protection*, *supra* note 29, at 1127.
[89] *See Sex Discrimination*, *supra* note 53, at 1515.
[90] *See Developments—Title VII*, *supra* note 84, at 1173.
[91] *See generally Sex Discrimination*, *supra* note 53.
[92] Frontiero v. Richardson, 411 U.S. 677 (1973).
[93] Shapiro v. Thompson, 394 U.S. 618, 633 (1968).

perceived as interacting with each other. Professor Cox suggests that equal protection decisions often rest upon "two largely subjective judgments," one as to "the relative invidiousness of the particular [classification]" and the other as to "the relative importance of the subject with respect to which equality is sought." [94] Professor Cox demonstrates this interaction by describing each as the occupant of a ladder. The first ladder is occupied by classifications, those at the top being the most invidious—suspect classifications—and the remainder in descending order of importance. Another ladder contains personal interests—procreation, education and the right to vote, among others—in ascending order of importance. When a statute directs itself to a classification at the top of the first ladder, it will be subjected to the strict scrutiny test even though the interest affected is at the bottom of the second ladder. As the nature of the classification falls lower on the first ladder, it will be strictly scutinized only as it affects an interest higher on the second ladder. For instance, while a permissive standard of review might be applied when university regulations require a curfew for women only,[95] a stricter standard would be applied to a statute inhibiting indigents from interstate travel.[96] Understanding the interplay between classifications and interests is helpful in ascertaining the constitutionality of sex distinctive military regulations.

D. MILITARY SEX DISCRIMINATION DECISIONS

1. Pregnancy Cases.

The first military related cases dealing with sex discrimination to test the post *Reed* application of the equal protection argument involved pregnancies.

In separate cases, three women members of the United States Air Force challenged the constitutionality of Air Force regulations which called for the immediate honorable discharge of pregnant personnel.[97] The three cases, arising in remarkably similar factual

---

[94] Cox, *The Supreme Court, 1965 Term-Foreword: Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV. L. REV. 91, 95 (1966).

[95] *See* Robinson v. Board of Regents, 475 F.2d 707, 711 (6th Cir. 1973).

[96] *See* Memorial Hospital v. Maricopa County, 39 L. Ed. 2d 306 (1974).

[97] Struck v. Secretary of Defense, 460 F.2d 1372 (9th Cir. 1971), *vacated and remanded for consideration of the issue of mootness,* 409 U.S. 1071 (1972); Gutierrez v. Laird, 346 F. Supp. 289 (D.D.C. 1972); Robinson v. Rand, 340 F. Supp. 37 (D. Colo. 1972).

contexts, illustrate the variety of approaches that can result from the application of the equal protection doctrine to sex discrimination issues in the military context.[98]

In *Struck v. Secretary of Defense*,[99] the petitioner was an unmarried Air Force nurse who became pregnant while serving on active duty in Vietnam.[100] She argued that the Air Force regulation violated her right to privacy, a fundamental interest, and since the classification was based on pregnancy alone, it was tantamount to sex discrimination and should be scrutinized under equal protection clause as a "suspect" classification.[101] Thus, she attempted to avail herself of both equal protection bases in order to invoke the strict scrutiny standard. The court summarily rejected Struck's contention that the pregnancy rule interfered with her personal privacy.[102] Just as blithely, the court dismissed the sex discrimination issue stating that the separate classification of women and treatment of their pregnancies corresponded to a "relevant physical difference between males and females."[103] The court, however, gave more careful consideration to the plaintiff's claim that the regulation was not premised on any rational basis and therefore deprived her of some "property" or "liberty" interest in her career without due process of law.[104] The court resolved the issue in favor of the regulation's validity. Finding that the regulation reflected a "high degree of rationality," the court stated that the military had a compelling interest in removing pregnant personnel from positions of responsibility within the combat zone.[105] Judge Duniway dissented. In his dissent, Judge Duniway utilized the strict rationality standard employed in *Reed*[106] and found no rational purpose was served by

---

[98] In two of the cases, Struck v. Secretary of Defense, 460 F.2d 1372 (9th Cir. 1971), *vacated and remanded for consideration of the issue of mootness*, 409 U.S. 1071 (1972) and Gutierrez v. Laird, 346 F. Supp. 289 (D.D.C. 1972), the courts upheld the Air Force regulation in the face of the equal protection and due process arguments of the plaintiffs.

[99] 460 F.2d 1372 (9th Cir. 1971), *vacated and remanded for consideration of the issue of mootness*, 409 U.S. 1071 (1972).

[100] 460 F.2d at 1373.

[101] Brief of Appellant at 6, Struck v. Secretary of Defense, 460 F.2d 1372 (9th Cir. 1971), *vacated and remanded for consideration of the issue of mootness*, 409 U.S. 1971 (1972).

[102] 460 F.2d at 1376.

[103] *Id.* at 1375.

[104] *Id.* at 1374.

[105] *Id.* at 1376.

[106] 404 U.S. 76 (1971). *Reed* was decided one week after the original Ninth Circuit opinion in *Struck*.

discharging pregnant WAF's while retaining other personnel who suffered disabilities infringing on their performance of duties.[107]

In *Gutierrez v. Laird*,[108] the court gave considerable attention to plaintiff's claim that the regulation denied her equal protection. Rather than applying the *Reed*[109] "strict rationality" test, however, the court relied on the traditional, permissive "rational basis" test articulated in the *Muller*[110] and *Goesart*[111] cases. The court presumed the regulation was justified by the military's "hard data of experience with women officers." Since the plaintiff failed to introduce evidence rebutting this presumption, the court concluded that the classification in the regulation met the rational basis test.[112] The court, like the one in *Struck*, also denied that the regulation interfered with the plaintiff's right to privacy. Instead, it found that the plaintiff had the voluntary choice of becoming pregnant or the "privilege" of a military career.[113]

In the third case, *Robinson v. Rand*,[114] the district court held that the regulation violated the due process clause,[115] contrary to the central thrust of the plaintiff's argument that the regulation denied her equal protection of the law.[116] The court refused to determine whether the plaintiff's interest was "fundamental" or the state's interest "compelling." Instead, the court formulated a balancing test.[117] This test compared the "individual rights," which included the right to have children without leaving the military, and the "military's need to control its own affairs."[118] The court conceded that pregnancy caused a period of unavailability and provided a rational basis for the regulation, but cited *Skinner v. Oklahoma ex rel. Williamson*,[119] for the proposition that governmental regulation of areas dealing with procreation "must be viewed in the light of least drastic means for achieving the same basic purpose."[120] The court concluded that while pregnancy may limit a

---

107 460 F.2d at 1378.
108 346 F. Supp. 289 (D.D.C. 1972).
109 404 U.S. 71 (1971).
110 Muller v. Oregon, 208 U.S. 412 (1908).
111 Goesart v. Cleary, 335 U.S. 464 (1948).
112 346 F. Supp. 292.
113 *Id.* at 293.
114 340 F. Supp. 37 (D. Colo. 1972).
115 *Id.*
116 Brief for plaintiff at 2, Robinson v. Rand, 340 F. Supp. 37 (D. Colo. 1972).
117 340 F. Supp. at 34, 38.
118 *Id.*
119 316 U.S. 535 (1942).
120 340 F. Supp. at 40-41.

WAF's availability for combat duty, a point made by the court in *Struck*,[121] a response less onerous than discharge, such as transfer from a combat zone, must be provided in order to protect sensitive procreative rights.[122] This rationale is strikingly similar to the Supreme Court's analysis of the forced maternity leave issue in *La Fleur*[123] decided two years later.

In reflecting on this trilogy of decisions, one must realize that all three courts found that the Air Force regulations satisfied the permissive rationality test. The regulatory features, the courts agreed, served to promote the immediate availability and physical capability of Air Force members to serve anywhere in the world, even under circumstances of severe hardship. The courts were able to reach this conclusion because they structured the issue in terms of whether there was a rational basis for treating pregnant WAF's differently from other Air Force personnel without this "disability." When the issue is examined thusly, the courts had little difficulty—with the exception of the court in *Robinson*[124]—in validating the Air Force's position in the face of a due process attack. The court in *Robinson* took basically the same position but was persuaded that the critical procreative interests involved required a less harsh alternative than discharge.[125]

The opinions, however, with the exception of Judge Duniway's dissent in *Struck*,[126] refused to frame the question in terms of whether the Air Force's treatment of pregnant WAF's, when compared to the treatment of other personnel incapacitated by temporary disabilities had a rational basis. By failing to frame the issue in this manner, the courts avoided the logical extension of the equal protection clause.[127] Had they framed the issue in terms of rationality, it is doubtful that under the "strict rationality" standard the Air Force's evidentiary base would have been sufficiently strong to justify treating pregnant WAF's differently than other Air Force personnel suffering a temporary physical disability.[128]

---

[121] Struck v. Secretary of Defense, 460 F.2d 1372 (9th Cir. 1971), *vacated and remanded for consideration of the issue of mootness*, 409 U.S. 1071 (1972).

[122] 340 F. Supp. at 40-41.

[123] Cleveland Board of Education v. LaFleur, 39 L. Ed. 2d 52 (1974).

[124] 340 F. Supp. 37 (D. Colo. 1972).

[125] *Id.* at 40-41.

[126] *See also* Cleveland Board of Education v. LaFleur, 39 L. Ed. 2d 52.

[127] *See* Note, *Pregnancy Discharges in the Military: The Air Force Experience*, 86 HARV. L. REV. 568 (1973).

[128] *See generally id.*

2. Mrs. Frontiero and Her Benefits.

The recent decision of *Frontiero v. Richardson*[128] is the most expansive application of the equal protection argument in combating sex discrimination. In *Frontiero*, a plurality of the Supreme Court considered sex a suspect classification and, as a result, struck down a federal statute that called for the different treatment of women, based solely on their sex, in the military.[130]

Lieutenant Sharon Frontiero, an Air Force officer, and her husband, a civilian college student subsidized by the G.I. Bill, were denied housing assistance and medical benefits because of Lieutenant Frontiero's inability to demonstrate that she was the source of more than one-half of her husband's living expenses.[131] Lieutenant Frontiero's husband's monthly living expenses, including his share of household expenses, were approximately $354, while his veteran's payments totaled $205. The pertinent statute provided that a married serviceman could obtain these same benefits regardless of whether he provided funds for more than one-half of his wife's living expenses.[132] The same statute, however, required that a female servicemember prove that she provided for more than one-half of her husband's expenses.[133] Thus, Lieutenant Frontiero could not qualify for the statutory benefits.

Claiming that the denial of these benefits constituted discrimination so unjustifiable as to violate due process, the Frontieros brought suit in federal district court to obtain a permanent injunction against enforcement of the statute and an order compelling a grant of the benefits.[134] A three judge district court, applying pre-*Reed*[135] equal protection analysis, upheld the statute. The court found that the classification need only bear a rational relationship to the statutory purpose and the statute in question satisfied this requirement.[136]

Although the Supreme Court reversed, there was no majority rationale.[137] Justices Douglas, White and Marshall joined Justice Brennan in finding that sex-based classifications should be "deemed

---

[129] 411 U.S. 677 (1973).

[130] *Id.*

[131] Frontiero v. Laird, 381 F. Supp. 201, 204 (M.D. Ala. 1972) (three-judge court).

[132] 10 U.S.C. § 1072(2)(c) (1970); 37 U.S.C. § 401 (1970).

[133] *Id.*

[134] Frontiero v. Laird, 341 F. Supp. 201 (M.D. Ala. 1972).

[135] 404 U.S. 71 (1971).

[136] Frontiero v. Laird, 341 F. Supp. 201 (M.D. Ala. 1972).

[137] Frontiero v. Richardson, 411 U.S. 677 (1973).

inherently suspect" and that the government could sustain them only by proving that a "compelling government interest" existed in the different treatment.[138] Likening the subjugation of women to the treatment of blacks in the 19th and early 20th centuries, Justice Brennan said that law and tradition still suppress women's rights, excluding women from the nation's "decision-making councils," the presidency and the high Court itself.[139] Justice Brennan went on to point out that "what differentiates sex from such nonsuspect statutes as intelligence or physical disability and aligns it with the recognized suspect criteria is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." [140]

Justice Powell, writing for himself and two other members of the Court, concurred in the judgment but expressly declined to reach the "suspect classification" issue since in his view the statutes were unconstitutional under the rationale found in *Reed*.[141] Unfortunately, Justice Powell failed to pinpoint what particular rationale he considered pivotal. According to at least one commentator, however, Justice Powell appears to have accepted the "strict rationality" concept.[142] The commentator suggests that while Justice Powell may accept administrative convenience as a justifiable government goal, he would require the government to adduce proof that the different treatment required by the statute actually furthered that end. Since the government offered no evidence to support the contention that it was financially less expensive to require men to prove their wives' dependency, the government failed to sustain its burden. This same commentator suggests that had sex not been found "suspect," and the government had adduced irrebuttable proof of the cost saving, the statute would have been upheld under the "strict rationality" test.[143]

The lack of a majority opinion in *Frontiero* poses a problem in predicting the decision's impact on military regulations and statutes that differentiate on the basis of sex. However, it does appear that under the interpretation of *Frontiero* most favorable to the government, the military *as a minimum* must have concrete evidence to

---

[138] *Id.* at 682-88.

[139] *Id.* at 686.

[140] *Id.*

[141] *Id.* at 689-90.

[142] *See generally* Note, *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 116-125 (1973).

[143] *See id.* at 122-123.

justify sex distinctions having administrative convenience as their wellspring.

The precedential value of *Frontiero* and *Reed*, in evaluating other sex related military regulations is circumscribed. In both cases, the court dealt with classifications based solely on gender, classifications that were weakly justified by government concern for administrative convenience and economy. One can speculate that the potency of the government/military argument will be strengthened when the classification is based on a sexual characteristic and defended under a "military necessity" rationale.[144]

3. Frontiero's Impact

The first reported application of *Frontiero* was in *Schlesinger v. Ballard*.[145]

Ballard was a lieutenant in the United States Navy who was ordered discharged pursuant to Section 6382 of Title 10, United States Code, for twice failing to be selected for promotion to lieutenant commander. The analogous statute for women officers is Section 4601 of Title 10; it allows a woman officer to complete a minimum of 13 years of service as an officer before she can be retired for failure to be promoted. Ballard argued that he had been denied a benefit—had he been allowed to remain on duty for 13 years as an officer, he could have retired accruing benefits worth approximately $200,000, as opposed to the $15,000 severance pay he would receive if discharged with but nine years service[146]—solely on account of his sex.

In a 5-4 decision, the Supreme Court held that the difference in the treatment of men and women was "rationally related" to the purpose it was intended to serve: affording equal opportunity for advancement to female officers.[147] The Court found that it was "a demonstrable fact" that male and female officers were "not similarly situated" with regard to promotional activity.[148] The Navy intended

---

[144] *See id.* at 124 n. 48 (1973).

[145] 43 U.S.L.W. 4158 (U.S. January 15, 1975).

[146] *See* 360 F. Supp. 643, 644-45 (S.D. Cal. 1973). Ballard's total prior service at the time separation action was initiated amounted to 17 years of service—7 years as an enlisted man and 10 years as an officer. He needed but 3 years more to qualify for a pension, valued at $200,000. 360 F. Supp. at 645.

[147] *See*, 43 U.S.L.W. at 61-62.

[148] *Id.* at 4161. The majority indicated that this difference in promotional opportunity may be due in part to the restrictions placed by Navy on the sea going duty of its female personnel. *Id.*

to argue to the Court[149] that in matters affecting the organization and military readiness of the armed services, the application of the "suspect" classification standard is inappropriate.[150] The majority in *Ballard* seems to have accepted this rationale.[151]

Justice Brennan dissented on the ground that the classification was "suspect" and should be subjected to "close judicial scrutiny."[152] Applying this test, Justice Brennan found that there was no rational relationship between the classification and the result desired.[153]

In conclusion, it is fair to state that the judicial view of sex distinctive statutes and regulations in the military is unfavorable. In discarding the permissive review standards with respect to equal protection issues, the courts have adopted a stricter test whose dimensions are yet to be determined. Whether the courts will consider the effects of sex discrimination so critical as to sustain judicial intrusion into heretofore exclusively military operations remains to be decided. But an examination of recent legislative developments may suggest the future judicial tack.

III. THE LEGISLATION

Congress has passed two major pieces of legislation aimed at the elimination of sex discrimination in employment: the Equal Pay Act of 1963,[154] and Title VII of the Civil Rights Act of 1964 as amended.[155]

---

[149] Letter from Captain E. R. Fink, JAGC U.S. Navy, Deputy Assistant Judge Advocate General (Litigation and Claims) to Honorable Irving Jaffe, Assistant Attorney General, Civil Division, Department of Justice, Washington, D. C.

[150] *See* Orloff v. Willoughby, 345 U.S. 83, 94 (1952). The Navy tack in arguing *Ballard* was to focus on the fact that *Frontiero* concerned benefits in an area that did not affect the actual conduct of military operations. In *Ballard* the Navy promotion system was said to be at stake, and judicial tampering would disrupt the entire organizational structure. Because the area is so much more sensitive than the *Frontiero* situation, a less stringent test was required to assess the validity of the statutory classification.

[151] *See* 43 U.S.L.W. at 4162.

[152] 43 U.S.L.W. at 4162. Justice Brennan wrote for himself, Justice Douglas and Justice Marshall. Justice White also dissented "agreeing for the most part" with Justice Brennan's dissenting opinion. *Id.* at 4166.

[153] *Id.*

[154] 29 U.S.C. § 206(d) (1963).

[155] 42 U.S.C. § 2000e (1970), *as amended*, Pub. L. No. 92-261, 86 Stat. 103 (Mar. 24, 1972).

A. THE EQUAL PAY ACT OF 1963

The Equal Pay Act of 1963 amended the Fair Labor Standards Act to require equal pay for equal work, regardless of the sex of the worker. The equal pay provisions forbid an employer from discriminating on the basis of sex by paying employees of one sex lower wage rates than he pays employees of the opposite sex doing equal work on jobs requiring equal skill, effort, and responsibility, and which are performed under similar working conditions. The Act applied to all employers whose employees were engaged in commerce or in the production of goods for commerce.[156]

B. TITLE VII

Title VII of the Civil Rights Act of 1964[157] appears to have advanced the war against sex discrimination in employment. Because of the impact of Title VII, it warrants critical analysis.

Title VII of the Civil Rights Act of 1964 forbids employers and unions from discriminating on the basis of race, color, sex, religion, or national origin.[158] The primary motive underlying the enactment of the equal employment opportunity provisions was, no doubt, to increase the relative social and economic position of the black. The import of the legislation, however, was sufficiently broad to enable other disadvantaged groups to use its cutting edge against the discriminatory aspects of the employment market.[159]

Early criticism of the Act denounced its narrow jurisdiction and lack of enforcement provisions. These criticisms appear to have been answered by the 1972 amendments to Title VII.[160] These amendments included within the definition of "employer" not only private sector enterprises "in an industry affecting commerce" and having at least fifteen employees, but also—and for the first time—

---

[156] 29 U.S.C. § 206(d) (1963).

[157] 42 U.S.C. § 2000e (1970), *as amended,* Pub. L. No. 92-261, 86 Stat. 103 (Mar. 24, 1972).

[158] 42 U.S.C. § 2000e (1970). Section 703(a) declares it to be an unfair employment practice for an employer to hire, fire, or otherwise discriminate in respect to the compensation, terms, conditions, or privileges of employment because of sex; or to limit, segregate, or classify employees by sex in wages which would tend to deprive an individual of an employment opportunity or otherwise adversely affect one's status as an employee.

[159] *See generally Developments—Title VII, supra* note 84, at 1166, 1167.

[160] 42 U.S.C. § 2000e (1970), *as amended,* Pub. L. No. 92-261, 86 Stat. 103 (Mar. 24, 1972).

all state "governments, governmental agencies and political subdivisions." [161]

More importantly, the new provisions enable the Equal Employment Opportunity Commission (EEOC) to go beyond its voluntary compliance procedures; EEOC may now go directly into federal court to seek relief against employers whose employment practices are violating the prohibitions of Title VII.[162] The impact of this provision is obvious. Under the old law, employers could choose to ignore Commission opinions and determinations and take the chance that individuals who had been aggrieved would not take the time, or could not afford, to pursue the matter in federal court. The current provisions permit the Commission to sue on its own initiative and thus put the Commission on the offensive.

Title VII, as amended, is not applicable to federal employees. Nevertheless, the Federal Government's policy of nondiscrimination in federal employment on the basis of race, color, religion, sex and national origin is set forth in Executive Order 11478.[163] Under this Executive Order, the Civil Service Commission is the enforcement authority with respect to eleven executive agencies including the various military departments.

The 1972 amendments to the Title VII will no doubt enhance the effectiveness of the Act. They do not, however, solve the underlying definitional problem that the courts and EEOC encounter in interpreting the Act.

1. Is Title VII Violated?

The various judicial and commission theories on the discriminatory prohibitions of the Act are enlightening considering the military's position on sex discrimination. The EEOC has determined that two general legal principles are to be considered in determining whether or not an employment policy violates the sex provisions of Title VII.[164] The first principle is that an employment policy which only operates to the disadvantage of employees of one sex is presumed discriminatory within the meaning of Title VII. The second principle is that the employer has the burden of showing that any

---

[161] 109 CONG. REC. 11, 178 (1963).

[162] *Id.*

[163] 3 C.F.R. § 133 (1969). Section 6 of the order indicates only the civil service employees of the military department fall within the enforcement provisions of the Order.

[164] EEOC, 7TH ANNUAL REPORT 9 (1972).

such "discriminatory" policy is authorized by a bona fide operational qualification (BFOQ) exception; the only permissible basis for a BFOQ lies in sexual characteristics, *i.e.*, "characteristics associated with all members of one sex and none of the other, as compared with characteristics which merely have a high correlation with one sex or the other." [165]

In essence, the application of Title VII initially requires a decision to be made as to whether there is discrimination and if there is, whether there is a BFOQ defense. The initial step, determining if an employment policy is discrimination, is the least onerous of the two steps and is an area in which the EEOC and courts have used a common denominator.

a. Test One: "Sex plus."

Various legal commentators have categorized sex discrimination as either explicit sex discrimination, or "sex-plus" discrimination or "sex neutral" discrimination.[166] The easiest type of discrimination to recognize is explicit sex discrimination; the generic classification of sex itself is the exclusive basis for the action taken by the employer. The employer's policy, whether it be grounded in substantiated data with respect to the sexes, classifies according to sex, either overtly—such as by advertising for men only—or by utilizing characteristics which are physically possible for only one sex such as terminating the employment of pregnant women. Explicit sex discrimination of this sort is considered to be discriminatory under the Act.[167]

A more subtle type of discrimination is commonly referred to as "sex-plus" discrimination. The term "sex-plus" was coined by Chief Judge Brown of the Fifth Circuit Court of Appeals in his dissent in *Phillips v. Martin Marietta Corp.*;[168] he used the term to describe two-pronged employer practices which do not discriminate solely on the basis of sex but embody sex plus some other neutral factor. For example, a policy that requires all female employees who marry to be terminated while permitting married male workers to be retained is a "sex-plus" policy. The employer's policy in *Phillips* which prompted this label was the refusal to accept

---

[165] *Id.* at 10.

[166] *See Developments—Title VII, supra* note 84.

[167] *See, e.g.*, Cheatwood v. South. Cent. Bell Telephone & Tel. Co., 303 F. Supp. 754 (M.D. Ala. 1969).

[168] 416 F.2d 1257, 1260 (5th Cir. 1969).

employment applications from mothers with preschool age children without applying a similar rule to fathers with preschool age children. The company argued that 75 and 80 percent of Martin Marietta's employees were female which evinced a policy of nondiscrimination. A majority of the court of appeals concluded that a per se violation of Title VII based on sex had not been established since the petitioner was "not refused employment because she was a woman nor because she had preschool age children. It [was] the coalescence of these two elements that denied her the position she desired." [169] Additionally, the court appeared to be swayed by the large percentage of women employed by the company.

The Supreme Court disposed of *Phillips* in a concise per curiam opinion which stated that under Title VII persons of like qualifications must be extended equal employment opportunities regardless of sex and that the lower court "therefore erred in reading this section as permitting one hiring policy for women and another for men—each having preschool age children." [170] The Court did point out, however, that if under the BFOQ exception the existence of conflicting family obligations was "demonstrably more relevant to job performance for a woman than for a man," it could "arguably be a basis for distinction under § 703(e) of the Act." [171]

Prior to the *Phillips* case, several courts had validated a "sex-plus" policy that required the resignation of all female airline stewardesses who married, while permitting male stewards to marry and retain their positions.[172] As did the lower court in *Phillips*, these courts focused on the additional characteristic—marriage—which was determinative in the employment decision, not the fact of the difference in sex.[173] Since the *Phillips* decision, the marriage question appears to be settled. The courts and EEOC now agree that a marriage ban cannot be applied only to women employees.[174]

Related to the "sex-plus" martial cases are situations involving unwed mothers. Could an employer terminate the employment to mothers of illegitimate children? Employers argue that such a policy

---

[169] *Id.* at 1260.

[170] Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971), *rev'g* 411 F.2d 1 (5th Cir. 1969).

[171] *Id.* at 544.

[172] Cooper v. Delta Air Lines, Inc., 274 F. Supp. 781, 785 (E.D. La. 1967); *accord*, Landsdale v. United Air Lines, Inc., 417 F.2d 454 (S.D. Fla. 1969).

[173] *See id.*

[174] *See* Sprozia v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971). One suspects that a marriage ban uniformly applied to both sexes would not violate Title VII.

is based on morality and not on sex.[175] The EEOC has responded that such a practice is prohibited since the fathers of illegitimate children would not be terminated.[176]

Another "sex-plus" area causing considerable difficulty is an employment policy that prohibits employing males with long hair while retaining women who have hair of an equivalent length. EEOC takes the position that the *Phillips*' rationale is controlling and that the "male sex plus short hair" requirement is impermissible under Title VII.[177] Recent court decisions, however, hold to the contrary.[178] In one case, the appellate court was persuaded by the company's customer preference argument:[179]

> . . . no facet of business life is more important than a company's place in public estimation . . . [and] reasonable requirements in furtherance of the policy are an aspect of managerial responsibility. Congress has said that no exercise of that responsibility may result in discriminatory deprivation of equal opportunity because of immutable race, national origin, color or sex classification. Clearly there are societal as well as personal interests so involved in providing equal opportunity for citizens, that an employer is not to be permitted under the Act to discriminate because of grounds resulting from forces beyond [the employee's] control.[180]

The court pointed out that hair length can readily be changed in order to conform to a company's reasonable grooming standards and since there was no suggestion that the company's regulation was "pretextual," the court was unwilling to hold that the policy constituted sex discrimination.

b. Test Two: "Sex Neutral"

Most of the cases currently being decided by the EEOC involve problems that arise out of the impact of so-called "neutral rules,"

---

[175] *See* EEOC DECISION No. 71-562, 3 FEP 233 (1970).

[176] *Id.* This is probably because the male in such cases is seldom detected, while the female can hardly conceal pregnancy.

[177] *See* Brief for EEOC as Amicus Curiae, Dodge v. Giant Food, Inc., — F. Supp. — (D.D.C. 1971), *aff'd*, 488 F.2d 1333 (D.C. Cir. 1973).

[178] Fagan v. National Cash Register Co., Civ. No. 71-1243 (D.C. Cir. June 29, 1973); Baker v. California Land Title Company, 349 F. Supp. 235 (D.C. Cal. 1972); Boyce v. Safeway Stores, Inc., 351 F. Supp. 402 (D.D.C. 1972). *Contra*, Willingham v. Macon Tel. Publishing Co., Civ. No. 72-2078 (5th Cir. June 28, 1973).

[179] Fagan v. National Cash Register Co., Civ. No. 71-1243 (D.C. Cir. June 29, 1973). *See also* McDonnell Douglas Corp. v. Green, 411 U.S. 807 (1973).

[180] Fagan v. National Cash Register Co., Civ. No. 71-1243 (D.C. Cir. June 29, 1973).

rules that might be characterized as "sex neutral" in their discriminatory effect.[181] This form of systematic discrimination is the most difficult to identify because it pertains to employment policies appearing neutral on their face but which in fact have a substantially disproportionate impact on one sex or the other. An example of a "sex neutral" policy is the employment test that is not sexually discriminatory on its face but which results in the disqualification of a disproportionate number of women. Such a test might contain an inordinate number of questions on mechanics or athletics, subjects that are unrelated to the employment position sought.

Griggs v. Duke Power Co.[182] dealt specifically with this neutral rule question. In the *Griggs* decision, the Supreme Court adopted the EEOC position that employment tests which are not discriminatory on their face but which have a substantially disproportionate impact on a particular group must be shown to be job related before they may be used as employment criteria.[183] The Court stated that the ". . . Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity."[184]

The EEOC has used the *Griggs* rationale in disapproving various "neutral" employment practices. One practice condemned was an employment prerequisite regarding height.[185] The Commission pointed out that without a showing of business necessity a minimum height requirement of five feet six inches was invalid because of its foreseeably disproportionate impact on women, 80 percent of whom are less than five feet five inches tall as opposed to the male whose average height is five feet seven and one-third inches.[186]

Apparently neutral rules or policies that discriminate against a potential employee because of his or her sex are nearly always considered by the EEOC as violative of Title VII. Those applicable principles, set forth in *Griggs* and the respective EEOC decisions, will be helpful in measuring the discriminatory content of military statutes and regulations.

---

[181] EEOC, 7TH ANNUAL REPORT (Jan. 1973).

[182] 401 U.S. 424 (1971).

[183] *Id.*

[184] *Id.* at 431.

[185] EEOC Decision No. 71-332 (1970) (Not cited in FEP Reporter).

[186] *Id.*

2. The Bona Fide Occupational Qualification Exception (BFOQ)

Once it is determined that an employment policy discriminates against employees of one sex within the meaning of Title VII, the next step is to determine whether the employer is authorized to maintain such a policy by the BFOQ exception. The burden of showing the BFOQ exception is on the employer.

Interestingly, the BFOQ defense is available only in cases of discriminatory policies based on religion, nationality and sex, but not race. The sex exception apparently reflects legislative recognition that certain functional differences, both physical and cultural, exist between the sexes and that employers can legitimately consider these differences in their hiring policies.[187] Examples given by the legislative drafters of the BFOQ exception included wet nurses, masseurs, and all male baseball teams.[188]

The Commission construes the exception to permit discrimination based only on characteristics peculiar to one of the sexes. This interpretation has been approved by the ninth circuit in *Rosenfeld v. Southern Pacific Railroad*.[189] In *Rosenfeld*, the court denied a BFOQ exception to an employer whose employment policy excluded women from agent-telegrapher jobs on the Southern Pacific Railroad. The position in question required work in excess of 10 hours a day and 80 hours a week, heavy physical effort in climbing about box cars and the lifting of a variety of heavy boxes and equipment.[190] The court relied on the EEOC conceptualization of the BFOQ exception and concluded that:

> Based on the legislative intent and on the Commission's interpretation, sexual characteristics, rather than characteristics that might, to one degree or another, correlate with a particular sex, must be the basis for the application of the BFOQ exception.[191]

This is an extremely restrictive definition which in effect invalidates a number of the examples, such as a professional baseball team and masseurs, considered by the statutory drafters to be within the purview of the exception. The only remaining jobs for which sex might validly be considered a BFOQ are wet nurse, actress, model and escort, positions which functionally depend on the sex of the em-

---

[187] 110 CONG. REC. 2718 (1964) (remarks of Representative Goodell).

[188] *Id.* at 2720 (remarks of Representative Multer).

[189] 444 F.2d 1219 (9th Cir. 1971).

[190] *Id.* at 1224.

[191] *Id.* at 1225.

ployee. If such a restrictive criterion is applied to the military, there are virtually no positions that should not be available to women.

Earlier tests of the BFOQ exception have been considerably broader in scope. They have been susceptible, however, to confusion and inconsistency. The most prominent test, and one which continues to be widely cited, is the formula set out in *Weeks v. Southern Bell Telephone & Telegraph Co.*[182] In *Weeks*, the discrimination was based on a state statute that placed maximum limits on the weight women were allowed to lift. The fifth circuit held that an employer must show more than a traditional stereotypical view that women would not be able to perform the task. Rather the employer, utilizing a factual basis, must persuade the court that "all or nearly all" members of one sex would be unable to safely and efficiently perform the duties of the job.[183] EEOC views this decision with disfavor since the articulated requirement detracts from the individualistic goals of the Act. The requirement is itself discriminatory. The individual woman who has the ability to perform a job would be prevented from establishing a violation because an employer is able to prove factually that substantially all members of the group are unable to perform the job.[184]

In *Diaz v. Pan American World Airways, Inc.* yet another factor was engrafted on the BFOQ formula.[185] The issue in *Diaz* involved the validity of the employer's rule of restricting the position of flight cabin attendant (stewardess) to members of the female sex. The airline argued that the unique features of an airplane's interior environment required the psychological makeup of a female. The district court found merit in Pan American's position and held that it was not "practically possible to identify in the hiring process those few men" who possessed the required character traits necessary to meet Pan American's requirement.[186] Additionally, the court said that customer preference is a valid means of selecting employees on the basis of sex.[187]

In reversing the district court, the Fifth Circuit Court of Appeals held that the BFOQ qualification required the application of a "*business necessity*" test as opposed to a test based on convenience

---

[182] 408 F.2d 228 (5th Cir. 1969).

[183] *Id.* at 230.

[184] *See generally Developments—Title VII*, *supra* note 84, at 1180.

[185] 442 F.2d 385 (5th Cir. 1970), *cert. denied*, 404 U.S. 950 (1970).

[186] 311 F. Supp. 559, 388 (S.D. Fla. 1970). The airline attempted to prove this contention through the testimony of a psychiatrist. *Id.*

[187] *Id.*

or customer preference.[198] The court indicated that "discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively."[199] Since the position of a stewardess is only "tangential to the essence of the business involved [that of flying the airplane]," discrimination based on the preference is unlawful.[200]

The *Rosenfeld, Weeks*, and *Diaz* decisions continue to influence BFOQ determinations. The EEOC, however, published *Guidelines on Discrimination Because of Sex.*[201] The current EEOC guidelines were preceded by two revisions that prescribed a very narrow range of behavior which may be justifiable under the BFOQ exceptions. Although these guidelines do not have any legal weight, the courts have payed them considerable deference.

It may be instructive to consider a sampling of EEOC cases in order to understand judicial and commission application of the BFOQ test and guidelines. The Commission has denied a BFOQ exception to an employer who had a policy against women truck drivers sharing driver assignments with male employees.[202] This policy reduced the female driver's chances of making long runs, thus restricting her earnings. The employer asserted that this limitation was justified because of the complaints from the wives of male drivers who did not want their husbands sharing driver assignments with a female employee. The Commission held that the employer did not demonstrate a valid business justification for its discriminatory policy. The Commission, after stating that neither employee nor their wives' preferences may be accommodated to the point of rendering nugatory the will of Congress, the Commission added that the employer could prescribe reasonable standards of on-the-road conduct applicable to both males and females and could take action to insure adherence to these standards.[203]

One can only speculate on whether the same rationale is applicable to a policy prohibiting male and female service members from sharing isolated sentry posts. The Commission has declared informally, however, that "jobs may be restricted to one sex . . . because of community standards of morality or propriety (restroom

---

[198] 442 F.2d at 387.

[199] *Id.* at 388.

[200] *Id.*

[201] 37 F.R. 6835 (April 5, 1972).

[202] EEOC DECISION No. 72-0644, 4 FEP 440 (1971).

[203] *Id.* at 441.

attendant, lingerie sales clerk)." [204] This statement appears to comport with a principle of practical jurisprudence: a legal system which will not bend must break.

In another decision, the Commission denied a BFOQ defense to an employer who refused to furnish quarters for his female employees while providing quarters for his male workers.[205] The case involved a civilian employer operating at a small Air Force base twenty miles from the nearest civilian community. The employer allowed all of its male employees to live in the barracks on the base, free of charge. The employer, however, refused to provide dormitory space to women employees or to provide cost-of-living compensation. The employer sought a BFOQ exception by arguing that the expense of providing the separate quarters would be prohibitive. The Commission in denying the exception cited the *Rosenfeld* test and stated that only "sex characteristics" "crucial to the successful performance" of the job could qualify for the exception. Addressing the cost argument the Commission added that

> the company would have us expand the BFOQ exception to include consideration of business expenses and not merely personal qualifications. Thus, in the company's view the exception was designed to sanction an inequality of benefits accorded males and females doing the same work, wherever equality of benefits cost money. But since remedying inequality normally costs money, the exception, thus construed would swallow the rule.[206]

An earlier case presented logistical issues involving male and female crew members aboard freight and passenger vessels operating under a Coast Guard regulation that required separate toilet and shower facilities. The Commission, in denying a BFOQ exception, concluded that logical and reasonable solutions could be worked out, depending on the size of the ship's female complement.[207]

The Commission has also denied a BFOQ exception to an employer who refused to hire women as courier guards; it disregarded the employer's argument of the high risks involved both to the property protected and the women themselves.[208]

---

[204] EEOC, TOWARD JOB EQUALITY FOR WOMEN 5 (1969).

[205] EEOC DECISION No. 72-1292, 4 FEP 845 (1972).

[206] *Id.* at 845, *quoting* Weeks v. Southern Bell Telephone & Tel. Co., 408 F.2d 228 (5th Cir. 1969).

[207] EEOC DECISION No. 6-11-144 (1969).

[208] EEOC DECISION No. 5-7-011 (1969).

3. Summary

Our discussion has demonstrated the stringent application by the EEOC of the strict egalitarian provisions of Title VII. The courts' inclination to sustain the EEOC efforts in the area suggests that the judiciary would uphold the constitutionality of the Equal Rights Amendment, should it be ratified, since the Amendment and Title VII have common denominators suggesting similar consequences.

B. THE EQUAL RIGHTS AMENDMENT (ERA)

The proposed Equal Rights Amendment[209] could have a great impact on sex discrimination problems in the military. The Amendment, passed by Congress on March 22, 1972, almost 50 years after it was first introduced, has been submitted to the States for ratification.[210] Once ERA is ratified, if it is ratified, there is a two-year period before the Amendment will take effect.

The Amendment, in its simplest terms, is directed to the elimination of sex-based discrimination encountered in federal and state governmental actions.[211] Its simple but broadly sweeping declaration provides:

> Equality of rights under law shall not be denied or abridged by the United States or by any state on account of sex.

---

[209] The House approved H.J. RES. 208 in its original form by a vote of 354-23. 117 CONG. REC. H. 9392. The Senate debated the issue in March 1972 and approved the joint resolution by a vote of 84-8. 118 CONG. REC. S. 4612.

[210] A constitutional question that may be encountered is whether a state can withdraw its ratification. Such an issue has never been considered by the courts, and there is no indication as to how it might be resolved. *But see* Coleman v. Muller, 307 U.S. 433 (1939) where the Supreme Court discussed the manner in which the political departments of the government dealt with the effect of a state's attempt to withdraw its ratification of a constitutional amendment. The Court noted that in the case of the fourteenth amendment, the political departments had determined the withdrawal to be "ineffectual in the presence of an actual ratification." 307 U.S. at 449. In the context of a state legislature's attempt to ratify a proposed amendment which it had once rejected, the Court determined ". . . the efficacy of ratifications by state legislatures . . . should be regarded as a political question pertaining to the political departments, with the ultimate authority on the Congress in the exercise of its control over the promulgation of the adoption of the amendment." 307 U.S. at 450.

[211] ERA applies only to government action, whether state or federal. Separation of the sexes in the private sector is not prohibited as long as it does not affect areas of public concern. *See* Freund, *The Equal Rights Amendment is Not the Way*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 234, 236-37 (1971).

Its merits and shortcomings have been thoroughly analyzed and debated by distinguished legal commentators.[212] Therefore, it would serve little purpose to but review, very generally, the parameters of the Amendment, and to briefly consider its impact on the specific military regulations to be considered later.

The breadth and vagueness of the Amendment require an examination of the legislative history of the Amendment in order to interpret its possible scope. Professor Emerson, a dedicated advocate of the Amendment, propounded the generally accepted premise of the Amendment—accepted by its proponents—: sex cannot be a factor in determining the legal rights of women or men[213] and a law must deal with the particular attributes of individuals rather than sexual generalities. Emerson includes two important exceptions to this rule of strict equality. First, the Amendment would not prohibit legislation which considers a physical characteristic unique to one sex, such as laws dealing with wet nurses and sperm donors.[214] Interestingly, this criterion bears a striking resemblance to the EEOC formula with respect to the BFOQ exception.[215] Second, Emerson would require the balancing of ERA precepts and preexisting constitutional rights, thus avoiding the possible use of sexual equality to subvert certain areas where traditional fundamental interests might be jeopardized.[216] For instance, the "right of privacy" doctrine in *Griswold v. Connecticut*[217] was thought to clearly validate the "separation of the sexes with respect to such places as public toilets, as well as sleeping quarters of public institutions."[218]

At the outset, it is important to understand that the drafters of ERA intended that it be applied comprehensively and that the exceptions construed restrictively. In other words, no "rational basis" or "compelling interest" criteria will justify the Amendment's infringement and administrative efficiency will not substantiate a subversion of its asexual mandate.[219]

---

[212] *See generally* Emerson, *In Support of the Equal Rights Amendment*, 6 HARV. CIV. RIGHTS–CIV. L. REV. 225 (1971); Freund, *The Equal Rights Amendment is Not the Way*, 6 HARV. CIV. RIGHTS–CIV. LIB. L. REV. 234 (1971).

[213] Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L. J. 871 (1971).

[214] *Id.* at 913.

[215] *See* pp. 47-50 *supra*.

[216] *See Equal Rights*, *supra* note 1, at 900.

[217] 381 U.S. 479 (1965).

[218] *Id.* at 486. *See also* S. REP. No. 92-689, 92d Cong., 2d Sess. 35 (1972).

[219] *See Equal Rights*, *supra* note 1, at 874-900.

The unique, sexual characteristic exception to the ERA is limited to physical characteristics and thus excludes sexual distinctions based on psychological, social or other characteristics of the sexes.[220] Since these latter traits are found, to some degree, in both sexes, any sex classification on such a basis would by its very nature include members of one sex who should not be covered or excluded members of the other sex who should be covered. For example, a statute, which prohibited women from working in coal mines based on their lack of strength, would eliminate some women who were physically able to do the work while qualifying some men who were not.

The most obvious application of the unique sexual characteristic exception is with respect to the child bearing capability of women. Based on this unique characteristic, it would seem to follow that pregnant women could be singled out for either adverse or favorable treatment within limits deemed reasonable by the courts. Notwithstanding this unique characteristic, it is likely that the Supreme Court's lead in *La Fleur* will be followed and any statute or regulation which distinguishes the sexes on the basis of this characteristic must do so in the manner that least obtrusively infringes on the women's procreation interests.[221] Arbitrary regulations or those not directly responsive to business necessity requirements will be invalidated in spite of their reliance on the unique characteristic.[222]

The second general exception to ERA occurs when its application will conflict with other constitutional imperatives; ERA is designed to achieve sexual equality within the context of the constitutional framework. The most publicized example of this conflict is the "right to privacy" issue mentioned previously. The solution to this conflict may be found in *Griswold*, but there are other conflicts that may prove more troublesome.[223] One of these areas is benign discrimination.

---

[220] *Id.* at 894-96. Professor Emerson and his associates identified six factors which a court should balance in determining whether the necessary close, direct, and narrow relationship exists between the unique physical characteristic and the regulation at issue: (1) the proportion of women or men who actually have the characteristic in question; (2) the relationship between the characteristic and the problem to be solved; (3) the proportion of the problem attributable to the unique physical characteristic; (4) the proportion of the problem eliminated by the solution; (5) the availability of less drastic alternatives; (6) the importance of the problem ostensibly being solved, as compared with the costs of the least drastic solution.

[221] 39 L. Ed. 2d 52 (1974).

[222] *See Equal Rights*, *supra* note 1, at 893-894.

[223] *See* 381 U.S. 479 (1965).

The benign discrimination issue can be structured as follows: may the government under ERA take sex into account in acting affirmatively to attain an egalitarian society. While such action might be sustained under a "compelling interest" standard—the state's purpose is to remedy the effect of past discriminatory practices[224]—no comparable test is permissible to sustain sex distinctions. Yet, absolute standards of equality, even in the racial sphere, have been contrary to the basic tenet of equal protection.[225] If it is the goal of ERA to enforce an absolute standard of equality with respect to nonunique characteristics, the conceptual basis for "affirmative action" to remedy past sex discrimination seems doomed. Whether these problems can be solved by structuring goals to fit within the parameters of recognized constitutional "right to privacy" lines remains to be seen.

In viewing this entire area, one should understand that the basic proposition of ERA is that "differences under the law may not be based on the quality of being male or female, but upon the characteristics and abilities of the individual person that are relevant to the differentiation." [226]

IV. MILITARY STATUTES AND REGULATIONS WHICH DISCRIMINATE

Having examined both the constitutional principles and legislative framework necessary in any evaluation of the discriminatory policies of federal and state agencies, as well as those of private employers, we will now examine sex discriminatory military statutes and regulations. The constitutionality of the statutes and regulations are analyzed first under the equal protection standards of review. If sustainable under these standards, the statutes and regulations are then assessed in terms of the ERA.

A. THE DRAFT

Women have never been required by law to register for induction or to serve involuntarily in the United States Armed Forces. Under the Military Selective Service Act of 1967, men in the United States between the ages of 18 and 26 are required to register for training

---

[224] *See* Swann v. Charlotte-Mecklinburg Board of Education, 401 U.S. 1 (1970); Dowell v. School Board, 244 F. Supp. 971, 981 (W.D. Okla. 1965), *aff'd*, 375 F.2d 158 (10th Cir. 1966), *cert. denied*, 387 U.S. 931 (1967).

[225] *See generally Equal Rights*, *supra* note 1, at 903-904.

[226] *Id.* at 909.

and service in the Armed Forces whenever Congress determines that men are needed in excess of those in the regular components, the National Guard and the Reserve components.[227]

In November of 1942, the War Department considered drafting women in order to relieve the manpower shortage in the Army during World War II. This proposal was made to Congress but was rejected; the legislators thought that the idea would be totally unacceptable to the American public.[228]

Although the issue of whether to draft women was mooted by the expiration of the draft portion of the Military Selective Service Act on 30 June 1973,[229] the registration requirement of the Selective Service System is still being used to establish and maintain a manpower pool. This manpower pool will provide a group of men prequalified for induction should a national emergency occur which requires an immediate build-up of active duty military forces.

Applying current judicial interpretations of the equal protection clause, there appears to be no requirement to extend the registration requirement to women. Males who have argued that the sex classification is not reasonably related to the purpose of the Act have done so without success.[230] In *United States v. Dorris*, a Selective Service prosecution, the defendant filed a motion to dismiss based on an equal protection contention; he argued that the total exemption of females from the draft discriminated against males. The district court found that the constitutionality of this sex-based classification had to be measured by the compelling interest standard since a "fundamental right,"—"the protection of the right to one's own life," —was involved. The court found the statute constitutional. The statutory classification, said the court, was justified by a compelling government interest: "to provide for the common defense in a manner which would maximize the efficiency and minimize the expense of raising an army . . ."[231] The same court in conclusion quoted Justice Goldberg's opinion in *Kennedy v. Mendoza*:[232]

---

[227] 10 U.S.C. § 453 (1967).

[228] TREADWELL, WOMEN'S ARMY CORPS IN WORLD WAR II 95 (1954) [hereinafter cited as TREADWELL].

[229] 50 U.S.C. App. §§ 451 *et seq.* (Supp. II, 1972).

[230] *See, e.g.*, United States v. Fallon, 407 F.2d 621 (7th Cir. 1963).

[231] 319 F. Supp. 1306 (W.D. Pa. 1970). *See also* United States v. Clinton, 310 F. Supp. 333 (E.D. La. 1970); United States v. Cook, 311 F. Supp. 618 (W.D. Pa. 1970).

[232] 372 U.S. 144 at 159-160 (1963).

> The powers of Congress to require military service for the common defense are broad and far-reaching, for while the Constitution protects against invasion of individual rights, it is not a suicide pact.[233]

Since women continue to be precluded from combat roles, the viability of the *Dorris* rationale remains firm. Until such time as women are utilized in combat occupations, the courts will perpetuate the correlation between men, combat and military necessity. By so doing, the male sex classification for conscription purposes can be justified.

Should the ERA become law there is little doubt that both men and women will be draft-eligible without regard to sex.[234] The Senate Report on the Amendment states that:

> The ERA will require Congress to treat men and women equally with respect to the draft. This means that, if there is a draft at all, both men and women who meet the physical and other requirements, and who are not exempt or deferred by law, will be subject to conscription. . . [235]

Anticipating an exaggerated impact with respect to the draft, the Senate Report continued:

> Of course, the ERA will not require that all women serve in the military any more than all men are now required to serve. Those women who are physically or mentally unqualified, or who are conscientious objectors, or who are exempt because of their responsibilities (*e.g.*, those with dependents) will not have to serve, just as men who are unqualified or exempt do not serve today. Thus the fear that mothers will be conscripted from their children into military service if the ERA is ratified is totally and completely unfounded. Congress will retain ample power to create legitimate sex-neutral exemptions from compulsory service. For example, Congress might well decide to exempt all parents of children under 18 from the draft.[236]

The argument that ERA will make women potential draftees is accurate. What may not be predictable, however, is what percentage of draftees will women compose. Under ERA will separate quotas be a viable option in the inducting of men and women into the Armed Forces? Since the census shows that there are more women of draft age than men, a draft based on the percentage of women in the general population will result in more women than men being drafted.[237] Since a woman's ability to serve in combat is unknown,

---

[233] 319 F. Supp. at 1308.

[234] *See* S. REP. No. 92-689, 92d Cong., 2d Sess. 11 (1972).

[235] *Id.* at 12.

[236] *Id.* at 15.

[237] *See* DOD, SELECTED MANPOWER STATISTICS (1972).

this imbalance could arguably sustain unequal quotas after balancing "military necessity" and the ERA standard of equality. This alternative appears viable under the second of Professor Emerson's exceptions to ERA—coordination of ERA concepts with existing precepts.[238]

B. THE SEPARATE WOMEN'S CORPS CONCEPT

Title 10, United States Code, contains the statutory basis and authority for the Women's Army Corps, a separate organization for women officers (other than those professionally qualified for appointment in the various corps of the Army Medical Department), warrant officers, and enlisted women.[239] The Army is the only service which continues to maintain a separate women's corps. This is largely due to the unique organization of the Army, which is divided into branches along functional lines. Each servicemember is permanently assigned to a particular "functional" branch.

The "function" of the Women's Army Corps is to provide for the "assimilation and appropriate use within the Army of Women volunteers" and to "constitute a nucleus of trained military women from which the Corps may be expanded in time of national emergency." [240] Essentially, the Women's Army Corps administers women, and when another branch needs a woman for a particular assignment, the Women's Army Corps supplies her. A woman who is in the Army *must* belong to the Women's Army Corps, except those who qualify for appointment in the Medical Corps. Her male counterpart is allowed to join any branch for which he is qualified and he may transfer from one branch to another.[241]

It is unlikely that the constitutionality of a separate Women's Army Corps organization would be invalidated by applying any equal protection standard of review. The Army can argue that its ultimate mission—maintaining an efficient, combat ready organization—is facilitated by a separate women's corps that specializes in the command and training of female personnel. Additionally, a distinctive corps gives the woman a sense of belonging that increases her morale and efficiency.[242]

---

[238] *See Equal Rights*, *supra* note 1, at 900.

[239] 10 U.S.C. § 3071 (1970).

[240] Army Reg. No. 600-3, para. 3 (18 March 1970).

[241] 10 U.S.C. § 3071 (1970).

[242] Interview with Brigadier General Bailey, Director of WAC on January 11, 1974.

One cannot deny that military effectiveness is a "compelling" reason and that the separate corps concept does not further that goal. The courts, the Army contends, should not interject themselves into an area so singularly military.[243] They simply do not have the means or the knowledge to second-guess military decisions that focus on the composition of military units. This same reason would not, however, preclude judicial interference in every instance of sex discrimination in the military, since there are areas which do not bear on professional military acumen. When military assignments and organizations of personnel are involved, the courts have been reluctant to intrude.[244] However, the logical sequitur is to ask whether, if one considers sex, like race, a suspect classification, there is any doubt that the courts would strike down a separate black corps, over military protestations that such organizational structure involved matters peculiar to the Army.[245] The efficacy of such a response is undeniable. Thus, the only meritorious justification that the Army has for a separate women's corps is privacy considerations. All of the other bases for a distinct organization fail for the same reasons they would if the issue concerned a separate black unit.[246]

The WAC role, according to one commentator,

> . . . stands as a symbol of the unwillingness of the Army to abandon distinctions based on sex. Under the Equal Rights Amendment the WAC would be abolished and women assigned to other corps on the basis of their skills.[247]

The Judge Advocate General of the Army took a somewhat modified view but reached the same basic conclusion. His comment was:

---

[243] *See* Gilligan v. Morgan, 413 U.S. 1 (1973); Orloff v. Willoughby, 345 U.S. 83 (1953); Cortwright v. Resor, 447 F.2d 245, 254 (2d Cir. 1971); United States v. Butler, 389 F.2d 172, 177-78 (6th Cir.), *cert. denied*, 390 U.S. 1039 (1968).

[244] *See* Gilligan v. Morgan, 413 U.S. 1 (1973); Orloff v. Willoughby, 345 U.S. 83 (1953); Cortwright v. Resor, 447 F.2d 245, 254 (2d Cir. 1971); United States v. Butler, 389 F.2d 172, 177-78 (6th Cir.), *cert. denied*, 390 U.S. 1039 (1968). *But see* Dash v. Commanding General, 307 F. Supp. 849 (D.S.C. 1969), *aff'd*, 429 F.2d 427 (4th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971) (reviewing military order and regulations interfering with constitutional rights).

[245] Judge Duniway's dissent in *Struck* focuses on the analogy between pregnant women and persons of "African ancestry" to make a similar point. Struck v. Secretary of Defense, 460 F.2d 1372, 1830 (9th Cir. 1971), *vacated and remanded for consideration of the issue of mootness*, 409 U.S. 1071 (1972).

[246] *See* Brown v. Board of Education, 347 U.S. 483 (1954). *See generally* Kenworthy, *The Case Against Army Segregation*, 275 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 27 (1951).

[247] *Equal Rights*, *supra* note 1, at 976.

> The primary function of maintaining a separate Women's Army Corps will probably be eliminated upon ratification of the equal rights amendment. Whether those distinctions based on sex that would remain permissible under the amendment will be continued through a separate label for female members is primarily a question of policy. However, the impact of the equal rights amendment, in my opinion, will so limit the permissible distinctions that it would be inaccurate to designate female members as belonging to a separate corps, as that term is used to designate separate branches within the Army.[248]

Should ERA be ratified, it appears certain that the Court will follow its strict mandate and eliminate the Women's Army Corps. Such a unit, developed solely on the basis of a sex classification, will not withstand judicial scrutiny prior to ERA ratification.[249] For the present, however, the separate Women's Army Corps will withstand any attack based on constitutional grounds.

C. *OFFICERS*

1. Appointment and Branch Assignment

Commissioned officers in the Regular Army are appointed without regard to branch except for special branches, professors at the United States Military Academy, and the Women's Army Corps.[250] By statute, women officers, other than those qualified for the Army Medical Corps, must be appointed as officers in the Women's Army Corps be they members of the Regular or Reserve Components of the Army.[251] Although there is no *statutory* authority specifically precluding branch transfers for women after their initial appointment, Army regulations[252] prohibit branch transfers for women. WAC officers are, however, permitted to be detailed on a temporary basis to any branch for an assignment for which they are found qualified.

Detailing WAC officers to other branches eliminates much of the inequity that would result if this policy were not in effect. Since the WAC officer is detailed only on a temporary basis, however, she is precluded from competing favorably for assignments and senior

---

[248] *Reprinted in* Speech by Carole L. Frings, DACOWITS Fall Meeting, Colorado Springs, Colorado, Nov. 16, 1972.

[249] *See generally* H.R. REP. No. 92-359, 92d Cong., 1st Sess. 6 (1971).

[250] 10 U.S.C. § 3283 (1970).

[251] 10 U.S.C. § 3311 (1970).

[252] Army Reg. No. 614-100, para. 4-2 (21 January 1969).

military schools with male officers who have served continuously in a branch's development program.

The disadvantages this transfer prohibition places on the female officer contravene the philosophy of Title VII and the EEOC Guidelines.[253] It also violates the intent of ERA. Under current equal protection standards, a strong case against the invalidity of the regulation can be made under the "strict rationality" test. Since women officers are in the same position as all noncombat branch male officers, it is difficult to perceive of any objective to be gained by the difference in treatment. The privacy considerations that arguably legitimatize a separate women's corps are not pertinent if women officers are housed separately and receive physical training consonant with that received by noncombat male officers.

Interviews with personnel officers at the highest levels within the Department of Army revealed no particular justification—other than as stated above—for placing women officers in a separate corps. Thus, one must conclude that there is no rational purpose to be achieved by this statutory distinction. Since the statute relegates women to a status that prevents them from competing on an equal basis with their male counterparts, it is a violation of the equal protection clause.[254] This does not mean, however, that the Women's Army Corps must be eliminated. Some women officers could still be assigned to that branch, but they would have to be afforded an opportunity to be permanently assigned to the other branches of the Army dependent on the Army's needs. Additionally, discontinuing this policy would not infringe upon the Army's authority to assign the best qualified officers to appropriate branches. Rather, each individual woman would have to be considered for the same branch assignments as would similarly situated male officers.

Modifying present policy limiting the branch assignment of women could be accomplished with a change in the Army Regulations, since the limiting factor in the statute only requires that women officers be initially appointed to the Women's Army Corps.[255]

2. Separate Promotion Lists

Title 10 of the United States Code establishes a separate promotion list for WAC officers. All other officers are carried on the Army

---

[253] "It is an unlawful employment practice to classify jobs by sex or to maintain separate lines of progression or seniority lists based on sex." EEOC, *Guidelines on Discrimination Because of Sex*, 37 F.R. 6835 (1972).

[254] *See* Reed v. Reed, 404 U.S. 71 (1971).

[255] 10 U.S.C. § 3311 (1970).

Promotion List (APL).[256] The use of a separate promotion list presents an interesting problem in sex discrimination since the advantages or disadvantages of its use are directly related to the quota established for that particular promotion list. The Secretary of the Army has the authority to establish quotas for the number of officers to be promoted from each list.[257] If the quota set for the WAC promotion list is high, a WAC officer may be promoted ahead of a similarly qualified male officer. The converse would be true if the quota for the WAC list were low. The result, however, of using this separate list leaves little doubt that women generally have fared worse than their male counterparts.[258]

The law effectively eliminates competition between the sexes for promotion within the Army. The Army argues that the use of the separate promotion list removes sex as a consideration in the selection process and effectively precludes discrimination based on sex,[259] since women cannot serve in combat and receive only limited opportunities to command men, they cannot compete on an equal basis with their male contemporaries.[260] This argument, however, has no merit when one considers that there are many men who serve in such branches as Military Intelligence and Finance who will never see combat and who will never be commanders; yet these men compete for promotion with combat officers who have command experience.

If one examines the separate promotion statute under the more lenient equal protection standard of review, strict rationality, it seems unlikely that the Army could show that the statute bears a substantial relationship to the Army's organization and readiness. If the statutory purpose is to "protect" women from competing with men, thereby enhancing their promotional capacity, statistical evidence will show that this end has not been accomplished by the statute.[261] What the statute does accomplish is to perpetuate distinctive sex defined roles which in turn maintain the status quo. Since no valid

---

[256] 10 U.S.C. §§ 3283, 3296, 3311 (1970), AR 624-100 (1966).

[257] 10 U.S.C. §§ 3299, 3305 (1970). The quotas are set to insure that the percentage of fully qualified women who are promoted is equal to the percentage of fully qualified men promoted. *See Utilization Hearings, infra* note 258, at 12440.

[258] *Hearings Before the Special Subcomm. on the Utilization of Manpower in the Military-House Comm. on Armed Services*, 92d Cong., 1st & 2d Sess. 12440 (1972) [hereinafter cited as *Utilization Hearings*].

[259] *Id.* at 12439.

[260] *Id.* at 12500.

[261] *See Utilization Hearings, supra* note 258, at 12440 (testimony of Congressman Pike).

government interest is involved in this statute, it cannot survive equal protection scrutiny.

The Judge Advocate General of the Army has stated that if ERA becomes law the statute will be unconstitutional. Testifying before the House Appropriations Committee, The Judge Advocate General said:

> The legislative history of the Equal Rights Amendment . . . indicates that a number of functions now served by maintenance of a separate Women's Army Corps will not be permitted if the equal rights amendment is ratified. For example . . . promotion of personnel, in my opinion, will have to be done on a best qualified basis, rather than by continuing separate . . . promotion lists. . . .[262]

3. Procurement Sources and Appointment Criteria

The main procurement sources for male officers are the U.S. Military Academy (USMA) and the Army Reserve Officer Training Corps (ROTC). Women are by regulation prohibited from being considered for admission to the USMA, although they are not barred by statute.[263] ROTC programs have only recently been opened to women.[264] Traditionally, women officers have been recruited through a system that provides for the appointment of commissioned officers directly from civilian life or through attendance of Officers' Candidate School.[265]

Under the direct commission program, women college graduates apply for appointment as commissioned officers in the United States Army Reserve (USAR) with concurrent active duty.[266] In-service enlisted women who have completed 50% of the work needed for their baccalaurate degree or who possess a two year college evaluation certificate from the Department of the Army may apply for Officers' Candidate School.[267]

---

[262] *Reprinted in* Speech by Carole L. Frings, DACOWITS Fall Meeting, Colorado Springs, Colorado, Nov. 12-16, 1972.

[263] 10 U.S.C. §§ 4346, 9346, 69581 (1970).

[264] A pilot program was initiated at ten colleges in September 1972 to determine the effectiveness of the ROTC as a procurement source for women officers. The success of the experiment influenced the Army to open all college ROTC programs to women in the Fall, 1973. Interview with Carole L. Frings, General Counsel's Office, Secretary of Defense, at the Pentagon, Jan. 11, 1974.

[265] *Utilization Hearings, supra* note 258, at 12450 (testimony of Gen. Bailey).

[266] *See* Army Reg. No. 135-100, para. 3-15 (1 Feb 1974) and paras. 3-16 and 3-17 (17 March 1972).

[267] Army Reg. No. 351-5, para. 2-5 (28 March 1971).

The criteria *for the appointment* of WAC officers under the direct commission program are similar to the qualifications that a male applicant possesses *upon graduation from* the USMA or ROTC, *i.e.*, minimum educational level of a baccalaureate degree. There are two major differences.[268] These differences are:

	Men	Women
Mental	GT score of 110	GT score 115
Dependents	Immaterial	Must request waiver if the parent or guardian of a child under 10 years

Apparently these sex based differentials are based on a simple supply and demand concept. Since more male officers are required than female officers, the standards are set accordingly.[269] The military's position is that the military services, just as any other employer, are free to select the most qualified applicants for a position as long as they do not arbitrarily exclude an individual solely on the ground of race, religion or sex.[270] The difficulty with this position is that the Army arbitrarily eliminates some women based on their sex since there is a higher entrance requirement for women than for men.[271] One must be skeptical of the constitutionality of a policy that makes such a sexual distinction.

The services firmly maintain the position that the primary mission of the service academies is to train men for assignment to the combat arms or combat support arms. Since women cannot be assigned to such a role, it is not necessary nor logical to grant them admission.[272] There is no statutory prohibition which specifies "male sex" as an admission prerequisite for any of the military academies.[273] There are, however, certain priority quotas reserved for "sons" of members of the Armed Forces and Medal of Honor winners.[274] Army regula-

---

[268] *See* Army Reg. No. 135-100 (17 March 1972).

[269] Speech by Carole L. Frings, General Counsel's Office, Secretary of Defense, DACOWITS Fall Meeting, Colorado Springs, Nov. 12-16, 1972.

[270] *Id.*

[271] *See* Reed v. Reed, 404 U.S. 71 (1971); Griggs v. Duke Power, 401 U.S. 424 (1971).

[272] *Utilization Hearings, supra* note 258, at 12471-12496 (testimony of Gen. Bailey).

[273] 10 U.S.C. § 4346 (1970).

[274] 10 U.S.C. § 4342 (1970).

tions governing admission to the USMA do not expressly specify "male sex" as a prerequisite, but there is little doubt that males are "preferred." Another reason for denying women admission was advanced by Brigadier General Mildred C. Bailey, Director, Women's Army Corps. She stated that it was simply not necessary to admit women since ". . . we get all—women officers—we need at no expense to the Government. Why should we spend the money to train them at West Point?" [275]

The position taken by a former General Counsel, Department of the Army, is more persuasive. He states that

> . . . if women were excluded from combat but were admitted to the Military Academy, it would be necessary to establish a separate curriculum for women cadets. Doing so, however, would not only depart from a long-standing policy of the Academy with respect to military training, but it would also create grave practical problems. If women were allowed to take a separate non-combat curriculum, it would be difficult legally to justify prohibiting men from taking it; but to the extent that men were permitted to and did in fact do so, the Army would face potentially severe shortage of Regular Army career combat officers.[276]

While these arguments might serve to provide a rational basis[277] for the exclusion of women, they cannot survive the "compelling interest" test should sex become a "suspect" classification.[278]

The Army's position depends on women's perceived inability to serve in combat. Even if this premise is accepted, any argument justifying exclusion must deal with the hard fact that in 1973, 109 USMA graduates were assigned to branches to which women are detailed.[279] Failure to adequately explain this phenomenon makes the Army's contention that separate noncombat curriculums would somehow result in a shortage of combat officers a highly speculative basis for precluding women from admission. Even if a shortfall of combat officers occurs after women are admitted to service academies, the military services could structure incentives that would

---

[275] *Utilization Hearings*, *supra* note 258, at 12471 (testimony of Gen. Bailey).

[276] Interview with Ira Greenberg, General Counsel's Office, Secretary of the Army, at the Pentagon, Mar. 8, 1974.

[277] *Compare* Williams v. McNair, 401 U.S. 951 (1971), *aff'g* 316 F. Supp. 134 (D.S.C. 1970) *with* Kirstein v. Rector and Visitors, 309 F. Supp. 184 (E.D. Va. 1970).

[278] *See generally* Kenworthy, *The Case Against Army Segregation*, 275 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 27 (1951). *See also* Begeman, *Air Force Tried Democracy*, 122 New Republic, May 15, 1950, at 14-15.

[279] Interview with Ira Greenberg, General Counsel's Office, Secretary of the Army, at the Pentagon, Mar. 8, 1974.

motivate a sufficient number of officers toward the combat branches.

Likewise, General Bailey's rationale is an inadequate justification for excluding women from attendance at service academies. In stating that the military academy is merely another source of officer procurement, General Bailey ignores the qualitative aspects of what must be considered the pinnacle of military training. It is from the academies that the best trained military officers come. To deny this opportunity to a woman solely on the basis of her sex is an obvious form of sex discrimination.[280]

Since this policy of exclusion cannot be sustained under the Equal Protection Clause, it is unnecessary to determine its validity under ERA.[281]

D. ENLISTED WOMEN

1. Standards for Enlistment

Prior to November 8, 1967, women were prohibited by statute from constituting more than two percent of the total military personnel in the Armed Forces.[282] Although the statutory bar has been removed, the two percent limit, at least in the Army, remains in force by regulation.[283] Because of this limitation, the Army is able to require higher enlistment qualifications for women than for men. Army Regulation 601-210 lists the enlistment qualifications for men and women separately. By using these requirements, the Secretary of the Army controls the quality and the quantity of men and women that voluntarily enter the service. The basic eligibility criteria are:

---

[280] The fact that the graduates from the Academies receive government subsidized education would appear to place an even heavier burden on the government to avoid discriminatory admission requirements.

[281] *See* Note, *The Equal Rights Amendment and the Military*, 82 YALE L.J. 1533, 1543 (1973).

[282] 10 U.S.C. § 3209 (1964), *as amended*, 10 U.S.C. § 3209(b) (1970) (repealed by Act of Nov. 8, 1967).

[283] Central All-Volunteer Task Force, *Utilization of Military Women*, at 6 (1972).

Basic Eligibility Criteria (Nonprior Service)[284]

Criterion	Men	Women	Basis
a. Age	17 thru 34	18 thru 34	AR 601-210
b. Mental	Minimum score of 16 on AFQT.	Minimum score of 59 on AFWST.	Statutory: Minimum score of 10 on AFQT Section 454, 50 App USC, modified by AR 601-210
c. Education	Be encouraged to complete high school before enlisting and meet educational requirements for the specific option for which enlisting	High School or GED equivalent and meet educational requirements for the specific option for which enlisting	AR 601-210
d. Medical	Meet physical fitness standards in AR 40-501 Minimum profile: 222222	Meet physical fitness standards in AR 40-501 Minimum physical profile: 111221	By regulation. Separate height and height/weight standards for men and women are in AR 40-501

The Army defines its recruiting goals in terms of acquiring sufficient quality personnel to achieve combat readiness. Based on the assumption that women will not be used in combat, the Army believes that such a force can only be attained by enlisting a larger percentage of men than women.

In order to sexually neutralize its enlistment standards, the Army would have to lower the enlistment requirements for women, and the Army is hesitant about lowering recruiting standards for women. The Army argues that if the standards were neutralized the lower caliber of women entering the service would create a situation analogous to the scandalous problem existing during World War II when enlistment standards were reduced for women. The lowering of the enlistment criteria during that era produced such a questionable reputation for the Women's Army Corps that there was a reduction of the number of applicants.[285] Because of this experience,

---

[284] *See* Army Reg. No. 601-210 (1973).

[285] TREADWELL, *supra* note 228, at 3-20.

the Women's Army Corps raised enlistment standards. There was no decrease in enlistments and thus the Women's Army Corps continued to meet its recruiting objectives. Statistics have proven, according to Army representatives, that when lower caliber women enter the Army reputable women possessing more desirable skills do not.[286] It is significant that although today's entrance standards are higher than ever before, the number of women recruits has increased.[287]

When this difference in enlistment standards is examined under the equal protection tests, it is possible to conclude that the criteria are reasonably related to the desired objective—a male oriented combat ready force—and, therefore, within the scope of a "rationality" test. This argument, however, loses its persuasiveness when one realizes that under the present concepts of military operations only 15 percent of the total troop strength engages in combat operations.[288] The need for an Army 98 percent of whom are men simply does not square with a realistic appraisal of combat occupational requirements. The achievement of this objective, which results in the elimination of a large proportion of women from substantial educational and vocational opportunities in the Army, does not justify the sex based classification under a strict scrutiny standard.[289] It is unlikely that this government objective could withstand examination under the harsher "compelling interest" standard.

2. *Separate Basic Training*

Basic training for men and women in the military has always been separate. Basic training for men focuses on the development of skills used in combat while the training of women is directed at the development of administrative proficiency.[290] The major differences in the two training courses are:

---

[286] Interview with Brigadier General Bailey, Director of WAC on Jan. 11, 1974.

[287] TREADWELL, *supra* note 228, at 15.

[288] 118 CONG. REC. S. 4390 (daily ed. March, 1972).

[289] A civilian employer within the scope of Title VII of the Civil Rights Act could not hope to justify a BFOQ exception based on the circumstances that because fifteen percent of his positions required strenuous or dangerous activity he is justified via sex restrictive entrance standards. *See e.g.*, EEOC DEC. No. 7011 (1969) (Courier guards).

[290] ARMY TRAINING PROGRAM (ATP) 21-121 (1970); ATP 21-114 (1970).

Subject	*Hours of Training*	
	WAC BT (ATP 21-121)	Male BCT (STP 21-11-1)
Weapons Training	0	108
Individual Combat Skills	0	22
Communicative Skills	40	0
Personal Development	14	0
Protective Training	31	65
Basic Military Skills	51	31
Individual Responsibilities	43	23
Administrative Subjects	100	63
Physical Training	30	20

Unquestionably, the differences in the training reflect the perceived utilization of men and women in the military. This view may change as a result of a recent authorization which now permits the assignment of women to interchangeable—male or female—positions in combat support units—Category II and III units. Such assignments will require, at the very least, some weapons and modified combat training for women,[291] since the secondary mission of all Category II and III combat support units requires that "[i]ndividuals of this organization [be able] to engage in effective, coordinated defense of the unit's area or installation."[292]

Another factor that has influenced the separate basic training courses is the view that the physical training of men and women requires different approaches. For instance, the calisthenics for women are designed to improve general physical strength and conditioning, whereas physical exercises for men are more rigorous and are designed to build muscular strength and physical stamina. In addition to actual physical exercise, women receive instruction in diet, nutrition, weight control, and personal hygiene. These distinctions reflect not only the prospective assignments of the two sex categories, but also adhere to the normal stereotypical concept, woman's inability to withstand arduous physical exercise.[293]

The third and perhaps the most valid reason for the differences in the two programs is the desire to maintain the personal privacy of each sex. A large portion of basic training is directed at testing the interaction of soldiers both in and outside the barracks' area. How a soldier is able to cope with peer pressure and military discipline

[291] DA Personnel Letter, Subject: Expansion of the Women's Army Corps (29 June 1972).

[292] *Id.*

[293] *Compare* ATP 21-121 (1970) (female) *with* ATP 21-114 (male).

within the limited confines of a barracks is an integral p ise in the basic training function. The potentially disruptive influence of integration could be fatal to this objective.

Under the present organizational structure of the Army—few women in combat related positions—separate basic training programs bear a reasonable relationship to valid military objectives. Thus, under the less stringent standard of equal protection review, the distinctive training programs appear acceptable. Likewise, when viewed in terms of the strict scrutiny test demanded by a "suspect classification," the separate training policy arguably continues to be justified based on privacy considerations. A court would be unlikely to substitute its judgment for that of the military in such matters if the military presented sufficient evidence to sustain this proposition.[294] It is difficult to conceive that the plurality opinion in *Frontiero* dictates otherwise.[295]

Under ERA, the privacy considerations would also justify the separate programs.[296] However, if it could be shown that noncombat military elements do not require cloistered segregation to attain the effectiveness necessary to achieve the element's mission, ERA will require that all noncombatants receive identical, integrated training with segregation permitted only with respect to sleeping and bathroom facilities.

E. ASSIGNMENTS

Within the last two years, the services have opened nearly all job specialties to women except those that are combat-oriented or considered physically too arduous or dangerous for women.[297] In the Army, 434 Military Occupational Specialties (MOS's) are now open to enlisted women and only 48 are closed.[298] For officers, 177 specialties are open to women and 188 are closed.[299] In the Marine Corps, 23 of the 36 general occupational fields are open to women, be they officer or enlisted.[300] The Navy has open to women, on a limited

---

[294] *See generally* Gilligan v. Morgan, 413 U.S. 41 (1973); Orloff v. Willoughby, 345 U.S. 83 (1953).

[295] *See* Frontiero v. Richardson, 411 U.S. 677 (1973).

[296] *See* Note, *The Equal Rights Amendment and the Military*, 82 YALE L.J. 1533, 1545-1547 (1973).

[297] *Utilization Hearings, supra* note 258, at 12443 (testimony of General Bailey).

[298] Central All-Volunteer Task Force, *Utilization of Military Women*, at 26 (1972).

[299] *See generally* Army Reg. No. 611-101 (2 June 1972) as amended.

[300] *Utilization Hearings, supra* note 258, at 12462 (testimony of Colonel Sustad).

basis, all enlisted ratings and all staff corps.[301] The Air Force restricts the assignment of women in only five areas, all of which are connected with combat positions.[302]

The rationale in nearly all the cases where women have been denied a particular specialty is the combat relatedness of the particular job. There are a few instances where women have been excluded because of physical requirements of the job, but the belief that women have no place in a combat environment generally delineates what jobs can or cannot be assigned women. Interestingly, there is no law that prohibits women from serving in combat, and the Army Regulation that specifically deals with the Women's Army Corps does not mention any restriction against women serving in combat. Thus, the position appears to be a policy limitation based on cultural and physiological reasons.[303]

Women are discriminated against by restricting them from combat positions. Just as men are motivated by patriotism or a sense of adventure to risk their lives, there are women of a similar bent.[304] Additionally, combat assignments afford the best opportunity to obtain upward mobility in the military. Thus, denying a woman the opportunity to hold a combat position is tantamount to denying her a chance to obtain higher rank and position at the same rate as her male counterpart. But whatever a woman's reason for desiring a combat assignment might be, she is discriminated against if she is denied the assignment on the basis of her sex.

One must also consider the issue from the standpoint of the male soldier who is subjected to discrimination by being required to occupy a combat position while his female counterpart is exempt from the potential danger that holding of such positions brings. Regardless of how this discrimination is viewed, it is improbable that the equal protection arsenal has sufficient potency to bring about a change. Applying the most stringent test, a court could reasonably conclude that the regulatory classification helps attain the compelling government objective of maintaining a strong national defense. Since women have been considered unsuitable for combat service as a matter of national policy and their capacity to perform in a combat environment is unknown, exclusive utilization of men in combat

---

[301] Washington Post, Feb. 15, 1972, at § A, at 3, col. 5.

[302] 10 U.S.C. § 8549 (1970).

[303] *See* Note, *The Equal Rights Amendment and the Military*, *supra* note 296, at 1549.

[304] *See also Equal Rights*, *supra* note 1, at 976-977.

positions appears directly related to the attainment of an effective and ready combat force. Additionally, the courts must recognize that this issue involves matters inherently military. Assignment related questions have traditionally been left to the control of the legislative and executive branches of the government.[305] Although judicial noninterference in this area has not been absolute, the courts appear to have abstained from intervention except in the clearest cases of deprivation of constitutional rights.[306] Thus, after balancing all considerations, the courts will conclude—even if they apply the strict scrutiny test—that the policy and regulations are constitutional.

Should the ERA be ratified, the judiciary will be unable to structure the issue in terms of compelling interests. Instead, the courts will be forced to measure the classification against the restrictive scope of the exceptions to ERA. In addressing issues involving the exclusion of women from combat occupations, the courts may consider instructive the analogous EEOC experience with Title VII requirements. EEOC Guidelines allow only one exception to the requirement of asexual job criteria, a criterion based on unique physical characteristics. Under a stringent application of the EEO—Title VII philosophy, the Army would be unable to satisfy this exception. Carrying a weapon and risking one's life in a hostile environment are not dependent on unique physical characteristics.

An interesting parallel exists between the Army's desire to protect women from the harshness of the combat zone and the states' interest in sheltering women from the rigors of the business world.[307] States that attempted to afford women such "protection" saw their statutes fall under the broad sweeping provisions of Title VII.[308] However, as with most analogies there are dissimilarities between the two situations and these dissimilarities disrupt any ability to arrive at common remedies. For example, it is difficult to argue that Title VII's business necessity theory is similar to the doctrine of military necessity and national survival.[309] Economic interests of a private employer do not equal the Secretary of the Army's interest in estab-

---

[305] *See* Gilligan v. Morgan, 413 U.S. 1 (1973); Orloff v. Willoughby, 345 U.S. 83 (1953).

[306] *See, e.g.*, Cortwright v. Resor, 447 F.2d 245 (2d Cir. 1971).

[307] *See, e.g.*, KANTOWITZ, WOMEN AND THE LAW 33-34 (1969); Oldham, *Sex Discrimination and State Protective Laws*, 44 DENVER L. J. 344, 373-374 (1967).

[308] *See, e.g.*, Sail'er Inn v. Kirby, 5 Cal. 3d 1, 485 P.2d 529 (1971).

[309] U.S. CONST. art I, § 8. *See, e.g.*, Dash v. Commanding General, 307 F. Supp. 849 (D.D.C. 1969), *aff'd*, 429 F.2d 427 (4th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971).

lishing policies essential to the effective execution of his prescribed duties. Consider the situation where young male and female soldiers maintain common foxholes on a desolate perimeter. Relying on past decisions, the conclusion is inescapable that EEOC would not allow a BFOQ exception. Instead, the Army would be required to maintain and enforce a strict standard of conduct, in addition to furnishing segregated quarters.[310] In a fluid combat situation, this is impractical.

Since the BFOQ test is considered identical to the "unique physical characteristics" exception of the ERA,[311] ERA proponents urge that individual women who measure up to prescribed combat criteria cannot be excluded if ERA is ratified.[312] If the courts are called upon to balance the equality dictates of ERA and the constitutional charge to the military—maintenance of an efficient combat force—they will probably require the Army to relax its absolute ban on the use of women in combat jobs. Since the thrust of ERA is too unequivocal to permit the arbitrary exclusion of all women from all combat positions, the Army will most likely be required to determine the particular role of a woman based on her specific attributes and the exigencies of the battlefield.[313] For instance, in situations where segregated sleeping quarters could not be provided or enforced, or where integration would impair discipline and military effectiveness, the Army could make its assignments accordingly. It is the categorical banning of women from all combat positions that ERA will prohibit.

F. SEPARATION

Recent statutory reforms repealed a number of laws containing arbitrary sex differentials respecting discharge. There remain, however, four general areas in which the grounds for discharge differ on the basis of sex. These areas—minority, marriage, pregnancy, and the parenthood exception—will be outlined and then analyzed as to their discriminatory effect.

---

[310] *See* notes 208-210, *supra* and accompanying text.

[311] *See Equal Rights*, *supra* note 1, at 926.

[312] *See* Note, *The Equal Rights Amendment and the Military*, *supra* note 296, at 1532 (1973); *see also* 118 CONG. REC. S. 4395-4409 (March 21, 1972).

[313] *See* 118 CONG. REC. S. 4390 (March 21, 1972) (remarks of Senator Bayh).

1. Outlines: General.

a. Minority. Army regulations require that a female member be released from military control if she enlisted while under the age of 18 and has not yet reached the age of 18.[314] Males are released only if under 17 years of age.

b. Marriage. A woman may be discharged early based on her marriage, if she has served 18 months of her current enlistment. Men are not eligible for discharge based on a change in marital status.

c. Pregnancy. A woman who is pregnant, or has "given birth to a living child" during the period of her current enlistment will be discharged unless she is granted a waiver allowing her to be retained on active duty.[315]

d. Parenthood. A woman who obtains custody of a child under 18 years of age who resides in her household for over 30 consecutive days, will be discharged unless she requests a waiver for retention on active duty.[316] Men are not afforded a discharge option under the regulation.[317]

2. Minority.

In reviewing the sex distinction with regard to what age constitutes minority under equal protection standards, there is no logical basis to sustain this differentiation under a "strict rationality" test. The governmental purpose in the age differential between sexes is that the younger age requirement for women "protects" young women from "making rash and immature" decisions.[318] This reasoning recalls traditional stereotypes used to justify state protective laws that have generally been disapproved. There is no factual basis for concluding that young women require any greater protection than young men regarding enlistment in the Armed Forces. A classification that seeks to accomplish this end serves no reasonable governmental purpose other than perpetuate the shibboleth that women are frail and emotionally immature. Thus, any such regulatory provisions are unconstitutional under minimum equal protection standards.[319]

---

[314] 10 U.S.C. § 505 (1970); Army Reg. No. 635-200, para. 7-5(d) (1972).

[315] Army Reg. No. 635-200, paras. 8-8 and 8-9 (21 June 1972).

[316] Army Reg. No. 635-200, paras. 8-17 and 8-18 (16 April 1971).

[317] 10 U.S.C. § 3814 (1970) (allows for discharge of male member but not because of his status as a parent).

[318] *Utilization Hearings, supra* note 258, at 12498.

[319] Reed v. Reed, 404 U.S. 71 (1971).

3. Marriage.

The policy that permits early release from the service for women due to their marriage may well discriminate against male service members since getting married is common to both sexes. This regulation is undoubtedly based on military mobility and readiness concepts. These ends are accomplished, according to the military, by maintaining a personnel structure composed of high-performance people who are free to adapt to the transient nature of military life. The Army theorizes that married women have domestic responsibilities that inhibit the attainment of this goal. While mobility is a legitimate governmental interest, one must question not only whether this classification effectuates that end, but also whether it does so to the detriment of more compelling governmental and military concerns. For example, to permit a woman, who has been furnished specialized education and training and who maintains a critical occupational specialty to voluntarily resign solely for the reason of marriage, is to foster unpredictability and instability in the utilization of women soldiers while attaining no real gain in mobility. In essence, the sex-based regulation elevates the personal desires of the woman above the military mission and places a greater military burden on similarly situated male soldiers. One must therefore conclude that the regulation's classification impedes rather than facilitates the ultimate governmental goal of a stable, efficient Army. Thus, the regulation is invalid under the "strict rationality" standard of the equal protection doctrine.

4. Pregnancy and Parenthood.

The parenthood discharge provisions pose a greater analytical problem to one seeking to determine whether the sexual differentiation contained therein is within the scope of equal protection standards. Undoubtedly, dependent children create family obligations that potentially impair the performance of both the individual service member and the military mission. The Army attempts to alleviate this problem by discharging those women who do not meet the waiver qualifications. On the other hand, men who become parents are not afforded the same treatment; the Army argues that national security is too heavily dependent upon a male dominated military structure.

In determining the validity of these regulations, one must remember that sensitive procreative interests affected by the discharge provisions require that the classification be examined in terms of the

"compelling interest" test.[320] The courts have held that there is a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." [321] Because these military regulations constitute a heavy burden on the exercise of a protected freedom, the government must prove that the classification is necessitated by compelling government objectives.[322]

At the outset, it is assumed that the government has two abiding interests in this matter. First, the government has a legitimate interest in the health and welfare of pregnant women and their unborn children in general,[323] especially in those women who are federal employees. Second, the government has an interest in maintaining an effective military force. Both of these interests can arguably be classified as compelling.[324] The question that must still be answered, however, is whether the classifications created—pregnant females, servicemen and women with temporary disabilities—are necessary in order to achieve these objectives.[325]

While the condition of pregnancy obviously differs from other "disabilities," its duration usually results in only minor interference with a woman's ability to work. Indeed, pregnancy incapacitates a woman worker for a shorter period of time than do many common disabilities affecting male workers, such as heart attacks.[326] In fact, because the disabling effects of pregnancy are relatively more predictable than other injuries, the impact on manpower requirements is less traumatic. Thus, from the standpoint of work there is little reason to treat pregnancy differently from other temporary physical disabilities. Some might argue that since pregnancy can be terminated, the woman has the power to "cure herself" thereby eliminating her disability. It is true that she can avoid the danger of discharge and the decision is entirely hers. This rationale, if it can even rise to that level, results in the Army implicitly telling the woman

---

[320] Cleveland Board of Education v. LaFleur, 39 L. Ed. 2d 52 (1974); Roe v. Wade, 410 U.S. 113 (1973).

[321] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

[322] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

[323] *See* Roe v. Wade, 410 U.S. 113 (1973).

[324] *See* 39 L. Ed. 2d 52, 60-61, *See also* Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 183 (1962), in which the former Chief Justice equated "military necessity" with "national survival."

[325] *See generally* Struck v. Secretary of Defense, 460 F.2d 1377, 1379-1380 (9th Cir. 1972) (Judge Duniway dissenting).

[326] *See id. See also* Green v. Waterford Board of Education, 472 F.2d 629 (2d Cir. 1973).

that if she refuses to obtain an abortion, she may lose her career and the equity that she may have in that career. This position not only offends the woman's procreative rights but the societal conscience as well.[327]

There does not appear to be any valid reason why women are any more hindered in the performance of their military duties upon becoming parents than are men. The Army seems to focus on the impact that the care of the child would have on the woman's ability to perform her duties: since a woman's first duty should be child rearing, her military career should not be permitted to conflict with this duty. This blanket stereotypical determination is the very type of arbitrary reasoning the Court in *Reed* sought to curb.[328]

Standard medical and hardship regulations provide asexual criteria for determining the future effectiveness of a service member with serious medical or domestic problems. These regulations are capable of being applied to the individual who has seriously debilitating problems that result from physical disabilities or parenthood. These regulations further the interests of the government, but do so without significantly interfering with the servicewoman's fundamental right to make personal procreative decisions.[329] Thus, the pregnancy and parenthood discharge provisions create a classification unnecessary to the furtherance of compelling governmental aims. Because they unduly infringe on the procreative interests of servicewomen, the regulations should be considered unconstitutional.[330]

G. RETENTION

The Army reenlistment program is designed to obtain and retain, on a long term basis, highly qualified enlisted personnel who are trained in occupations of critical importance and enlisted personnel who have demonstrated proficiency and military leadership in any military occupation, regardless of criticality. There are basically two reenlistment categories. One pertains to immediate reenlistment be-

---

[327] The decision faced by the tenured officer whose choice is between fulfillment of a career and abortion when told she must leave the service is even more traumatic than merely whether to bear a child—she must decide whether to extinguish life itself.

[328] Reed v. Reed, 404 U.S. 71, 76 (1971).

[329] *Cf.* 39 L. Ed. 2d 52, 60 (1974).

[330] *See id.*; Roe v. Wade, 410 U.S. 113 (1973).

fore discharge,[331] and another that deals with reenlistment after a break in service.[332]

1. Immediate Reenlistment.

The criteria for immediate reenlistment are essentially the same for both men and women. There is, however, one exception. Women are ineligible for immediate reenlistment if they are pending separation because of marriage, pregnancy or parenthood.[333] This reenlistment ineligibility criterion applies only to women because of separation provisions that pertain exclusively to women. The discriminatory content of these separation criteria has been discussed previously.[334]

2. Break In Service Reenlistment.

The second category of reenlistment standards, applicable after an individual has been discharged from the service, makes some distinctions between the sexes.[335] Generally, the differences in treatment correspond to the disparities in initial enlistment requirements.[336] However, there are additional sex-based criteria. For example, a woman with prior service is *permanently disqualified* from ever enlisting in the Army if she has previously been separated from the armed services with a dishonorable or bad conduct discharge,[337] or discharged for reasons of unfitness or unsuitability.[338] A male soldier discharged for comparable reasons may be granted a *waiver* for reenlistment purposes.[339]

The sex distinctive basis for these different criteria for reenlistment appears to fail to satisfy even the most lenient of equal protection standards. The special treatment afforded women, no doubt, is a means of promoting the quality of the woman soldier. While such a goal is commendable, there is no rational basis for limiting this objective to women. Supply and demand requirements might arguably

---

[331] Army Reg. No. 601-280, para. 2 (1973).

[332] Army Reg. No. 601-210, para. 2-3 (10 Aug 1973).

[333] *See generally* Army Reg. No. 635-200, ch. 8 (21 June 1972).

[334] *See* pp. 72-76 *supra*.

[335] Army Reg. No. 601-210, paras. 2-2 and 2-3 (10 Aug 1973).

[336] *See* notes 282-284, *supra* and accompanying text.

[337] Army Reg. No. 601-210, para. 2-5, line R (10 Aug 1973).

[338] Army Reg. No. 601-210, para. 2-6, line F (23 June 1971).

[339] Army Reg. No. 601-210, para. 2-5, line R (10 Aug 1973); Army Reg. No. 601-210, para. 2-6, line F (24 June 1971).

justify initial enlistment differences; the same reason does not sustain the reenlistment differentiation. To afford some males the opportunity to remove the stigma of prior military misconduct and not afford women the same chance, perpetrates an injustice only remotely enhancing the quality and effectiveness of the military as a whole.[340]

H. IN-SERVICE CONDITIONS

The remaining regulations containing sex distinctive provisions are varied. They demonstrate the myriad of areas within the military in which sexually based classifications control rights and responsibilities.

1. Criminal Confinement.

In the sphere of military discipline, there are regulations that afford different treatment to criminal offenders on the basis of sex. These regulations benefit military women since they generally eliminate confinement as a punitive measure in the discipline of female personnel. For instance, a woman may not be given a punishment under Article 15 that includes correctional custody or confinement on bread and water.[341] Additionally, it is the Department of Army policy that the courts-martial convening authorities "should disapprove adjudged confinement of females of one year or less." [342] If a sentence to confinement exceeds one year, the woman is separated from the Army.[343] The male soldier, on the other hand, is not by regulation or policy, spared the threat of confinement as a punishment alternative.

This different punishment scheme is mandated no doubt by the lack of female correctional facilities in the Army. One might speculate that there are very few female offenders and the Army considers it extravagant to build facilities that will seldom be occupied. One should question whether the objective served justifies the dissimilar treatment of male and female offenders similarly situated.

The Army's argument is essentially one of administrative convenience. The rationale of *Reed v. Reed* did not foreclose the acceptability of such an argument if sufficient justifying evidence can

---

[340] The arbitrariness of the regulations bears a resemblance to situation created in *Reed* but the results appear here to be even more inequitable. *See generally* Reed v. Reed, 404 U.S. 71 (1971).

[341] Army Reg. No. 27-10, para. 3-7(b) (12 Dec. 1973).

[342] U.S. DEP'T OF ARMY, PAMPHLET 27-5, para. 10 (1963).

[343] *Id.*

be provided. The government may be able to prove that the number of criminally convicted women offenders in the Army does not warrant a fiscal expenditure necessary to construct such confinement facilities and equality of treatment may be obtained through other measures, such as confinement to quarters.[344]

Under a strict scrutiny test, however, it is unlikely that these tenuous administrative inconvenience and fiscal economy grounds would be sufficiently compelling to warrant the discriminatory treatment of male military offenders.[345] One might argue that since the differences contained in these provisions carry no connotation of inferiority, the invidiousness of the discrimination is somehow lessened. This might be a valid contention where the classification is an attempt at rectifying past discrimination.[346] The rectification of past discrimination, however, does not appear to be the purpose of these provisions. Certainly, no state could arbitrarily refuse to imprison all women offenders because of inadequate facilities.[347]

2. Overseas Tours of Duty.

Sex is also a determinant in the length of some overseas service tours.[348] In some overseas areas, single female personnel are required to serve but three-quarters of the normal bachelor tour of overseas duty. While a woman may extend her tour to equal that "required" of her male counterpart, the male does not have a corresponding right to curtail his tour to the length of his female counterpart. Does this illegally discriminate against similarly situated males by requiring them to serve longer overseas tours? One can only speculate as to the objective sought to be reached by this sex classification. It may be that overseas stations having primarily combat missions have fewer positions for women, and the policy allows them to rotate at a faster rate. If this is the objective, it is preferable that the classification be

---

[344] *Cf.* Sas v. Maryland, 295 F. Supp. 389, 418 (D. Md. 1969) (segregated prison facilities).

[345] A similar burden has been recently placed upon states which seek to provide different criminal sentencing schemes for male and female offenders. While such differential treatment was once left routinely to the states, the trend has been toward a "strict rationality" approach requiring empirical data to justify the distinctions. New Jersey v. Costello, 59 N.J. 334, 346, 282 A.2d 748, 755 (1971). *See* United States *ex rel.* Robinson v. York, 281 F. Supp. 8, 15 (D. Conn. 1968).

[346] Cases cited notes 146-153 *supra.*

[347] *See* United States *ex rel.* Robinson v. York, 281 F. Supp. 8, 15 (D. Conn. 1968).

[348] Army Reg. No. 614-30, app. A, para. III (21 May 1974).

asexual, predicated on the individual's occupational specialty. This would mean that all noncombat, unmarried personnel would serve the same length tour, thereby avoiding the arbitrary sexual classification. Unless a more rational basis can be found to justify this sex based classification, it will fail under the strict rationality standard.

One can also conclude that this regulation is injurious to women. While the discriminatory impact on men is no doubt slight, such a provision perpetuates the separatist feminine role in the military. It is this type of minor special treatment that, over the long term, provides an additional military justification for affording women second class status.

3. Benefits.

The *Frontiero* decision has provided the impetus for the Army to expurgate those regulations that vary benefits received on the basis of sex. However, Army Regulation 930-4 continues to preclude widowers of service personnel from obtaining financial assistance from the Army Emergency Relief fund.

Since women as a class earn less than men and their economic opportunities in higher age groups are more limited, there is a rational basis for according widows favored financial advantage. In *Gruenwald v. Gardner*, the second circuit upheld a similar sex classification, the favored treatment afforded women in computing social security benefits. The court found no equal protection violation, stating that there was a "reasonable relationship between the objective sought by the classification, which is to reduce the disparity between the economic and physical capabilities of a man and a woman—and the means used to achieve that objective in affording to women more favorable benefit computations." [349]

Gruenwald, decided four years prior to *Reed*, used the permissive rational basis test and relied on traditional stereotypes to justify the classification. *Reed* refused to accept such reasoning with respect to the selection of probate administrators. Therefore, the *Reed* rationale would not permit the validation of the same stereotyped rationale in the computation of social security benefits, or for that matter, entitlements from the Army Emergency Relief fund.[350] Hence, because the financial assistance is provided solely on a sex basis, arbitrarily eliminating those widowers who may be of greater financial

---

[349] Gruenwald v. Gardner, 390 F.2d 591, 592 (2d Cir. 1968).

[350] *Cf.* Reed v. Reed, 404 U.S. 71 (1971).

need than widows who will be assisted, the regulation likely will be found unconstitutional.

IV. CONCLUSIONS AND RECOMMENDATIONS

Having considered the Army Regulations' sex-oriented provisions in terms of the equal protection alternatives and the potential effect of ERA, it may be useful to categorize the statutes and regulations according to their constitutionality—or lack thereof—under these "testing" options.

In the event the courts balk at the designation of sex as a "suspect" classification, the test that will be applied to the sex-based military provisions will be *Reed's* "strict rationality" test. The Army statutes and regulations compiled hereunder are likely to be found unconstitutional under this standard because the sex classifications contained within the provisions cannot be proven to rationally further a legitimate governmental purpose:

(a) Army Reg. No. 641-100, para. 4 (1969)—Prohibiting branch transfers for women officers.
(b) 10 U.S.C. §§ 3283, 3296, 3311 (1970).
(c) Army Reg. No. 135-100 (1972)—Requiring higher educational requirements for women OCS applicants.
(d) Army Reg. No. 635-200, ch. 7 (1972)—Requiring a lower age of minority for female discharges than for male's.
(e) Army Reg. No. 635-200, ch. 8 (1972)—Permitting the discharge of women for reason of marriage.
(f) Army Reg. No. 614-30, para. A-4 (1968)—Allowing single women to serve shorter overseas tour lengths than single men.
(g) Army Reg. No. 930-4, para. 2 (1968)—Excluding widowers by implication from receiving Army Emergency Relief assistance.

Immediate action must be taken to "sex neutralize" these Army regulations, and legislative revision should be sought when statutory requirements are applicable.

The following is a list of those Army regulatory provisions that would be found unconstitutional should sex be established as a "suspect" classification. Because the classifications created by these statutes and regulations cannot be justified by a compelling governmental interest, they will probably fail the strict scrutiny standard of review demanded by the "suspect" category:

(a) 10 U.S.C. § 4342(a)(1), (b)(1) and (c) (1970)—Authorizing appointments of sons of certain veterans to the U.S. Military Academy.
(b) Army Reg. No. 601-210 (1971) (education).
(c) Army Reg. No. 635-200, chapter 8 (1972)—Requiring female discharge because of pregnancy unless waiver granted.
(d) Army Reg. No. 635-200, chapter 8 (1972)—Requiring female discharge because of custody of minor child unless waiver granted.
(e) Army Reg. No. 27-10, para. 3-7 (1973); Department of Army Pamphlet No. 27-5 (1963)—Eliminating confinement as punitive alternative for women.

Recommendation: Feasibility studies be initiated and consideration be given to eliminating these sex differentials if sex is judicially recognized as a suspect classification. Because the sensitive procreation interests of the servicewoman are infringed, the waiver requirements of the pregnancy discharge provision should be eliminated immediately.

If the Equal Rights Amendment is ratified, the following Army statutes and regulations, as well as those listed above, will undoubtedly be found violative of the Amendment's egalitarian mandate:

(a) The Military Selective Service Act, 50 U.S.C. App. § 451 *et seq* (Supp II 1972)—Limiting the draft to males.
(b) 10 U.S.C. § 3071 (1970)—Authority for the separate WAC branch.
(c) ATP 21-121 & 21-114 (1970)—Sexually segregated basic training programs.

Recommendation: A contingency plan be established to prepare for an increase in the number of women in all branches of the Army. Training facilities, other than those for combat programs, should be scrutinized to prepare for integrated training and segregated housing. Studies should be conducted with regard to the utilization of women in the combat environment.

Neither the Army or Congress are passive with regard to the inequitable position of women within the services. The Army's policy, however, while becoming increasingly liberal with respect to the utilization of women, continues to reflect in its regulations the military perception of the separate roles of the sexes. This "special" treatment for military women, evidenced by the marital and parental discharge provisions and separate promotion lists, is an anachronism

in this day of Title VII and its concomitant emphasis on individual, as opposed to sexual, qualities.

Congress on the other hand appears to recognize the incongruity between the expanding asexual employment criteria of the civilian community and the continuing sexist nature of the military hierarchy. The recently drafted bill, the Defense Officer Personnel Management Act,[351] exemplifies the current egalitarian spirit within the legislature. Additionally, the courts are not oblivious to this sexual revolution, and ERA or not, will look with disfavor on sexual bias even in the sacred recesses of the military.

Hence, it will benefit the Army to exert an internal effort to influence an orderly sexual transition. As we have seen, this can be accomplished only by an objective assessment of whether the sexual distinctions within the Army are warranted by empirically grounded evidence or are instead anchored in stereotypes of another century.

---

[351] H.R. 12405, 93d Cong., 2d Sess. (1974).

COMMENTS

LEGAL ASPECTS OF FUNDING DEPARTMENT OF THE ARMY PROCUREMENTS*

Captain Dale Gallimore**

TABLE OF CONTENTS

* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

** JAGC, US Army, Contract Appeals Division, United States Army Legal Services Agency. B.A., J.D. 1969, University of Tulsa. Member of the Bar of Oklahoma.

I. FORMULATION OF THE BUDGET

A. INTRODUCTION

The United States Constitution vests in the Congress the absolute power to determine through the appropriations process how much the Government will spend on each program and the total extent of federal expenditures.[1] The considerable influence of the Congress over the nature, scope and direction of programs and activities in the executive branch, as well as the ways in which these programs are accomplished, is inherent in the exercise of its Constitutional fiscal responsibilities. Limitations which the Congress may place on spending for federal programs have a substantial impact on the conduct of procurement activities. And yet, although the law of appropriations—statutory limitations on program spending, together with administrative interpretations—is a significant part of the law of federal procurement, it does not have an immediate impact on the relative rights and liabilities of the parties to the contract. Principles governing the availability of funds, the validity of obligations, and accounting for fund distributions is of only limited concern to the contractor, since he generally has no duty to ascertain whether sufficient funds are available for contract performance.[2] This is altogether a matter of internal management, an area of concern for the government's contract administrator. On the other hand, limitations in the appropriations process are fundamental to the authority of the government to commit itself by contract. One need look no further than the sanctions imposed by the Antideficiency Act[3] to conclude that the law of appropriations is of significance to the contracting officer and those who advise him.

---

[1] U.S. CONST. art. I, § 9, cl. 7.

[2] Ross Construction Corp. v. United States, 183 Ct. Cl. 694 (1968). This is not true, however, in the unusual case of a contractor paid out of a "specific" appropriation—*i.e.*, where the purpose of the appropriation is fulfilled by a single contractor. *See, e.g.*, Sutton v. United States, 256 U.S. 575 (1921). A contracting officer certifies that funds are available by affixing his signature to a contract award, unless the award is expressly made contingent on fund availability. *See, e.g.*, Henry Angelo & Sons, Inc., ASBCA No. 15082, 72-1 B.C.A., para. 9356.

[3] 31 U.S.C. § 665 (1970).

B. THE ANNUAL BUDGET

1. In General.

Prior to the enactment of the Budget and Accounting Act of 1921,[4] the budget requests of each of the departments and agencies were separately formulated. A book of estimates containing the proposed expenditures of the establishments was compiled under the direction of the Secretary of the Treasury, who did not, however, have authority to modify individual estimates. Although the book was submitted through the Secretary to the Congress, it did not represent a coordinated financial plan of the executive branch. The 1921 Act made it a responsibility of the President to prepare a comprehensive annual budget. The national budget today is a single comprehensive document, which serves as the primary source of financial information available to the Congress, and as an instrument for overall supervision and control of the executive branch by the President.

2. Participants in the Budget Process.

To enable the President to properly meet his responsibilities for the preparation of a national budget, the Budget and Accounting Act of 1921 created a Bureau of the Budget, headed by a Director, in the Department of the Treasury.[5] The Director of the Bureau was appointed by, and directly responsible to, the President, and was one of the highest ranking policymaking officers in the executive branch whose appointment did not require confirmation by the Senate. The Bureau was charged with the responsibility of preparing the budget for the President, and was given authority to assemble, correlate, revise, reduce, or increase the estimates of the departments and agencies. To enable the Bureau to discharge its responsibilities, the departments and agencies were required to furnish the Bureau such information as it might from time to time require; and employees of the Bureau, when duly authorized, were given access to, and the right to examine, any books, documents, papers, or records of the departments and agencies.[6] Effective July 1, 1970, the functions of the Bureau of the Budget were transferred

---

[4] Budget and Accounting Act, 1921, ch. 18, 42 Stat. 20, *as amended* (codified in various sections of 31 U.S.C.).

[5] 31 U.S.C. § 16 (1970).

[6] 31 U.S.C. § 21 (1970).

to a newly designated agency titled the Office of Management and Budget pursuant to the Second Reorganization Act of 1970.[7]

Title IV of the National Security Act Amendments of 1949 provided for the establishment of a Comptroller in the Office of the Secretary of Defense.[8] The Comptroller, who is an Assistant Secretary of Defense, supervises and directs the preparation of the budget estimates of the Department.[9] The same act provided for a comptroller in each of the military departments.[10] The Comptroller of the Army is currently a general officer responsible, as a Deputy Chief of Staff, concurrently to the Chief of the Army Staff and to an Assistant Secretary of Army (Financial Management). As authorized by the act, there has also been established in each of the military departments a comptroller activity at each level below the military department headquarters, including the headquarters of each major command, bureau, and technical service, and each of their major field installations.

3. Budget Policy Formulation.

Although the appropriations process is a continuing one, there are four clearly defined phases in each complete cycle: (1) budget formulation and presentation; (2) Congressional authorization and appropriation; (3) budget execution; and (4) audit.

The budget process begins with discussions between the Office of Management and Budget and the departments and agencies with a view to identifying the major decisions that must be made with respect to the scope of each agency's program for the fiscal year involved and the resources required to implement those programs. Through these discussions, the Office of Management and Budget acquires a general budgetary outlook on the basis of which it advises the President on the budgetary problems to be resolved through the successive stages of budget formulation. The entire budget formulation period is characterized by a continuous exchange of information, proposals, evaluation, and policy determinations among the President, the Office of Management and Budget, and the agencies. While these initial conferences with the departments and agencies are still being held, the Office of Management and

---

[7] Reorganization Plan No. 2 of 1970, Pt. I, 31 U.S.C. § 16 (1970).
[8] 10 U.S.C. § 136 (1970).
[9] *See generally* Dep't of Defense Directive No. 5118.3 (July 12, 1972).
[10] 10 U.S.C. § 3014 (1970).

Budget obtains preliminary revenue estimates from the Treasury Department, which are based on a forecast of economic conditions and are predicated on the assumption that laws affecting the raising of revenues will remain in force as presently in effect. National income level forecasts will also be obtained from the Council on Economic Affairs. On the basis of such data, the resource requirements of the establishments are considered in connection with anticipated revenues for the fiscal year. The Office of Management and Budget also confers with the President, and on the basis of the overall expenditures and revenues outlook a broad fiscal policy for the fiscal year is formulated, at least in tentative form.

The Director, Office of Management and Budget then sends a "policy letter" to the heads of the departments and agencies setting forth the economic assumptions on which the budget is to be prepared, and may include a target budgetary allowance which reflects an initial assessment of the agency's requirements.

4. Preparation And Review Of Budget Estimates.

The work of formulating the annual budget then shifts to the departments and agencies, and the preparation of tentative estimates of their expenditures for the ensuing fiscal year. The heads of the agencies are required to transmit their estimates to the Director, Office of Management and Budget usually during the month of September, but the work of preparing the estimates must be begun by the budget officers considerably earlier, nearly two years before the beginning and three years before the close of the fiscal year involved. Preparation and submission of the estimates must conform to instructions contained in a circular prepared by the Office of Management and Budget.[11]

During this stage of the budget process, each agency evaluates its programs, identifies policy issues, and makes budgetary projections, with the objective of matching its programs with resource requirements. Each higher level in the organizational hierarchy reviews and revises information on fund requirements obtained from subordinate levels, integrates this data and submits a comprehensive budget estimate to the department budget officer. Throughout this stage of formulation, revisions are made from time to time in the estimates as successively higher levels of authority integrate the

[11] Office of Management and Budget Circular No. A-11.

estimates of subordinate levels to conform to guidance provided from still higher levels.

The discussion that follows will focus on the major budgeting events that occur within the Department of Defense and the Department of the Army.

Within the Department of Defense, guidance for the preparation and submission of the budget estimates of the military departments and defense agencies is issued at the outset by the Assistant Secretary of Defense (Comptroller). This guidance includes the Department of Defense Budget Guidance Manual[12] and instructions from the Office of Management and Budget, as implemented. The Secretarial guidance is issued approximately 18 months before the beginning of the fiscal year, and is almost entirely of a procedural nature. What substantive guidance is furnished consists generally of advance controls in the form of dollar limitations which supplement the fiscal guidance contained in the Five Year Defense Program, which will be subsequently discussed, as updated in the most recently completed planning, programming and budgeting cycle.

The Department of the Army then distributes to the major commands and agencies Budget and Manpower Guidance, which consists of the Army portion of the Five Year Defense Program, for use in preparing the Command Budget Estimates. The recipient commands and agencies then revise and distribute their own guidance to subordinate elements.

The Command Budget Estimates, compiled by the major commands, are designed to assist Army staff agencies in the preparation of the Annual Budget Estimate. The Annual Budget Estimate is the Army's formal budget submission to the Secretary of Defense, and is based on current program decisions as reflected in the Five Year Defense Program. It should be noted that responsibility for preparation of the Army budget is centralized in these staff agencies; the Command Budget Estimates include only information that is not available at Headquarters, Department of the Army (including, for example, local contractual requirements).

The Annual Budget Estimate is submitted to the Assistant Secretary of Defense (Comptroller), where it is intensively reviewed by budget analysts from both the Department and from the Office of Management and Budget. Hearings are held, and witnesses appear

---

[12] Dep't of Defense Directive No. 7110.1 (Aug. 23, 1968) establishes the Department of Defense Budget Guidance Manual, DoD 7110.1-M, published annually.

from the staff agencies with responsibility for each portion of the budget under review to justify their estimates. Decisions based upon this review are published as a series of Program Budget Decisions. The Army may reclama from adverse decisions, if considered to be of sufficiently serious impact to warrant the personal attention of the Secretary of Defense. It should be noted that the role of the Office of Management and Budget in formulating the Department of Defense budget differs from its corresponding function in other agencies because it acts more as an adviser to the Assistant Secretary of Defense (Comptroller) than as an arbiter with responsibility for final budget decisions binding on the Department.

After a final review by the Office of Management and Budget, the Department of Defense Budget is submitted to the President.

5. The Budget Document.

The authority to determine the form and detail to be set forth in the budget document that is presented to the Congress is that of the President. However, the budget must contain certain specific information, including (a) functions and activities of the Government; (b) a reconciliation of the summary data on expenditures with proposed appropriations; (c) estimated expenditures and proposed appropriations necessary for the support of the Government for the ensuing fiscal year; (d) estimated receipts of the Government during the ensuing fiscal year, under revenue proposals contained in the budget message, if any, as well as under existing law; (e) balanced statements reflecting the condition of the Treasury for the fiscal year last completed, the current fiscal year, and the ensuing fiscal year; and (f) appropriations, expenditures, and receipts of the Government during the fiscal year last completed and the current fiscal year.[13]

The budget also includes a citation of all existing statutory authorizations as well as authorizations to be proposed for each appropriation category as a part of the appropriation description.

The budget contains all of the language proposed to be included in the various appropriations acts. The work of drafting this language is performed by the departments and agencies affected by each appropriation requested in the budget.

---

[13] 31 U.S.C. § 11 (1970).

C. PLANNING-PROGRAMMING-BUDGETING SYSTEM

1. In General.

Program budgeting was formally introduced in August 1965 in the form of an integrated planning-programming-budgeting system (PPBS) in the executive branch, to be used initially in the preparation of the fiscal year 1968 budget and to be developed further thereafter. The initial instructions concerning PPBS from the Bureau of the Budget to executive agencies required 22 agencies and departments to adopt the system.[14]

Under PPBS budgeting, emphasis is placed on the uses of resources, rather than on dollar amounts allocated by the agency or department to its operating elements. The system requires that the agency: (a) Establish long-range planning for goals and objectives; (b) Analyze systematically, and present for agency head and for presidential review and decision, possible alternative objectives and alternative programs to meet objectives; (c) Evaluate thoroughly and compare the benefits and costs of programs; and (d) Present the prospective costs and accomplishments of programs on a multi-year basis.

The initial step under PPBS is to organize the agency's budget structure so that its activities are classified into a small series of output-oriented categories called programs. These in turn are subdivided into program elements. The next step is to develop multi-year indices of the level of accomplishment under each program and the cost of each element. This step leads directly to the final step, which is an analysis of the alternative means of achieving program objectives, and the selection of that combination of program elements which will achieve a given output at the lowest cost.

There are three critical documents in PPBS budgeting. The program and financial plan is a comprehensive summary of all agency programs and each program element in terms of their outputs, costs, and financing needs over a five-year planning period—the current fiscal year and the ensuing four—on the basis of current decisions. It is not a projection of future objectives and strategies, but instead is designed to reflect the future implications of current decisions. The program and financial plan forms the basis of the agency's budget request.

The program memorandum (PM) is prepared when the agency has a major program issue which requires decision in the current

---

[14] BoB Bulletin No. 66-3 (Oct. 12, 1965).

budget cycle. It (1) integrates the objectives of the program with specific decisions made on program issues for the budget year, (2) shows why particular choices have been made, and (3) compares alternative programs in terms of their costs and who paid them, and their benefits.

Special analytical studies are ad hoc studies prepared in response to either OMB or agency requests, and provide the underlying analysis on which the selection of program and element is based.

2. PPBS in the Department of Defense.

The Department of Defense has employed an integrated planning-programming-budgeting system since 1961. Prior to adoption of PPBS, a single budget was presented for the Department of Defense, but it represented a combination of budgets separately formulated by the military departments. Military planning conducted by the Joint Chiefs of Staff was not integrated with the budget process. Further, requirements for new obligational authority were developed in terms of activities and functions rather than major objectives, so that resources could not be identified to missions. The overall defense budget was first made to conform to the fiscal policy of the administration, and the total budget amount was then allocated to the military departments who were exclusively responsible for the manner in which funds were distributed. Finally, since the budget was projected for only one year into the future, defense managers were effectively prevented from forecasting the long-range implications of major problems.

The adoption of PPBS has meant that programs are presented in terms of major missions which they are designed to serve; and by providing a method of continuously updating the Five Year Defense Plan, the system facilitates long-range projections of these programs.

3. Five Year Defense Plan.

The central focus in DoD planning-programming-budgeting is the Five Year Defense Plan (FYDP), since the primary object of PPBS is to update the FYDP and make the first year of the FYDP a firm basis for the development of budget estimates by the military departments. The FYDP consists of planned forces for either years, and manpower requirements and associated costs for five years.

4. Program Structure.

A salient feature of PPBS is its program structure. The structure is designed to enable managers to focus their attention on major resource problems, and it provides a basic classification scheme for the marshaling of information needed to make program decisions. It is mission-purpose oriented, rather than dependent on the traditional budget activity structure. It classifies into a few major programs all the operations and activities of DoD, which reflect the end purposes of the Department. Each program collects the forces, manpower and costs associated with a major mission for planning purposes, and it consists of several interrelated program elements: the forces, support systems and other activities by means of which the major mission is executed.

The program structure presently consists of ten programs.[15] Seven programs represent major "force-related" missions which theoretically are independent of any requirement other than national security objectives,[16] while the remaining programs are "support-related" and depend upon the scope of the independent programs they support.

The PPB cycle begins in July and ends in January, eighteen months later, so that initial planning steps are taken two years before the fiscal year involved and three years before it ends. Detailed strategic and fiscal guidance is issued at the outset of the cycle to the Joint Chiefs of Staff and the military departments, based on guidance from the administration. Executive agencies, including the Office of Management and Budget, the Council of Economic Advisers, and the National Security Council, have undertaken long-range assessments of the federal budget. Department of Defense projections and alternatives for force and strategic assumptions are taken into consideration in these deliberations, so that the adminis-

---

[15] The ten programs are:
a. Strategic Forces
b. General Purpose Forces
c. Intelligence and Communications
d. Mobility Forces
e. Guard and Reserve Forces
f. Research and Development
g. Central Supply and Maintenance
h. Training, Medical, and Other General Personnel Activities
i. Administrative and Associated Activities
j. Support of Other Nations

[16] Programs a-f and program j, *see* note 15 *supra*.

tration is able to consider national security needs in the context of all competing requirements for federal funds.

5. Fiscal Guidance.

The Secretary of Defense annually issues tentative five-year fiscal guidance to the military departments for comment. After Volume II of Joint Strategic Operations Plan (JSOP) and the comments of the military departments in response to the tentative guidance have been reviewed, revised fiscal guidance is issued in terms of firm dollar limitations for each of the military departments and for each of five program years beginning with the current budget year. Fiscal guidance is more flexible with respect to major mission and support categories, where constraints are imposed primarily for planning purposes and a reallocation of funds is permitted unless specifically prohibited in the fiscal guidance. The military departments must submit programs that conform to these constraints, but they may also propose alternative programs. In this fashion, the services themselves are required to plan and budget for requirements in the light of the availability of resources as reflected in this early fiscal guidance.

6. Program Objectives.

The Joint Strategic Operations Plan, Volume II, is issued in January and contains an evaluation, without fiscal constraints, of the force levels, manpower, and associated costs required to execute the strategy contained in Volume I as modified by the strategic guidance issued by the Secretary of Defense. In June, after reviewing the revised fiscal guidance, the Joint Chiefs of Staff issue a Joint Force Memorandum, which is in the same format as JSOP, Volume II, except that recommended force levels must be within the parameters of the fiscal guidance. If fiscal constraints dictate a reduction in the recommended force levels, the Joint Force Memorandum will also contain an assessment of the risks associated with the reduction. Based upon the firm fiscal guidance and the resulting force structure contained in the Joint Force Memorandum, each military department submits, in late June, a single Program Objective Memorandum, which is a comprehensive and detailed expression of total program requirements. The final stage in the PPB cycle is the issuance of Program Decision Memoranda to update the Five Year Defense Program. Based upon current decisions, the Secretary of Defense submits a memorandum to the National Security Council

and the Office of Management and Budget summarizing the forces and capabilities used as a planning base for the fiscal year budget. Component services submit their budget estimates in September based upon the first year of the revised Five Year Defense Program. While PPBS has a substantial impact on financial management, it has not affected the traditional budget process. After fiscal decisions have been made in program terms, they are translated into the traditional budget categories, which follow a functional scheme of organization.[17]

7. *Program Change Proposal System.*

The integrity of PPBS is impaired when actual program costs exceed the cost estimates on which program approvals are based. To eliminate this possibility, a program proposal change system, requiring the approval in advance of the Secretary of Defense for any cost variances from the approved program levels, is made part of the PPBS. The program change proposal provides a means for continuously revising programming and budgeting, and consequently permits the maintenance at all times of a current, complete and accurate FYDP. Program change proposals are accompanied by estimates of cost and effectiveness and a consideration of alternative courses of action. Such proposals are reviewed by staff agencies of DoD and evaluated by systems analysts in terms of the total defense plan.[18]

II. CONGRESSIONAL AUTHORIZATION AND APPROPRIATION

A. CONGRESSIONAL AUTHORITY TO MAKE APPROPRIATIONS

The Constitution vests in Congress control over the financial affairs of the federal government. Article I, Section 8, Clause 1, gives Congress the power to lay and collect taxes and to provide

---

[17] The House Appropriations Committee has emphasized that while PPBS is a useful tool in financial planning and management, it does not support a major change in techniques of budget preparation. H.R. Rep. No. 1607, 87th Cong., 2d Sess. 5 (1963) (Department of Defense Appropriations, 1963).

[18] On the subject of PPBS generally, see Dep't of Defense Directive No. 7000.1, *Resource Management Systems of the Department of Defense*, (Aug. 22, 1962); Dep't of Defense Instruction No. 7045.7, *The Planning, Programming, and Budgeting System* (Oct. 29, 1969).

for the common defense and general welfare of the United States. Congress is empowered by Clause 12 to raise and support armies. Article I, Section 9, Clause 7 gives Congress firm control over federal expenditures by prohibiting payments out of the Treasury unless an appropriation has been made by Congress: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time." The meaning of this clause was explained by the first Secretary of the Treasury, Alexander Hamilton:

> The design of the Constitution in this provision was, as I conceive, to secure these important ends,—that the purpose, the limit, and the fund of every expenditure should be ascertained by a previous law. The public security is complete in this particular, if no money can be expended, but for an object, to an extent, and out of a fund, which the laws have prescribed.[19]

The clause is thus at the core of the concept of legislative control of the purse; it constitutes a limitation on the powers of the executive branch but does not restrict Congress in appropriating funds from the Treasury.[20] Before any expenditure of public funds can be made, there must be an act of Congress appropriating the funds and defining the purpose for which the appropriation is made.[21] And it equally forbids the making of contracts or other promises for the payment of money for which no appropriation has been made. The purpose of an appropriation, as well as the terms and conditions on which it is made, are matters solely within the discretion of the Congress.[22] In addition to the power to appropriate money, Congress has the concomitant power to regulate the making, spending, and accounting for appropriations.[23]

---

[19] F. W. POWELL, CONTROL OF FEDERAL EXPENDITURES—A DOCUMENTARY HISTORY 133 (1939), *quoted in* FINANCIAL MANAGEMENT IN THE FEDERAL GOVERNMENT, S. Doc. No. 92-50, 92d Cong., 1st Sess. 125 (1971).

[20] Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937).

[21] Thus, no officer of the federal government is authorized to pay a debt due from the United States, whether or not reduced to a judgment, unless an appropriation has been made for that purpose. Reeside v. Walker, 52 U.S. (11 How.) 271 (1850).

[22] Spaulding v. Douglas Aircraft Co., 60 F. Supp. 985 (S.D. Cal. 1945), *aff'd*, 154 F.2d 419 (9th Cir. 1946). The Supreme Court has thus held that a decision by Congress to recognize a claim founded on a merely equitable or moral obligation as a debt of the United States is not usually subject to judicial review. United States v. Realty Co., 163 U.S. 427, 440 (1896).

[23] Hart v. United States, 16 Ct. Cl. 459, 485 (1880), *aff'd*, 118 U.S. 62 (1886).

The provision of the Constitution which gives Congress power to raise and maintain an army was not designed to confer on the federal government authority to do so, but rather to designate which branch of the government should exercise such powers. This provision grew out of a conviction on the part of the Framers of the Constitution that the executive should be deprived of the sole power of raising standing armies. For the same reason, they inserted the limitation that no appropriation for raising or maintaining an army should be available for a period longer than two years.[24] It is settled that this provision is not violated by the appropriation of funds to remain available until expended for purposes other than to "raise and support armies" in the strict sense of the word "support." [25] It would appear to constitute a limitation on the period of availability solely of those appropriations which are made to finance the day-to-day operations of the military departments, such as appropriations for military personnel and operation and maintenance.

B. AUTHORIZATION

Congressional approval of Federal expenditures for any given program reflects two separate stages of consideration, each of which originates in a different standing committee of either House: (1) the enactment of substantive legislation authorizing or directing the Government to do a certain act or prescribing the powers, duties, organization and procedure of an establishment of the federal government; and (2) the enactment of legislation appropriating the funds by which this authorization is to be put into effect. Stated another way, *authorization* is the approval of those programs and activities for which funds are to be granted; it authorizes a specific program, *e.g.*, foreign assistance, but does not provide the funds necessary for its conduct. Once the program is approved, funds are provided in *appropriations*, legislation which grants to the department or agency sponsoring the program the authority to obligate the government to certain expenditures, or what is called "new

---

[24] U.S. CONST. art. I, § 8, cl. 12.

[25] It has been held that a contract providing for the payment of a royalty for use of a patent in constructing guns and other equipment would be lawful although the royalty payments were likely to continue for more than two years, 25 OP. ATT'Y GEN. 105 (1904). Relying on this earlier opinion, it was held that there was "no legal objection to a request to the Congress to appropriate funds to the Air Force for the procurement of aircraft and aeronautical equipment to remain available until expended," 40 OP. ATT'Y GEN. 555 (1948).

obligational authority." [26] To illustrate, a new Army program such as construction for the Safeguard Anti-Ballistic Missile System is properly the subject of authorizing legislation developed in the Armed Services Committees,[27] while funds necessary for such construction must be provided by the Appropriations Committees.[28]

The distinction between an authorization and an appropriation has been succinctly stated by the Comptroller General:

> Section 402 of the cited act is a statutory authorization for appropriations for the purposes therein stated. It does not appropriate funds. It has long been established that an authorization of appropriations, such as made by section 402, does not constitute an appropriation of public moneys but contemplates subsequent legislation by the Congress actually appropriating such funds; nor does such an authorization result in expanding the availability of appropriations thereafter made in the absence of specific provisions in such appropriations to indicate such a purpose.[29]

The principle that authorizing legislation must be enacted before an appropriation is made is recognized in the rules of both Houses.[30] The rules also effect a distribution of powers between the Appropriations Committees and the other standing committees, and determine the nature of amendments that may be proposed to bills of either category while they are under consideration. The rules state that all proposals for substantive legislation shall be referred to the proper committee on substantive legislation—thus, for example, annual authorization bills for the Department of Defense are referred to the Armed Services Committees—and that all proposals for the appropriation of money from the Treasury shall be referred to the Appropriations Committee; that the committees on substantive legislation shall have no authority to include in bills reported by them a provision for the appropriation of money; and that, on the

---

[26] Obligational authority is also provided in two other forms in addition to appropriations: (1) contract authority, which permits obligations but requires an appropriation in order to liquidate the obligations; and (2) authority to spend debt receipts, which permits the use of borrowed money to incur obligations and make payments. THE BUDGET OF THE UNITED STATES GOVERNMENT, H.R. Doc. No. 92-215, pt. I, 92d Cong., 2d Sess. 484 (1972).

[27] *See* Anti-Ballistic Missile Construction Authorization, Armed Forces Appropriation Authorization Act, 1971, tit. IV, 84 Stat. 909 (1970).

[28] *See* Military Construction Appropriations Act, 1971, 84 Stat. 1409 (1970).

[29] 35 COMP. GEN. 306, 307 (1955) (citations omitted).

[30] RULE XXI, RULES OF THE HOUSE OF REPRESENTATIVES, H.R. Doc. No. 384, 92d Cong., 2d Sess. 463 (1973); RULE XVI, SENATE MANUAL, S. Doc. No. 91-1, 91st Cong., 1st Sess. 17 (1969).

other hand, the Appropriations Committee has no authority to include in bills reported by it any item not previously authorized by law, unless designed to retrench expenditures.[31] Moreover, no amendment calling for an appropriation is in order to a substantive bill, and no substantive amendment is in order to an appropriations bill. Since the rule is procedural in nature, an otherwise unauthorized legislative item in a duly enacted appropriation will be fully as effective as any other legislation if points of order under the rule are waived in advance of the consideration of the bill, or if no point of order is raised during debate by any member, or if a point of order is raised and sustained by the Chair but voted down.[32]

Congress adopted this system in order to centralize responsibility for appropriations in the Appropriations Committees of the House and Senate. Prior to 1921, the jurisdiction of the Appropriations Committees was generally limited to activities at the seat of government, while appropriations for field establishments were generally the responsibility of various other standing committees. The policy of granting to standing committees on substantive legislation the power to report out bills covering appropriations diffused fiscal responsibility. On the other hand, to have vested complete control over the authorization of federal programs as well as the grant of funds with which to execute these programs in the hands of a single committee would have entrusted to that committee virtually exclusive power with respect to government operations. Apart from the unwillingness of Congress to vest such power in a single committee, it was considered that the volume and variety of work to be done was of such magnitude that it could be efficiently conducted only by a number of committees in a position to specialize in particular areas of concern.

It is typical for annual authorizing legislation to specify a maximum amount authorized for appropriation.[33] This amount represents the maximum expenditure which Congress considers justifi-

---

[31] The language in the rules permitting legislation which tends to retrench expenditures is known as the "Holman Rule." It is this exception which justifies the inclusion of general provisions, many of which are legislative in nature, in the annual Department of Defense appropriation acts.

[32] Syphax's Case, 7 Ct. Cl. 529 (1871).

[33] Armed Forces Appropriation Authorization, 1973, § 501(a), 86 Stat. 734 (1972). The section provides:

> . . . (a) Military construction for the Safeguard antiballistic missile system is authorized for the Department of the Army as follows: Military family housing [sic], Grand Forks Safeguard site, North Dakota, two hundred and eighteen units, $6,004,000.

able in order to obtain the anticipated benefits from the approved program. While it is not incumbent upon the Appropriations Committees to recommend appropriations in an equal amount, the recommended appropriations cannot exceed the authorized sums. The amount finally appropriated is frequently less than the amount authorized, since there is little need for Congressional concern with regard to competing demands for funds when authorization bills are under consideration. On the other hand, the appropriations process involves not only a further review of program and management, but the allocation of resources among competing programs as well.

Only a portion of the appropriations made available to the Department of Defense requires an annual authorization.[34] Appropriations for military personnel and operations and maintenance are made on the basis of continuing authorizations in the form of basic enabling statutes.[35] While such statutes replace the need for annual authorization of appropriations, an annual statutory authorization is presently required for the average active duty personnel strength of each component of the Armed Forces prior to the appropriation of funds for support of these Forces. The action of the Appropriations Committees in recommending appropriations for military personnel and operations and maintenance must reflect the authorized strengths in the annual authorization act.[36]

C. *THE APPROPRIATIONS PROCESS*

1. Transmittal of the Budget.

The President transmits to the Congress during the first fifteen days of each regular session during the month of January the national budget for the fiscal year beginning on the first of July fol-

---

[34] An annual authorization is required for appropriations for the procurement of aircraft, missiles, naval vessels (§ 412(b), Pub. L. No. 86-149, 73 Stat. 322), tracked combat vehicles (Pub. L. No. 89-39, § 304, 79 Stat. 128), and other weapons (Pub. L. No. 91-121, § 405, 83 Stat. 207); and for research development, test and evaluation (Pub. L. No. 87-436, § 2, 76 Stat. 55, Pub. L. No. 88-174, § 610, 77 Stat. 329).

[35] Permanent legislation authorizing appropriations for programs and activities for which sums are appropriated under Operations and Maintenance and Military Personnel are set forth in brackets before each title of the annual budget requests submitted for the Department of Defense. *See* THE BUDGET OF THE UNITED STATES GOVERNMENT—APPENDIX, H.R. Doc. No. 93-16, 93d Cong., 1st Sess. 267 *et seq.* (1973).

[36] Pub. L. No. 91-441, § 509, 84 Stat. 913, 91st Cong., 2d Sess., *amending* Pub. L. No. 86-149, § 412(b).

lowing its transmittal, together with his budget message.[37] Additionally, the President in his discretion is authorized to transmit to the Congress proposed supplemental or deficiency appropriations which may be necessary to meet obligations incurred on account of laws enacted after the transmission of the budget, or are otherwise in the national interest.[38] Specific information to be included in the budget is set forth in Section 201 of the Budgeting and Accounting Act of 1921.[39]

The various stages of budget preparation described in the preceding chapter are designed to require the executive departments and agencies to translate their programs and activities into fiscal terms so that each activity might be brought into proportion with all other federal activities and into harmony with long-range executive policy, and matched with available government resources. The law provides only for a comprehensive national budget submitted by the President. No officer or employee of any executive agency may submit to Congress or to any committee any estimate or request for an appropriation unless at the request of either House.[40]

2. Committees and Subcommittees.

The budget message and the budget are immediately referred to the Committee on Appropriations of the House of Representatives. The Committee in full meeting considers the budget as a whole and formulates a policy with respect to it. The Legislative Reorganization Act of 1970 directs the full Appropriations Committees in each House to hold hearings on the budget as a whole within 30 days after transmittal of the budget by the President.[41] The Act further requires the committees to receive testimony from the Director of the Office of Management and Budget, the Secretary of the Treasury and the Chairman of the Council of Economic Advisors, in addition to such other persons as the committees may desire to hear and question. The principal purpose of these hearings is to elicit information about overall budgetary considerations and about the basic assumptions upon which the budget is premised.[42] Having

---

[37] Budget and Accounting Act § 201(a) (1921), 42 Stat. 20, as amended, 31 U.S.C. § 11 (1970).

[38] Budget and Accounting Act § 203(a) (1921), 42 Stat. 21, as amended, 31 U.S.C. § 14 (1970).

[39] *See* note 37 *supra*.

[40] Budget and Accounting Act § 206 (1921), 42 Stat. 21, 31 U.S.C. § 15 (1970).

[41] Legislative Reorganization Act of 1970 § 242 (1970).

[42] H.R. REP. No. 91-1215, 91st Cong., 1st Sess. 14 (1970).

determined its budget policy, which may take the form of a determination that the total amount of appropriations recommended to the House shall not exceed a stated sum, the work of examining the budget estimates in detail begins. For this purpose, the Committee resolves itself into subcommittees.

The Committee on Appropriations at present has 55 members, 33 from the majority party and 22 from the minority. Its work is done in 13 subcommittees of 5 to 12 members each. Budget estimates for the Department of Defense are considered by the Department of Defense subcommittee, which consists of 11 members, or by the Subcommittee on Military Construction Appropriations, which consists of 8 members. Members of the Committee on Appropriations do not serve on other committees except in extremely rare instances; membership in the House is large enough to allow exclusive subcommittee assignments.

The Committee on Appropriations of the Senate, with only 24 members, is too small to permit exclusive subcommittee assignments. Some of the Senate subcommittees include ex officio members from the appropriate standing committees who serve as liaison.

3. Hearings.

The subcommittee first holds hearings on that portion of the budget for which it is responsible. These hearings are closed to the public, but printed copies of the hearings are made available when the session is completed. The objective of the hearings is to develop a detailed knowledge of the budget estimates, as a basis for recommending appropriations to the full committee. Testimony before the subcommittee principally consists of that of the head of the agency, his principal assistants, his budget officer, and the staff of the Office of Management and Budget. These witnesses view their role primarily as that of program advocates; they stress the equal importance of all items in the estimates and strongly oppose any reductions by Congress.

4. Subcommittee and Committee Markup.

After the hearings are completed, the subcommittee staff compiles the most significant data concerning each item in the bill, *e.g.*, the purposes of the program and prior year appropriations. The subcommittee then goes into executive session for the purpose of marking up the bill. The bill is scrutinized item by item while the subcommittee decides on amounts to recommend and restrictions to

place on programs. After the subcommittee completes its markup, it will furnish a report for use by the full committee and a "committee print" of the bill embodying its recommendations.

The committee then examines the items in executive session. The recommendations and report of the subcommittee are rarely discussed in detail before they are approved by the committee.

5. House Floor Procedures.

Under House rules, appropriation bills must first be considered in the Committee of the whole House on the State of the Union, where 100 members of the House constitute a quorum. Appropriation bills are highly privileged; it is in order for a motion to be made to resolve into a Committee of the Whole at almost any time after approval of the journal of the previous day for the purpose of considering an appropriation bill.

On the floor, the chairman of the subcommittee in charge of the bill acts as floor manager; he initiates the floor debate with a statement justifying the actions of the Committee on Appropriations. When the House resolves into a Committee of the Whole, agreement is first reached that general debate on the bill shall be limited to a certain number of hours. The allotted time is controlled by the member in charge and by the ranking minority member on the subcommittee. General debate may relate to matters extraneous to the bill. Following general debate, the bill is taken up paragraph by paragraph for discussion and amendment under the "five-minute rule." It is at this point that the House as a whole critically considers the appropriations recommended by the Committee on Appropriations. Discussion must be germane to the bill and to the particular paragraph under consideration. Committee amendments are first taken up for consideration. Committee amendments are themselves open to amendments from the floor. All committee amendments are passed, amended, or rejected before floor amendments are taken up for consideration.

The bill is then reported back to the House by the Committee of the Whole for a third reading, after which it is immediately acted upon and, if passed, sent to the Senate. Motion for amendment is not in order at this point.

6. Senate Action.

Congressional consideration of appropriation bills has historically originated in the House of Representatives. Although the Constitu-

tion apparently requires only that revenue measures originate in the House, the House claims also the exclusive right to initiate appropriation legislation. The House Committee on the Judiciary, however, issued two reports prior to the adoption of the national budget system deciding that the constitutional power to originate such legislation was not exclusively in the House. The issue has never been *finally* resolved, and *in the meantime the House* continues to initiate appropriations legislation.

The procedure in the Senate for dealing with appropriation bills is substantially similar to that employed in the House. In the House, an appropriation bill while under consideration by the Committee of the Whole, is open to amendment on the motion of any individual member. Under a rule of the Senate, no amendment that would have the effect of increasing appropriations contained in a bill may be proposed until it has been considered and approved by the appropriate legislative standing committee, unless such amendment is designed to put into effect existing provisions of law.

In the Senate subcommittee hearings, questioning tends to center on the amounts of obligational authority required in the Budget. On the floor of the Senate, debate is usually more extended than in the House because of the privilege of unlimited debate.

7. Conference Committee.

After an appropriation bill has been passed in both the House and Senate, a conference committee convenes to resolve any differences between the two versions. The conference committee consists of members of the House and Senate subcommittees that had charge of the bill, who are appointed by the President of the Senate and Speaker of the House, respectively. The composition of the conference committee is another indication of the extent of the power wielded by the subcommittees over the appropriations bill. If committee recommendations have been altered by floor action, the subcommittee members-conferees may strive for a return to their original determinations in conference.

Nothing in the bill can be changed except in areas of disagreement; new matter cannot be added in conference. When the two houses disagree on an amount for any given program, the conference committee may agree only on any figure between the two extremes. A violation of this rule subjects the conference report to a point of order.

When identical versions of the bill and the report of the conference committee is presented for final approval, the bill cannot be

amended on the floor of either house; it must be accepted in toto or rejected and recommitted to conference with specific instructions.

When the bill has been accepted by both houses, it is enrolled, signed by the two presiding officers, and sent to the President.

8. Presidential Action on Appropriation Legislation.

After final Congressional approval, the appropriations bill is sent to the President for his signature or veto. The bill must be accepted or rejected in its entirety; the veto power of the President, as provided in the Constitution,[43] does not authorize an "item veto" that is, the power to veto particular items in a bill. Nevertheless, the President does have considerable discretionary power over the amount of Federal expenditures on the theory that appropriations grant authority to make expenditures; they do not direct that expenditures be made. In particular, the Antideficiency Act makes express provision for the Presidential impounding of funds through the apportionment process,[44] by which the President can obtain the full effect of an item veto.

D. CONTINUING APPROPRIATIONS

When appropriations for the fiscal year have not been enacted by Congress in advance of the first of July, emergency legislation must be passed by both Houses in order to finance continuing operations of the departments and agencies. It has become increasingly necessary in recent years to enact continuing appropriations. For example, at the beginning of Fiscal Year 1963 no appropriations bills had been passed by the Congress. During the 87th through the 91st Congresses, continuing appropriations bills were enacted a total of 36 times. And the first session of the 90th Congress was still enacting a continuing appropriation on December 20, nearly halfway through the fiscal year.

A continuing appropriation is enacted as a joint resolution. The act typically provides funds only for continuing projects or activities which were conducted during the previous fiscal year and for which funds would be provided by the appropriation act for the department or agency for the fiscal year concerned. In reporting the Continuing Appropriations Resolution for Fiscal Year 1973, the House Committee on Appropriations stated:

---

[43] U.S. CONST. art. I, § 7.

[44] Rev. Stats. § 3679, *as amended*, 31 U.S.C. § 665(c) (1970).

> [W]ithout laying down any hard and fast rules and short of encumbering administrative process with detailed fiscal controls, the Committee nonetheless thinks that to the extent reasonably possible, departments and agencies should avoid the obligation of funds for specific budget line items or program allocations, on which congressional committees may have expressed strong criticism, at rates which unduly impinge upon discretionary decisions otherwise available to the Congress.[45]

To implement the instructions of the committee, the Office of Management and Budget issued a statement of policy with respect to the rate of obligations to be incurred under the Resolution. It stated:

> Agencies will incur obligations under authority of the Continuing Resolution at the minimum rate necessary for the orderly continuation of existing activities, preserving to the maximum extent reasonably possible the flexibility of the Congress in arriving at final decisions in the regular appropriation bills. Particular attention should be given to probable congressional appropriation action which may ultimately result in a lower appropriation level than in fiscal year 1972. Accordingly, agency heads will establish controls to assure that their programs are operated in a prudent, conservative, and frugal manner.[46]

The scope of a continuing appropriation resolution is illustrated by the experience of the Army during hearings conducted on the Department of Defense Appropriation Bill, 1973, with regard to the civilianization of KP duties. The Army tested a civilianization program during Fiscal Year 1972 at a cost of $34 million. Intending to fully implement the program on a worldwide basis during Fiscal Year 1973, the Army committed over $73.5 million for the program through July 13, 1972 while operating under a continuing appropriation.[47] The House Committee on Appropriations, in reporting the Department of Defense Appropriations Bill, 1973, stated:

> The Army advised that it interprets the wording of the Continuing Resolution as not imposing restraints as to rate on individual functions or items which are merely one facet of the Operation and Maintenance activity of the Army. The information provided by the Army further showed that on April 27, 1972, it advised all affected commands that although the civilianization of KP programs had received "intense Congressional interest, it is the intent of the DA [Department of the Army] to fully implement the program on 1 July 1972 under the provision of the fiscal year 1973

---

[45] H.R. REP. No. 92-1173, 92d Cong., 2d Sess. 2 (1972).

[46] Office of Management and Budget Circular No. 73-1 (3 July 1972).

[47] H.R. REP. No. 92-1389, 92d Cong., 2d Sess. 28, 29 (1972).

> OMA [Operation and Maintenance, Army] appropriation or its continuing resolution."
>
> In the opinion of the committee, there is no question that this is a violation of the Continuing Resolution understandings. Although Operation and Maintenance funds have been appropriated in large sums for each service, they have been justified by programs, projects, and activities within the budget request. The funding of the civilianization of KP program was discussed specifically with the Secretary of the Army and other Army officials during testimony before the committee. There is no justifiable reason for any one to believe that the Continuing Resolution grants the Army or the other services the right to obligate funds solely on the premise that appropriations are made for large budget requests and do not impose restraints as to individual functions or items within these large overall amounts.[48]

E. CONGRESSIONAL ATTEMPTS TO CONTROL EXPENDITURES

In addition to establishing a limit on the authority to withdraw money from the Treasury by the amounts set forth in the appropriation bills, the Congress has recently undertaken to set an overall limit on the total amount of obligations and expenditures of the Federal Government for a particular fiscal year.[49]

F. CONTRACT AUTHORIZATIONS

A contract authorization is any statutory authority which permits an agency or department to enter into contracts or incur other obligations prior to the enactment of an appropriation for the payment of such obligations.[50] This authority may be permanent or limited to a fiscal year or years, and definite or indefinite in amount.

Once used frequently for the procurement of major end items, the use of contract authorizations today has been largely supplanted by multiple-year appropriations. The Department of Defense is currently affected, however, by certain contract authorizations of a permanent, indefinite nature including:

(1) the authority for emergency procurement by the military departments of clothing, subsistence, forage, fuel, quarters, trans-

---

[48] *Id.* at 30-31.

[49] *See, e.g.,* Section 202, Revenue and Expenditures Control Act of 1968, 82 Stat. 271 (1968), 31 U.S.C. § 11 (note) (1970); Titles IV and V, Second Supplemental Appropriations Act—1970, 84 Stat. 405-406 (1970).

[50] Office of Management and Budget Circular No. A-34, § 21.1 (10 July 1971).

portation, and medical and hospital supplies contained in 41 U.S.C. § 11;[51]

(2) stock fund procurement in anticipation of succeeding fiscal year sales under 10 U.S.C. § 2210(b);[52] and

(3) procurement for foreign military sales under 22 U.S.C. § 2762.[53] Contract authorizations permit the incurrence of obligations, but do not provide authority or funds to make expenditures in liquidation of those obligations.[54]

III. AVAILABILITY OF APPROPRIATIONS

A. PURPOSES FOR WHICH AVAILABLE

Congress seeks to maintain supervision of Federal programs through the appropriations process, and the enactment of an appropriations bill constitutes final Congressional approval of the programs administered by the department or agency concerned under the appropriation. At the same time, limitations on that approval find expression in the language of the act. These limitations most frequently restrict the purposes and the period of time for which the appropriation is made available.

31 U.S.C. § 628 restricts the use of appropriations to the particular purposes which they were intended by the Congress to serve:

> [e]xcept as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which made, and for no others.[55]

Ascertaining the legislative intent in regard to the purposes for which an appropriation is made available is, of course, a matter of statutory construction. When the plain language of an appropriation is not sufficiently clear to resolve doubts about the purposes for which it is available, resort must be had to its legislative history, including the committee hearings and reports made in both the House and Senate,[56] the Conference Report,[57] and the floor debates.[58]

---

[51] 41 U.S.C. § 11 (1970).

[52] Act of September 7, 1962, 76 Stat. 522, 10 U.S.C. § 2210(b) (1970).

[53] Act of October 22, 1968, 82 Stat. 1323, 22 U.S.C. § 2762 (1970).

[54] 30 OP. ATT'Y GEN. 147 (1913); 28 COMP. GEN. 163 (1948).

[55] 31 U.S.C. § 628 (1970).

[56] *See, e.g.*, 33 COMP. GEN. 235 (1953). When the legislative histories made in the House and Senate conflict, the more detailed history will be accepted as the more persuasive. 49 COMP. GEN. 411 (1970), *citing* Steiner v. Mitchell, 350 U.S. 247, 254 (1956).

[57] Ms. COMP. GEN. B-142011 (30 April 1971).

[58] 49 COMP. GEN. 411 (1970).

An appropriation ordinarily not available for a particular purpose cannot be presumed to be available because the department or agency concerned has indicated that expenses for that purpose shall be charged to the appropriations, for example in orders for temporary active duty.[59] Thus, the Comptroller has held that the fact that the Commandant of the Coast Guard had stated in hearings before a subcommittee of the House Committee on Appropriations that an appropriation for "Operating Expenses" of the Coast Guard was to be charged with the payment of certain claims for pay and allowances did not have the effect of making the appropriation available for such payments.[60] Similarly, the Comptroller has stated that:

> The general presentation to the Congress of plans for a proposed project and the enactment of specific authority for the procurement of certain of the facilities to be used therein is not an acceptable substitute for obtaining specific authority for the procurement of other nonincidental facilities and services which constitute principal elements of the program.[61]

This case involved the authority of the Air Force to procure communications services for the "Sage" project, one element of a continental air detection and warning system. The project itself consisted of five major elements, one of which was the augmentation of communications systems already in place and the acquisition of new systems. The necessary services were to be procured under contracts with commercial telephone companies placed during Fiscal Year 1956, although no actual obligations would be incurred until the following fiscal year. The Air Force had budgeted and obtained appropriations for the first four major elements for Fiscal Year 1956, but had not requested appropriations for the communications services since they did not involve any obligations. The Air Force had provided Congress with detailed information regarding the nature of the communications services, and had advised that contracts were to be awarded during that fiscal year. The Comptroller concluded that statutory authority relied upon by the Air Force was not adequate, and that the mere fact that Congress had been fully informed about the scheduling of contracts was not an adequate substitute for statutory authority, particularly in view of the magnitude of the communications services, and even though no actual obligation of funds for that fiscal year was involved.[62]

---

[59] 18 COMP. GEN. 713 (1939).

[60] 37 COMP. GEN. 732 (1958).

[61] 35 COMP. GEN. 220 (1955) (syllabus).

[62] *Id.*

However, the Comptroller has indicated that the use of an appropriation under a long-continued practice with the apparent knowledge and sanction of Congress may be viewed as bringing such use within the contemplation of current appropriations.[63]

The amounts of individual items in the budget estimates presented to the Congress, on the basis of which a lump-sum appropriation is enacted, are not binding on the administrative officers unless carried into the appropriation act itself.[64] Thus, if after the enactment of a current appropriation an emergency situation develops which indicates the need for a greater expenditure of funds under a particular program than was earlier anticipated, an agency or department is not foreclosed by the amounts included in its own budget presentation from expending those funds, if otherwise available. On the other hand, where an amount to be expended for a particular purpose has been included in a budget estimate, and such amount is subsequently appropriated by the Congress, the Comptroller generally recognizes the availability of the appropriation for such purpose, even though no express provision for the purpose is made in the act.[65] But where the amount actually appropriated is less than the budget estimate, itemized estimates for particular programs or activities which are not carried into the appropriation language are of little value in determining the intention of Congress with respect to any particular item so estimated.[66] Further, the inclusion of an item in the budget estimates for an innovative program or activity not otherwise reasonably contemplated by law—or one which is expressly prohibited by law—and the subsequent appropriation of funds without specific reference to the item does not constitute statutory authority for the program or make the appropriation available for obligations incurred in connection therewith.[67]

An authorization act cannot expand the availability of subsequent appropriations, in the absence of specific provisions in such appropriations to indicate such a purpose.[68] But an appropriation which specifically refers to an authorization act has been held to incorporate the provisions of the authorization act by reference in the

---

[63] 18 COMP. GEN. 533 (1938).

[64] 17 COMP. GEN. 147 (1937).

[65] 26 COMP. GEN. 545 (1947); 28 COMP. GEN. 298 (1948); Ms. COMP. GEN. B-146672 (8 Nov. 1961).

[66] 35 COMP. GEN. 306 (1955).

[67] 18 COMP. GEN. 533 (1938); 26 COMP. GEN. 545 (1947).

[68] 19 COMP. GEN. 961 (1940); 26 COMP. GEN. 452 (1947); 35 COMP. GEN. 306 (1955); 37 COMP. GEN. 732 (1948).

absence of legislative history to the contrary. Thus, appropriation language specifically referring to an authorization act, which provides that appropriations made pursuant thereto shall remain available until expended, operates to incorporate the provisions of the authorizing act relating to the period of availability by reference, into the provisions of the appropriation. Such incorporation by reference is sufficient to overcome the implication of fiscal year availability derived from the enacting clause of a regular annual appropriation act and also meets the requirements of Section 718 of Title 31 of the United States Code.[69]

The Comptroller has ruled that existing appropriations which generally cover the types of expenditures involved are available for the cost of performing additional duties thereafter imposed upon the department or agency concerned by proper legal authority.[70]

The Comptroller has repeatedly held that the test to be applied in determining whether a particular type of expenditure is covered by an appropriation is whether the expenditure is reasonably necessary or incident to the execution of the program or activity authorized by the appropriation.[71] Thus, an appropriation for the procurement of strategic and critical materials, which was construed to include indefinite storage until a national emergency may require its use, was available for the cost of surfacing an area to be used for storage of the materials, even though the appropriation was made in terms only for procurement.[72] An appropriation for expenses necessary for the administration and enforcement of the immigration and naturalization laws was held available for the purchase and installation of lights and automatic warning devices and the erection of observation towers adjacent to a boundary fence between the United States and Mexico.[73] And a specific appropri-

---

[69] 45 COMP. GEN. 236 (1965); 50 COMP. GEN. 857 (1971). *Cf.* 45 COMP. GEN. 508 (1966). Section 7, Act of August 24, 1912, *as amended,* 31 U.S.C. § 718 (1970) precludes the construction of an appropriation as available for obligation continuously without reference to a fiscal year limitation unless the appropriation act makes express provision for extended availability. See Section B pp. 99-102 *infra.*

[70] 15 COMP. GEN. 167 (1935); 30 COMP. GEN. 205 (1950); 30 COMP. GEN. 258 (1951); 32 COMP. GEN. 347 (1953); 46 COMP. GEN. 604 (1967).

[71] 17 COMP. GEN. 636 (1938); 29 COMP. GEN. 419 (1950); 38 COMP. GEN. 782 (1959); 50 COMP. GEN. 534 (1971).

[72] 17 COMP. GEN. 636 (1938). The Comptroller noted, however, that to provide adequate storage facilities did not involve the erection of public buildings or the improvement of public property within the meaning of 41 U.S.C. § 12 (1970).

[73] 29 COMP. GEN. 419 (1950).

ation for the purchase of passenger-carrying automobiles was available for the cost of transportation incident to delivery of the vehicles, to the exclusion of a more general appropriation.[74] The purchase of books and published reports by war leaders, which had been determined by the American Battle Monuments Commission to contain historical data necessary in connection with the erection of war memorials, was held to be a "necessary expense" within the meaning of an appropriation for the purpose of erecting such memorials.[75] Similarly, the purchase of litter bags was held reasonably necessary or incident to the stated purposes of an appropriation for the management of lands under the supervision of the Forest Service.[76] The Comptroller has held that an appropriation for necessary expenses of the Civil Aeronautics Board was available for the purchase of airline tickets for use as evidence in criminal prosecutions of tariff violations, since the production of evidence was incident to the Board's responsibility of administering and enforcing the statute providing for the tariff.[77]

The lease of land adjacent to a Coast Guard base for use as a parking lot for private vehicles belonging to employees in an area where public transportation was inadequate and parking space elsewhere was nonexistent was held not to be essential to the operation and maintenance of the base. The Comptroller emphasized that transportation to and from the place of employment is generally a personal responsibility of the employee, and reasoned that the personal inconvenience to employees caused by the shortage of parking space did not serve as a basis for leasing space at Government expense in the absence of specific authorization.[78] The Comptroller has more recently shown a greater deference to the administrative determination that particular types of expenditures which normally may be viewed as personal in nature are necessary to the day-to-day operations of an agency. For example, the Comptroller has approved rental payments to the MUZAK Company for "incentive-type" music, agreeing with the agency determination that the playing of such music is a "necessary expense" in that it improves employee morale and productivity.[79]

---

[74] 20 COMP. GEN. 739 (1941).

[75] 27 COMP. GEN. 746 (1948).

[76] 50 COMP. GEN. 534 (1971).

[77] 27 COMP. GEN. 516 (1948).

[78] 43 COMP. GEN. 131 (1963).

[79] 51 COMP. GEN. 797 (1972), *overruling* Ms. COMP. GEN. B-86148 (8 November 1950).

The Comptroller General has held that the costs of pursuing the claim of a contractor against a subcontractor after the contract has expired is properly chargeable to an appropriation made available for "all costs in connection with the purchase of electric power and energy," at least when the Government has a beneficial interest in the proceeds of any recovery. That decision involved attorney fees which would be incurred by a contractor in the trial or settlement of an action to recover the costs of repairing a defective generator from its manufacturer, under a contract pursuant to which the contractor agreed to construct a power generating plant and the Government agreed to purchase the output of the plant and to reimburse the contractor all costs of operating and maintaining the plant.

The Comptroller reasoned that although the purchase of electric power was not involved since the attorney fees were incurred after the contract had expired, such fees were nevertheless incidental to the purchase of power under the contract. Since the fees would have been reimbursed by the Government had the contract remained in force, payment of the fees could properly be considered an adjustment of the contract price.[80]

The principle that an appropriation for a particular object confers implied authority to incur expenses which are necessary or incident to the principal object is frequently invoked in cases which also involve a distinction between general or "lump sum" appropriations and specific appropriations.

A specific appropriation is one made for a single purpose; a general appropriation is one made for a group of purposes necessary for the performance of a broad function. At the present time, the only regular annual appropriations of the Department of Defense which are specific appropriations are those which authorize construction.

The existence of a specific appropriation for a particular purpose precludes the use of a more general appropriation which might otherwise have been available for the same purpose, and the exhaustion of the specific appropriation does not authorize charging excess payments to the general appropriation.[81] On the other hand, where either of two general appropriations may reasonably be construed as available for expenditures not specifically mentioned under

---

[80] 42 COMP. GEN. 595 (1963).

[81] 19 COMP. GEN. 892 (1940); 20 COMP. GEN. 272 (1940); 23 COMP. GEN. 481 (1944); 23 COMP. GEN. 749 (1944); 36 COMP. GEN. 526 (1957); 38 COMP. GEN. 758, 767 (1959).

either—the administrative determination as to which appropriation will be charged is generally not open to question—except that consistent use of the appropriation initially charged is thereafter required.[82]

Appropriations for the construction or improvement of public property must be specific. The United States Code provides:[83]

> No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose.

Thus, authority for construction ordinarily may not be implied from an appropriation of the department or agency concerned as necessary or incident to its normal duties or functions:[84]

> While it is true that the appropriations made available to the Agency provide for "necessary expenses," that phrase and similar phrases have been construed as referring to current or running expenses of a miscellaneous character arising out of and directly related to the Agency's work, and not as broad enough to include the cost of construction, nor definite enough to comply with the requirements of section 3733, Revised Statutes. 4 Comp. Gen. 1063.

The Comptroller General has held that authority for the construction of an industrial facility for use in maintaining railroad tank cars used for the transportation of helium gas could not be inferred from a statute which established a "Special Helium Production Fund" for the purposes of "acquiring, administering, operating, maintaining, and developing" helium properties.[85] The Comptroller noted that while a separate provision of the statute authorized the construction of facilities for the transportation of helium, there was nothing to indicate a Congressional intent to provide for such construction in the general terms used in the statute to designate the purposes of the fund. Also, the Comptroller has held that an appropriation for the extension and remodeling of the State Department Building was not available for the installation of a pneumatic tube communication system between State and the White House, which had been justified as necessary in the conduct of foreign affairs. The Comptroller concluded that the specific purpose for which the

---

[82] 10 COMP. GEN. 440 (1931); 23 COMP. GEN. 827 (1944).
[83] 41 U.S.C. § 12 (1970).
[84] 38 COMP. GEN. 758, 762 (1959).
[85] 38 COMP. GEN. 392 (1958).

appropriation had been made had no necessary relation to the conduct of foreign affairs.[86]

The Comptroller has occasionally permitted the use of a general appropriation to construct buildings which are of a temporary character when the construction bears a direct relation to the work to be performed under the appropriation, and when the buildings "are so absolutely essential that a failure to construct them would render it impossible to accomplish the purpose for which the appropriation was made." [87] The Comptroller has also held that an agency's appropriation is available for necessary structural alterations in a public building incidental to the installation of special purpose equipment necessary to the performance of the agency's functions.[88] Under this principle, the Comptroller has approved the charging of an appropriation available for the purchase and installation of X-ray equipment with the cost of structural changes in the building in which the equipment is to be installed.[89]

The question of what constitutes a "public building" or "improvement" within the meaning of Section 12, Title 41 of the United States Code has been the subject of several decisions, some of which have been summarized as follows:

> In construing this statute it has been held that such items relating to public buildings as the installation of an elevator, the conversion of certain buildings for school purposes, the rehabilitation of a cafeteria and the remodeling and conversion of school buildings for use as a clinic, constitute "public improvements" within the meaning of this statute, and that in the absence of specific provisions therefor in the appropriations sought to be charged such appropriations are not available for payment of the involved work.[90]

In that decision, major alterations to a building formerly used as a hospital in order to make it suitable for use as an office building were held to constitute a "public improvement." [91] A quonset hut, 40 x 100 feet in dimensions and attached to a concrete base,[92] and storage buildings of frame construction on a concrete base[93] have

---

[86] 42 COMP. GEN. 226 (1962).

[87] 10 COMP. GEN. 140, 141 (1930).

[88] 3 COMP. GEN. 812 (1924); 5 COMP. GEN. 1014 (1926); 16 COMP. GEN. 160 (1936); 38 COMP. GEN. 758, 764 (1959).

[89] 3 COMP. GEN. 812 (1924).

[90] 38 COMP. GEN. 588, 593 (1959) (citations omitted).

[91] *Id.*

[92] 30 COMP. GEN. 487 (1951).

[93] 5 COMP. GEN. 575 (1926).

been held to be "public buildings." On the other hand, special-purpose facilities, such as a testing facility to be used for the protection of personnel from radiation exposure on a mineral research project[94] and an automated self-service postal unit,[95] were held not to constitute public buildings or improvements. Although the testing facility consisted of a 50-foot well beneath a chamber 6 feet in diameter fabricated of high-density concrete and 50 inches thick, the Comptroller concluded that it "would not resemble a building in the ordinary sense of the word. . . ." [96] The same reasoning was applied to an automated postal unit consisting of a fabricated core 14 feet long and 6 feet wide and containing vending machines and other equipment, where the Comptroller stated:

> We agree that a unit, such as described above, having none of the attributes and characteristics generally associated with buildings used for shelter or storage, or warehouses, or offices, and which does not resemble a building in the ordinary sense, does not constitute a building within the meaning of 41 U.S.C. 12.
>
> The question whether the unit is a public improvement, however, is not entirely free from doubt. Whereas the term "building" has a generally recognized meaning and instantly calls to mind a structure of some kind having walls and a roof, the term "improvement" creates no specific image in the mind since almost any item of property can be improved upon. However, the legislative history of this provision discloses that the term "improvement" was used primarily with reference to real property. See 38 Comp. Gen. 758, 762. While the unit herein considered could be construed to be an improvement in the broad sense of that term, it is, if anything, an improvement to the equipment itself rather than an improvement to any land or buildings.[97]

The statute prohibits the construction of temporary buildings, as well as permanent structures.[98] In this connection, the Comptroller has indicated that the fact that a structure is prefabricated, portable, and is accounted for as personal property is immaterial as to whether it falls within the scope of the prohibition.[99] On the other hand, minor structures clearly of a temporary nature and intended to be

---

[94] 39 COMP. GEN. 822 (1960).
[95] 45 COMP. GEN. 525 (1966).
[96] 39 COMP. GEN. 822, 823 (1960).
[97] 45 COMP. GEN. 525, 526 (1966).
[98] 10 COMP. GEN. 140 (1930).
[99] 42 COMP. GEN. 212, 215 (1962).

used for only a temporary period have been held not to be public buildings or improvements.[100]

The Comptroller has ruled that Section 12 prohibits the use of federally appropriated funds in connection with public improvements on state property, reasoning that if specific legislative authority is required with respect to improvements on federal property, then a fortiori, specific authority is required for improvements on state property.[101] Similarly, appropriated funds are not available for public improvements on private property. However, the Comptroller has permitted the use of Government funds to finance certain alterations to a contractor's property, where the improvements are made to secure an end product and are reasonably incident and necessary in the execution of the program for which the appropriation was made:

> As stated above, the established rule is that appropriated funds ordinarily may not be used for permanent improvements to private property unless specifically authorized by law. The rule is one of policy and not of positive law; consequently, such improvements are not regarded to be prohibited in all cases. Section 322 of the Economy Act, as amended, 40 U.S.C. 278(a), relating to the amount that may be expended for repairs, alterations and improvements, to leased premises, in effect, constitutes a limited exception to the rule.
>
> In addition, the decisions of the accounting officers have recognized that, notwithstanding the rule, improvements of a permanent character on land not owned by the Government are permissible in exceptional cases. That is, if appropriations are otherwise available therefor, provided such improvements are determined to be incident to and essential for the accomplishment of the authorized purposes of the appropriations; that expenditures for such purposes are in reasonable amounts and the improvements are used for the principal benefit of the Government; and provided that the interest of the Government are fully protected with respect thereto.[102]

B. PERIOD OF AVAILABILITY

Congress provides for a periodic review and justification of programs by placing time limitations on the availability of funds. Since Congress is concerned in the appropriations process only with the granting of new obligational authority and does not determine the level of Federal expenditures for any given fiscal year, time limi-

---

[100] 7 COMP. GEN. 629 (1928); 42 COMP. GEN. 212, 214 (1962), *citing* 26 COMP. GEN. 829 (1920).

[101] 32 COMP. GEN. 296 (1952); 39 COMP. GEN. 388 (1959).

[102] 42 COMP. GEN. 480, 483, 484 (1963) (citations omitted).

tations on the use of appropriations are generally expressed in terms of when obligations may be incurred, rather than when expenditures may be made.

Appropriations may be classified according to the limitations they impose on the period of availability for obligation as annual, or "one-year" appropriations; multiple-year appropriations; and permanent or "no-year" appropriations.

Most of the appropriations used to finance the day-to-day activities of the Government are annual appropriations. They are available for incurring obligations only during a specified fiscal year.[103] In fact, there exists a statutory presumption that an appropriation made in any regular appropriation act is an annual appropriation unless the act expressly provides to the contrary.[104] Annual funds are available only to fulfill a bona fide need of the fiscal year for which the funds are appropriated.[105] Annual funds which remain unobligated as of the end of the fiscal year are said to "expire" and no longer remain available for obligation.[106] However, annual funds remain available indefinitely to liquidate obligations properly incurred in the fiscal year for which the appropriation was made.[107] At the close of the second full fiscal year following the fiscal year in which the appropriation was made, the obligated but unexpended balance of each annual appropriation is transferred from the separate appropriation accounts into a "successor" or "M" account of the agency.[108] Into each successor account are merged the obligated but unexpended balances of all appropriations made for the same general purposes.[109] As a result of this merger, the obligated

---

[103] Office of Management and Budget Circular No. A-34, § 21.1 (10 July 1971).

[104] Section 7, Act of August 24, 1912, 37 Stat. 487, *as amended*, 31 U.S.C., § 718 (1970). A recurring provision in the annual DOD appropriation acts is of similar import, *e.g.*, Department of Defense Appropriation Act 1973, § 711, 86 Stat 1184 (1972) provides:

> No part of any appropriations contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein.

[105] See Section C pp. 122-130 *infra*.

[106] An expired account is no longer available for obligation but is still available for disbursement to pay existing obligations. This includes successor accounts established pursuant to 31 U.S.C. §§ 701-703, 705-708 ("M" accounts). Office of Management and Budget Circular No. A-34, § 21.1 (10 July 1971).

[107] 31 U.S.C. § 702 (1970) (originally enacted as Act of July 25, 1956, § 2, 70 Stat. 648).

[108] Chapter 5, Army Regulation No. 37-100 (28 June 1968) describes the successor accounts available to the Department of the Army.

[109] 31 U.S.C. § 701(a)(1) (1970) (originally enacted as Act of July 25, 1956, 70 Stat. 647).

but unexpended balances of all annual and multiple-year appropriations of the agency lose their fiscal year identity for expenditure purposes.[110] Each successor account remains available without fiscal year limitation for payment of obligations chargeable against any of the appropriations from which the successor account was derived. Payment of obligations may be made without reference to the General Accounting Office, except those which involve doubtful questions of law or fact,[111] or are barred by the statute limitations,[112] or which are required by statute or regulations promulgated by the General Accounting Office or decision of that Office to be settled in the GAO before payment.[113]

Under prior law, expenditures from a fiscal year appropriation could be made administratively only for an additional two years after the close of the fiscal year or years for which the appropriation was made. Upon the expiration of this two-year period, the appropriation was said to "lapse"; expenditures from a lapsed appropriation could be made only if the General Accounting Office first certified the payments to be lawfully due.[114]

A multiple-year appropriation is governed by the principles outlined above, except that the appropriation is available for obligations for a definite period in excess of one fiscal year.[115]

"A permanent or 'no year' appropriation is available for obligations for an indefinite period of time until (1) the appropriation has been 'exhausted'—that is fully obligated, or (2) no disbursements have been made out of the appropriation for two full con-

---

[110] 31 U.S.C. § 702 (1970) (originally enacted as Act of July 25, 1956, § 2, 70 Stat. 648).

[111] In view of S&E Contractors, Inc. v. United States, 406 U.S. 1 (1972), it seems clear that "doubtful questions of law and fact" do not include questions of fact that may be resolved pursuant to the "Disputes" clause of a contract. *See also* 38 COMP. GEN. 749 (1959), where the Comptroller declined to express an opinion on the merits of a claim based on unreasonable delay in furnishing Government property for use in connection with contract performance, referring the contractor to his remedy under the "Disputes" clause. 4 GAO MANUAL § 6.3 states in part that "[a]ction will generally be expedited if claimants file their claims initially with the administrative department or agency out of whose activities they arose."

[112] 31 U.S.C. § 71a (1970) (originally enacted as Act of October 9, 1940, § 1, 54 Stat. 1061), bars every claim or demand against the United States cognizable by the GAO unless received within ten years after the date such claim accrues.

[113] *See generally* Title 4, GAO MANUAL.

[114] Act of July 6, 1949, 63 Stat. 407 (1949), *repealed*.

[115] Office of Management and Budget Circular No. A-34, § 21.1 (revised) (10 July 1971).

secutive fiscal years or (3) whenever the head of the agency concerned determines the objectives for which the appropriation was made have been accomplished." [116]

C. *DOCUMENTATION REQUIRED FOR RECORDING AN OBLIGATION*

Section 1311 of the Supplemental Appropriation Act of 1955[117] resulted from the conclusion of the Congress that loose practices had grown up in some agencies with respect to the recording of obligations in situations where no real obligation existed, and that by reason of these practices the Congress did not have reliable information in the form of accurate obligations on which to determine an agency's future requirements.[118] To correct this situation, subsection (a) of the statute establishes legal criteria for determining the validity of an obligation; and subsections (b) through (e) prescribe procedures for reporting and certifying amounts of obligations to Congress.[119]

The specific legal criteria are intended to encompass all types of obligations incurred in the conduct of government activities and have the effect of limiting the recordable amount of an obligation to the legal liability of the government at the time the obligation is created. Common to all the criteria is a requirement that each obligation be supported by some form of documentary evidence of the transaction creating it.

Section 1311(a) provides that no amount shall be recorded as an obligation unless it is supported by documentary evidence of, *inter alia*:

> (1) a binding agreement in writing between the parties thereto, including Government agencies, in a manner and form and for a purpose authorized

---

[116] *Id.*; 31 U.S.C. § 706 (1970) (originally enacted as Act of July 25, 1956, § 6, 70 Stat. 649).

[117] Section 1311(a) of the Act of August 26, 1954, 68 Stat. 830 (1954), *as amended*, 31 U.S.C. § 200(a) (1970).

[118] FINANCIAL MANAGEMENT IN THE FEDERAL GOVERNMENT, S. Doc. No. 92-50, 92d Cong., 1st Sess. (1971).

[119] Subsection (b) originally required annual agency reports to the Chairmen of the House and Senate Committees on Appropriations, the Bureau of the Budget, and the General Accounting Office of obligations and unobligated balances under each appropriation and fund of the agency. Section 210(a) of the General Government Matters Appropriation Act, 1960, 73 Stat. 167, 31 U.S.C. § 200(b) (1970) substituted for this reporting requirement a simplified report to the Bureau of the Budget, when submitting requests for appropriations, certifying the validity of obligations previously recorded in accordance with § 1311(a).

> by law, executed before the expiration of the period of availability for obligation of the appropriation or fund concerned for specific goods to be delivered, real property to be purchased or leased, or work or services to be performed; or
>
> . . . .
>
> (4) an order issued pursuant to a law authorizing purchases without advertising when necessitated by public exigency or for perishable subsistence supplies or within specific monetary limitation; or
>
> . . . .
>
> (6) a liability which may result from pending litigation brought under authority of law; or
>
> . . . .
>
> (8) any other legal liability of the United States against an appropriation or fund legally available therefor.[120]

Section 1311(d) provides that no appropriation or fund which is limited for obligation purposes to a definite period of time—annual and multi-year appropriations—shall be available for expenditure after expiration of the period of availability except for liquidation of amounts obligated in accordance with subsection (a).[121] As a consequence, the recording of an obligation has principal significance as a basis for the expenditure of fiscal year appropriations.

Section 1311(a)(1) precludes the recording of an obligation unless it is supported by documentary evidence of a binding agreement between the parties. It is not necessary, however, that this binding agreement be the final formal contract. The primary purpose is to require that there be an offer and an acceptance imposing liability on both parties.[122]

The agreement must be executed within the period of availability of the funds to be charged. Most of the problems in connection with this requirement arise because evidence of either an offer or acceptance within the period of availability is lacking. Although the successful offeror may not have executed the contract document within the fiscal year, a notice of award mailed to him within the fiscal year is sufficient if the resulting contract incorporates all the terms and conditions of a written offer without qualifica-

---

[120] Section 1311(a)(1), (4), (6) and (8) of the Act of August 26, 1954, 68 Stat. 830 (1954), *as amended*, 31 U.S.C. § 200(a) (1970).

[121] This subsection codifies earlier decisions of the Comptroller General to the effect that annual and multi-year appropriations are available only to liquidate obligations wherein a valid agreement was entered into within the period of availability. *See, e.g.*, 16 COMP. GEN. 37 (1936) and authorities therein cited.

[122] H.R. REP. No. 2663, 83d Cong., 2d Sess. (1954) 18. *See also* 39 COMP. GEN. 829, 831 (1960).

tion,[123] but a notice of award incorporating modifications of the offer orally agreed to during negotiations is not sufficient.[124] A unilateral contract does not qualify as an obligation where performance does not begin until after the close of the fiscal year sought to be charged.[125]

Section 1311 does not change the rule that funds which are originally obligated with the cost of a contract which is thereafter terminated for default remain available for a replacement contract executed after the funds have otherwise expired for obligation purposes. In this circumstance, the statute is satisfied by the original contract, executed within the period of availability.[126] The rule has no application, however, to an entirely new and separate undertaking, such as a personal services contract.[127]

Where the award of a contract is made under such circumstances that it is later determined to be invalid, the funds committed for the original award are no longer available for obligation with the cost of a valid and binding contract executed after the period of availability has expired.[128] The Comptroller in such cases has recognized a distinction between contracts that are void and those that are merely voidable at the election of the Government.[129] In the event that a contract is merely voidable, the substitution of a different contractor upon an offer submitted in response to the same solicitation has been held to properly obligate the funds of the same fiscal year.

The agreement must be one for specific supplies or services. Accordingly, funds should not be obligated on the basis of an instrument which states the work to be performed in excessively broad terms and is subject to numerous amendments which will provide more specific work directives.[130] Similarly, an indefinite delivery contract which contains no minimum guarantee but merely provides for an estimated amount is not sufficiently specific.[131]

---

123 35 COMP. GEN. 319 (1955). But the inadvertent mailing of the notice to the wrong bidder does not impose any liability, and so does not give rise to an obligation, 40 COMP. GEN. 147 (1960).

124 Ms. COMP. GEN. B-118654 (10 Aug. 1965).

125 Ms. COMP. GEN. 125644 (21 Nov. 1955); Ms. COMP. GEN. B-164990 (6 Sep. 1968).

126 34 COMP. GEN. 239 (1954).

127 Ms. COMP. GEN. B-114876 (21 Jan. 1960).

128 38 COMP. GEN. 190 (1958); Ms. COMP. GEN. B-157360 (11 Aug. 1965).

129 Ms. COMP. GEN. B-152033 (27 May 1964).

130 Ms. COMP. GEN. B-126405 (21 May 1957).

131 34 COMP. GEN. 459 (1955).

The incurrence of a contingent liability does not give rise to an obligation.[132] In deciding that a proposed liability clause to be included in aircraft rental agreements which would fix absolute liability on the Government did not qualify as an obligation under Section 1311, even though it did not create an indeterminate liability of the type prohibited by the Antideficiency Act since maximum liability would be measured by the fair market value of the aircraft, the Comptroller stated:

> Where a clause of this nature is included in a contract, there is always the possibility of payment thereunder being required. This bare possibility alone is not sufficient to require recognition thereof by establishment of a reserve, unless and until some circumstance arises from which it is apparent that a demand under the clause may be made.[133]

Similarly, formal claims for equitable adjustment in the contract price under the "Changes" or "Changed Conditions" clauses of the contract do not create recordable obligations.[134]

Section 1311 determines only when an obligation may properly be recorded; it does not affect other rules relating to the obligation of funds, particularly as to which fiscal year is chargeable.[135] The Comptroller has commented on the relationship between Section 1311 and other laws as follows:

> There can be no doubt but that when an eligible postal employee makes an expenditure or incurs a debt for the acquisition of prescribed items of uniform dress to which allowances are applicable—within the scope and monetary limitations of the Federal Employee Uniform Allowance Act and the regulations and instructions issued thereunder—the Government is obligated to reimburse him. The obligation arises simultaneously with the making of the expenditure or the incurrence of the debt. The fact that the recording of the obligation or the payment thereof cannot be made until certain documentary evidence is received is immaterial insofar as determining when the obligation arises and the fiscal year appropriation chargeable therewith.
>
> . . . The appropriation chargeable with the cost of the uniforms is the one currently available at the time the obligation is incurred, i.e., when the expenditure is made or the debt is incurred by the employee concerned, even though some additional administrative work and expense will be involved.[136]

---

[132] 42 COMP. GEN. 708 (1963).
[133] *Id.* at 712-713 (citations omitted).
[134] 37 COMP. GEN. 691 (1958).
[135] 34 COMP. GEN. 459, 461 (1955).
[136] 38 COMP. GEN. 81, 82-83 (1958) (citations omitted).

Further, an obligation purportedly incurred against annual funds which is not intended to fulfill a bona fide need of that year is not a valid obligation, even if documentary evidence of a binding agreement in writing for specific supplies or services is available.[137]

The enactment of Section 1311 prompted the Department of Defense to promulgate a directive prescribing specific rules for the recording of obligations.[138] The salient provisions of current guidance with respect to contractual obligations are summarized below.

1. Firm Fixed-Price Contracts.

Obligations are recorded for the total fixed price.

2. Fixed-Price Contracts with Escalation, Price Redetermination, or Incentive Provisions.

Obligations are recorded for the total fixed price, or the target or billing price in the case of a contract with redetermination or incentive features.[139] When a contract has both a target price and a ceiling price, obligations are recorded for the target price.

3. Indefinite Delivery Type Contracts.

Obligations for definite quantity contracts are recorded on the basis of individual delivery orders, either when issued or when accepted in writing, depending on the terms of the contract. Under indefinite quantity contracts, the initial obligation is recorded in the amount of the stated minimum quantity; obligations are thereafter recorded on the basis of the issuance of an order. Obligations are recorded under requirements contracts as each order is issued.

4. Contracts Authorizing Variations in Quantities to be Delivered.

Where the contract authorizes variations in quantity, for example, includes the contract clause found at Armed Services Procurement

---

137 35 COMP. GEN. 319, 321 (1955).

138 Department of Defense Directive No. 7220.6, April 28, 1955 (superseded) was issued after review of a preliminary draft by the Comptroller General, 34 COMP. GEN. 418 (1955). DoD guidance on prerequisites to the recording of obligations is currently set forth in Section 221, DEPARTMENT OF DEFENSE ACCOUNTING GUIDANCE HANDBOOK 7220.9-H, August 1, 1972. *See also* Chapter 2, Army Regulation No. 37-21 (14 Oct. 1971).

139 In reviewing the directive, the Comptroller emphasized the need to provide appropriate safeguards against violations of the Antideficiency Act, Rev. Stats. § 3679, *as amended*, 31 U.S.C. § 665 (1970), such as an administrative reservation (commitment) of funds sufficient to cover maximum estimated liabilities. 34 COMP. GEN. 418, 421 (1955).

Regulation 7-103.4 or 7-603.27, obligations are initially recorded for the price of the quantity specified for delivery, exclusive of permitted variations, and are adjusted to reflect the price of the quantity actually delivered and accepted.

5. Cost-Reimbursement and Time and Material Contracts.

An obligation is initially recorded when the contract is executed in the amount of the total estimated cost stated in the contract, but not in excess of the maximum current liability shown, including the fixed fee in the case of a cost-plus-a-fixed-fee contract, the target fee in the case of a cost-plus-incentive-fee contract, or the base fee in the case of a cost-plus-award-fee contract.

6. Letter Contracts.

When the offer and acceptance are sufficiently specific and definitive to show the scope and purpose of the contract finally to be executed, a letter contract and amendments thereto accepted in writing by the contractor constitute sufficient documentary evidence to support the recording of an obligation.[140] An obligation is initially recorded in the amount of the stated maximum liability in the letter contract rather than anticipated liability under the definitized contract, and is adjusted to reflect the amount agreed to upon definitization.

7. Rental Agreements.

The amount recorded as an obligation under a lease or rental agreement for real or personal property is to be based on the terms of the agreement or on a written administrative determination of the amount due under the provisions thereof.

Under a rental agreement which may be terminated by the government at any time without notice and without incurring any obligation to pay termination costs, the obligation shall be recorded each month in the amount of the rent for that month.

Under a rental agreement providing for termination without cost upon giving a specified number of days notice of termination, an obligation shall be recorded upon execution of the agreement in the amount of rent payable for the number of days notice called for in the agreement. In addition, an obligation shall be recorded each month in the amount of the rent payable for that month. When the number of days remaining under the term of the lease is equal to

---

140 *Id.*

the number of days advance notice required to terminate it, no additional obligation shall be recorded.

Under a lease or rental agreement providing for a specified payment in the event of termination, an obligation shall be recorded upon execution of the agreement in the amount of the specified minimum payment. In addition, an obligation shall be recorded each month in the amount of the rent payable for that month. When the amount of rent remaining payable under the terms of the agreement is equal to the obligation recorded for the payment in the event of termination, no additional monthly obligation shall be recorded.

Under a rental agreement which does not contain a termination clause, an obligation shall be recorded at the time of its execution in the total amount of rent specified in the agreement even though the period of the lease extends into the subsequent fiscal year.

8. Change Orders.

Change orders involving increased costs may be recorded as obligations at the time of their issuance, if the Government has the right unilaterally to issue change orders under the contract. Accordingly, the estimated value of such order should be indicated on fiscal copies to be used to record the increase or decrease in the amount of the obligation, subject to further adjustment upon determination of the amount of the equitable adjustment to which the contractor is entitled.

9. Termination of Contracts for Convenience.

When a contract is terminated in whole or in part for the convenience of the Government by the giving of a Notice of Termination to the contractor, the obligation recorded for such contract or agreement shall be decreased in an amount which would result in an outstanding obligation under such contract or agreement sufficient to meet the settlement costs under such termination. Such obligation shall not be decreased below the amount shown by the estimate made by the contracting officer, based on the best evidence then available, of the amount due as a result of such termination.

10. Orders Required by Law to be Placed with a Government Agency.

An order required by law to be placed with a Government agency, such as an order required to be placed with Federal Prison

Industries,[141] the Government Printing Office,[142] or General Services Administration,[143] shall be recorded as an obligation by the ordering agency in the amount stated at the time the order is issued.

11. Project Orders.

A project order issued to a component of the Department of Defense or to another government agency under the United States Code[144] is recorded as an obligation in the amount stated in the order when accepted in writing.

12. Economy Act Orders.

An order issued to a component of the Department of Defense or to another Government agency pursuant to § 601(a) of the Economy Act[145] is recorded as an obligation in the amount stated in the order when the order is accepted in writing.

13. Military Interdepartmental Purchase Requests (MIPR's).

Military Interdepartmental Purchase Requests (MIPR's) constitute authority to procure supplies or services in accordance with single department procurement assignments between components of the Department of Defense.[146] Contracts or orders awarded by the procuring component are required to cite the funds of the requiring component, "direct citation," except in limited circumstances, for example, it is not considered feasible and economical by the procuring component to do so,[147] in which case the funds of the procuring component are cited "reimbursable procurement." In a direct citation procurement, orders are recorded as an obligation against the appropriation of the requiring component when notified in writing that the contract or order has been executed or a copy of the contract or order has been received by the requiring component. In a reimbursable procurement—when the order provides

---

[141] Act of June 25, 1948, 62 Stat. 851, *as amended*, 18 U.S.C. § 4124 (1970).

[142] 44 U.S.C. § 501 (1970) (originally enacted as Act of October 22, 1968, 82 Stat. 1243).

[143] Act of June 30, 1949, 63 Stat. 383, *as amended*, 40 U.S.C. § 481 (1970).

[144] Act of June 5, 1920, 41 Stat. 975, *as amended*, 41 U.S.C. § 23 (1970).

[145] Section 601 of the Act of June 30, 1932, 47 Stat. 417, *as amended*, 31 U.S.C. § 686 (1970).

[146] Armed Services Procurement Reg. § 5-1106.1(a) (1973) (hereinafter referred to as ASPR).

[147] ASPR § 5-1107.1; ASPR § 5-1107.2.

for procurement on a contract funded by the procuring department and does not separately cite the funds of the requiring component—the contract or order is recorded as an obligation by the requiring component when the order is accepted in writing.

D. BONA FIDE NEEDS

A basic limitation on the availability of annual or multiple-year funds is that such funds may be obligated only to fulfill a bona fide need of the fiscal year or years for which the funds were appropriated.[148] This does not necessarily mean that goods and services procured with annual funds must be delivered or performed in that fiscal year, so long as the need for the goods or services arose during the fiscal year.[149] In this connection, the Comptroller General has stated that:

> [D]etermination of what constitutes a bona fide need of the service of a particular fiscal year depends in large measure upon the facts and circumstances of the particular case, there being no general rule for application to all situations.[150]

Relatively firm guidelines covering most situations can, however, be extrapolated from the decisions of the Comptroller.

1. Performance Beyond the Fiscal Year—Supply Contracts.

Questions concerning whether a contract fulfills a bona fide need of the fiscal year for which annual appropriations are made necessarily arise only when contract performance takes place at least partially beyond the fiscal year.

---

[148] Section 1 of the Act of July 6, 1949, 63 Stat. 407, 31 U.S.C. § 712a (1970) (the so-called "Surplus Fund–Certified Claims Act of 1949"), sometimes cited as the statutory basis for the bona fide needs rule, although the rule predates enactment of the statute, provides:

> Except as otherwise provided by law, all balances of appropriations contained in the annual appropriations bills and made specifically for the service of any fiscal year shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year.

31 U.S.C. § 628 (1970), Rev. Stats. § 3679, *as amended*, 31 U.S.C. § 665 (1970), and Rev. Stats. § 3732, *as amended*, 41 U.S.C. § 11, (1970), have also been cited as prohibiting an obligation of fiscal year funds to meet the needs of future years.

[149] 1 COMP. GEN. 708 (1922); 20 COMP. GEN. 436 (1941); 23 COMP. GEN. 370 (1943); 37 COMP. GEN. 155 (1957). This is true notwithstanding that payment will not be made and the exact amount of the Government's liability will not be known until the following fiscal year, 21 Comp. Gen. 574 (1941).

[150] 44 COMP. GEN. 399, 401 (1965). *See also* 37 COMP. GEN. 155, 159 (1957).

Careful attention must be given to scheduling deliveries under supply contract to avoid extending deliveries to such an extent that the supplies may be presumed not to satisfy a need of the fiscal year.[151] When the delivery schedule precludes any deliveries until the following fiscal year, it may be concluded that the contract was made in the prior fiscal year with the sole objective of obligating an expiring appropriation and that the supplies are not intended to fill a bona fide requirement of that year.[152]

On the other hand, a need may arise and be contracted for in one fiscal year but deliveries may be postponed until the following fiscal year because of required lead time,

> [w]e recognize . . . that certain material may be needed in the future when related work or processes currently under way may be completed. If such material will not be obtainable on the open market at the time needed for use, a contract for its delivery when needed may be considered a bona fide need of the fiscal year in which the contract is made, provided the time intervening between contracting and delivery is necessary for production or fabrication of the material.[153]

or because of unforeseen delays in contract performance.[154] But if an excessive period of time intervenes between contract award and performance, particularly for standard commercial items readily available from other sources, the contract will not be regarded as

---

[151] 33 COMP. GEN. 57 (1953) (delivery schedule extended from June through January), *withdrawn on the basis of additional facts tending to establish a bona fide mobilization requirement for the prior fiscal year*, MS. COMP. GEN. B-115736. January 22, 1954. *Cf.* 38 COMP. GEN. 628, 630 (1959), where the Comptroller stated:

> Secondly, and while it may not be relevant, these funds were obligated during the last week of April just prior to the last two months of the fiscal year during which the limitation on the incurring of obligations contained in section 621 of the Department of Defense Appropriation Act, 1958, 71 Stat. 327, was operative.

[152] 21 COMP. GEN. 1159 (1941).

[153] 37 COMP. GEN. 155, 159 (1957).

[154] Thus, the Comptroller General approved payment under a construction contract for work performed in the fiscal year following its execution, since the Government awarded the contract as expeditiously as possible and had specified that work was to commence within the fiscal year but experienced delays in installing certain Government property. 1 COMP. GEN. 708 (1922). Similarly, the funds current as of the date of execution of a contract for the transportation of household goods were properly chargeable with the cost of services not rendered until the following fiscal year because the employees involved failed to locate suitable quarters at the new location within the fiscal year. 20 COMP. GEN. 436 (1941). *See also* 23 COMP. GEN. 82 (1943).

satisfying a requirement of the fiscal year for which the funds were made available.[155]

2. Replacement of Stock.

Fiscal year funds may properly be obligated to replenish stock used during the fiscal year, even though the replacement items may not be delivered or used until the following fiscal year, on the theory that a requirement for a constantly maintained level of inventory is a bona fide need.[156] "Stock" in this connection is generally limited to "readily available common use standard items," and does not include items which are specially created for a particular purpose and which require a lengthy period for production.[157] The Comptroller has questioned whether the purchase of articles which are retained in stock for more than a year prior to issuance for actual use satisfies a bona fide need.[158] The replacement of stock argument obviously has no application where no storage facilities exist or the "inventory" is used upon delivery.[159]

3. Performance Beyond the Fiscal Year—Service Contracts.

Contracts for services are generally chargeable to the appropriation current at the time such services are actually rendered. The Comptroller, however, has recognized that there are circumstances in which a need arises for services which by their nature cannot feasibly be divided for performance in separate fiscal years, and so has held that the question of when a need for services arises—whether the funds for obligation are those current at the time

---

155 35 COMP. GEN. 692 (1956); 38 COMP. GEN. 628 (1959). The nature of the work contracted for is often relevant. For example, the decision at 1 Comp. Gen. 115 (1921) involved a contract for the supply of gasoline which scheduled partial deliveries to commence in the following fiscal year; since the gasoline was actually consumed as delivered, the need arose for each quantity only as the Government called for delivery. The rationale of the decision is thus similar to the distinction made between severable and "entire" contracts considered below in connection with service contracts. In 1 COMP. GEN. 708 (1922), discussed in the preceding note, the construction effort there involved seems to have been treated as a single undertaking; the Comptroller emphasized that contract payments were made on the basis of a completed project.

156 21 COMP. GEN. 1159 (1941); 29 COMP. GEN. 489 (1950); 32 COMP. GEN. 436 (1953).

157 44 COMP. GEN. 695 (1965).

158 MS. COMP. GEN. B-134277 (18 Dec 1957).

159 1 COMP. GEN. 115 (1921).

services are rendered, or those current at the date of execution of the contract—depends upon whether the services are severable or "entire":

> The fact that a contract covers a part of two fiscal years does not necessarily mean that payments thereunder are for splitting between the two fiscal years involved upon the basis of services actually performed during each fiscal year. In fact, the general rule is that the fiscal year appropriation current at the time the contract is made is chargeable with payments under the contract, although performance thereunder may extend into the ensuing fiscal year.[160]

It is true, of course, that under certain conditions, such as where a contract calls for performance of purely personal services with compensation therefor fixed in proportion to the amount of work performed, the fiscal year appropriation properly for charging is that current at the time the personal services are rendered.[161]

Such a contract is termed severable as distinguished from entire. Thus, there is involved one undertaking, which although extending over a part of two fiscal years, nevertheless was determinable both as to the services needed and the price to be paid therefor at the time the contract was entered into. Such being the case, the fiscal year appropriation current at the time the contract was made was obligated for payments to be made thereunder.

The decision in which the quoted language appears involved a contract for the cultivation and protection of a crop of rubber-bearing plants. Since the crop year covered parts of two fiscal years, it was clear that the requirement could not be divided for performance under two separate contracts awarded for each of the fiscal years involved. From this it is apparent that a crucial test in determining whether particular services are severable or entire in character is that of economic feasibility.

The clearest example of contracts which call for services of a severable nature are those for custodial maintenance or similar services which are performed on a continuous basis:

> The need for current services, such as those covered by the contract here under consideration, arises only from day to day, or month to month, and the Government cannot, in the absence of specific legislative authorization, be obligated for such services by any contract running beyond the fiscal year.[162]

---

[160] 23 COMP. GEN. 370, 371 (1943) (citations omitted).

[161] 10 COMP. TREASURY DEC. 284 (1903).

[162] 33 COMP. GEN. 90, 92 (1953). *See also* 35 COMP. GEN. 320 (1955), *modified on the basis of additional facts*, MS. COMP. GEN. B-125444 (16 Feb. 1956).

The method of compensation may be useful in determining whether particular contract services represent a single undertaking. The contract for crop cultivation mentioned above, for example, fixed compensation at a definite price per acre; a contract calling for continuous services typically entitles the contractor to compensation in proportion to the amount of work performed.

4. Multi-year Procurement.

Certain supplies and services procured with annual funds require substantial investment by the contractor in equipment with a useful life extending beyond one year, or require extensive investment in the hiring and training of personnel. This is particularly true of contracts for such activities as production, repair, and maintenance. Such a substantial investment cannot be economically written off by the contractor as the expenses of a single year. Nevertheless, if the annual funds supporting the contract are available only for that particular fiscal year, the contract price must cover all these expenses or the contractor runs the risk of never recovering his unamortized investment if he loses the contract for the ensuing year or years. This is particularly so when the new facilities or equipment will be of little or no expected future use or value to the contractor. This situation tends to discourage potential contractors from bidding on such procurements, thereby reducing competition and tending to increase prices. The successful contractor in these circumstances, however, obtains a competitive advantage in later years since the competitors must include in their prices the same initial investment costs that the contractor confronted. As a result, competition is further reduced. Moreover, many small business firms are unable to provide the initial investment capital needed to compete on an annual basis, and this condition also reduces competition.

Government equipment and facilities may be furnished in such circumstances as an alternative to extensive contractor investment, but this is objectionable to the extent that government property becomes unavailable for other government purposes. Moreover, if the construction or manufacture of new plant or equipment is involved, a greater investment may be required of the Government than is justified. Another alternative, that of coupling one-year contracts with options, is relatively ineffective since the contractor has no assurance that the Government will exercise the option, and so must still cover his investment costs in the initial contract price.

If contracts could be awarded on a multiple-year basis, the contractor could spread the initial costs over the entire contract term. This should result in increased competition by firms that are otherwise unable or unwilling to compete on a one-year basis, reduced administrative costs involved in frequent reprocurement, and it should eliminate the disruption of frequent changes of contractors and the attendant problems of poor performance during a transition period. The Comptroller General, however, has held that a multi-year procurement using annual funds violates the basic statutory prohibitions against obligating funds made available for a particular fiscal year for future needs. In the *Wake Island* case[163] the Air Force awarded a three-year requirements contract using operations and maintenance funds which required the contractor generally to perform aircraft maintenance services, to billet Government personnel, and to perform air base management services. The Comptroller cited substantial precedent for the proposition that

> contracts entered into under fiscal year appropriations purporting to bind the Government beyond the fiscal year involved must be construed as binding upon the Government only to the end of the fiscal year; and even where the contract contains an option in the Government to renew from year to year to the end of the stated term contingent upon the availability of future available appropriations, affirmative action, in effect making a new contract and complying with the advertising requirements, is required in order to exercise the Government's option of renewal.[164]

And since the contract involved purported to bind the Government for supplies and services furnished in future fiscal years without affirmative renewal, it exceeded the available appropriations. Since a requirements contract was involved, under which no orders would be placed in any fiscal year unless determinations were made that a requirement existed and that funds were available, the Air Force had concluded that the contract obligated no funds in advance of their availability.[165] The Comptroller, however, concluded that *any*

---

[163] 42 COMP. GEN. 272 (1962).

[164] *Id.* at 276, *citing* Leiter v. United States, 271 U.S. 204 (1926); Goodyear Tire & Rubber Co. v. United States, 276 U.S. 287 (1928); 28 COMP. GEN. 553 (1949); 29 COMP. GEN. 91 (1949); 33 COMP. GEN. 90 (1953); 36 COMP. GEN. 683 (1957).

[165] In Ms. COMP. GEN. A-60589 (12 July 1935), the Comptroller General ruled that requirements contracts could cover a period beyond the end of the current fiscal year, but they were precluded from covering a period in excess of one year by 41 U.S.C. § 13 (1970), which prohibits contracts for stationery or other supplies

legal obligation or liability which may arise under a contract supported by a fiscal year appropriation and ultimately require the expenditure of funds was prohibited, without regard to whether such liabilities were covered by the definition of appropriations obligation in Section 1311, Supplemental Appropriation Act, 1955.[166] Further, doubt was expressed as to whether a "requirements" contract was involved, since the contract services were automatic incidents of the use of the airfield, so that no administrative determination that a requirement existed was actually needed—in fact, only a determination to close the field would eliminate a requirement.

Because of the difficulties involved in contracting with annual funds on a fiscal year basis, subsection (g) was added to Title 10 Section 2306 by Public Law 90-378[167] to grant the Department of Defense limited authority to award contracts for periods up to five years for services and related supplies only in overseas locations. The statute permits contracting with annual funds for (1) operation, maintenance, and support of facilities and installations; (2) maintenance or modification of aircraft, ships, vehicles, and other highly complex military equipment; (3) specialized training necessitating high-quality instructor skills; and (4) base services. Before the authority in the statute can be used the head of the agency must make a finding that (1) there will be a continuing requirement for the services under current plans for the proposed contract period; (2) the furnishing of such services will require a substantial initial investment in plant or equipment, or the incurrence of substantial

---

for a longer term than one year from the time the contract is made. This statute does not apply to the military departments including the Coast Guard or to NASA. 10 U.S.C. § 2314 (1970). This early decision appears not to have been modified by the *Wake Island* decision. In 48 COMP. GEN. 497 (1969), the Comptroller stated:

> For the reasons stated in 42 Comp. Gen. 272, we are not convinced that the decision of July 12, 1935, A-80589 permitting requirements contracts under fiscal year appropriations to cover 1-year periods extending beyond the end of the fiscal year is technically correct. Since that practice, however, has been followed for over 30 years apparently in reliance upon the July 12, 1935 decision, no objection will be made to its continuance.

Cf. ASPR 22-107(iii), permitting the term of a one-year requirements or indefinite quantity contract for services to extend beyond the end of the fiscal year current at the time of award, if the stated minimum quantity is certain to be ordered during the first fiscal year.

[166] Act of August 26, 1954, § 1311, 68 Stat. 830, *as amended*, 31 U.S.C. § 200 (1970).

[167] Act of July 5, 1968, § 1, 82 Stat. 289, 10 U.S.C. § 2306(g) (1970).

contingent liabilities for the assembly, training, or transportation of a specialized work force; and (3) the use of a multi-year contract will promote the best interests of the United States by encouraging effective competition and promoting economies in operation. For contracts longer than three years the head of the agency may not delegate the authority to make these findings.

If no funds are available for the continuation of a multi-year contract, the contract must be canceled or terminated and the cost of cancellation or termination could be paid from (1) appropriations originally available for the performance of the contract concerned, (2) appropriations currently available for procurement of the type of services concerned, or (3) funds expressly appropriated for such payments.

Where the authority contained in the statute for multi-year procurement using operations and maintenance or military personnel appropriations is not available, the only arrangement available to serve the same purpose which would also satisfy the requirements of the basic statutes prohibiting contracts in excess of available appropriations would be a contract coincident with the fiscal year current at the time of its execution, with an option for renewal for the succeeding years upon notification to the contractor. It has previously been mentioned, however, that such an arrangement is not entirely satisfactory to the contractor because he has no assurance that the option will ever be exercised. Accordingly, he will make an effort to have included in the contract a termination penalty or similar provision pursuant to which the government agrees to pay to the contractor an amount representing the unamortized balance of the acquisition cost of such assets in the event that the government fails to renew the contract for any fiscal year. The Comptroller General has held that such provisions contravene the same statutes which preclude the obligation of annual funds for future needs:

> The theory behind such obligations (covering amortized facility costs unrecovered at time of termination) has been that a need existed during the fiscal year the contracts were made for the productive plant capacity represented by the new facilities which were to be built by the contractor to enable him to furnish the supplies called for by the contracts. After thorough consideration of the matter, we believe that such obligations cannot be justified on the theory of a present need for productive capacity. . . .
>
> The real effect of the termination liability is to obligate the Commission to purchase a certain quantity of magnesium during each of five successive years or to pay damages for its failure to do so. In other words, the

> termination charges represent a part of the price of future, as distinguished from current, deliveries and needs under the contract, and for that reason such charges are not based on a current fiscal year need.[168]

If the contractor's cost of investment in plant and equipment cannot be recovered separately under a termination penalty, such costs will naturally be included in the contract price in the form of increased unit prices for the supplies or services to be furnished. In this case, the contract may provide for price adjustments as the contract is renewed to account for that portion of the acquisition costs which the contractor will recover as a result of the renewal. Whether provision is made for such price adjustments or not, however, the government is in the position of indirectly purchasing the contractor's facility without obtaining any interest in the property apart from the contract, unless provision is made in the contract for acquisition by the government of title to the assets. There would ordinarily be no authority for such a provision, however, in view of the statutory requirement of a specific provision in an appropriation for the acquisition of public buildings and improve-

---

[168] 36 COMP. GEN. 683, 685 (1957); 37 COMP. GEN. 155 (1957). This is a recurring problem in procuring ADP equipment. The Comptroller General has approved a plan which provided credits as follows:

> The final plan submitted (Company "C") seems to avoid these legal difficulties. Company "C's" plan is similar to the prior plan in that the Government must complete the full rental period to qualify for the benefits offered. However, Company "C" makes its benefits available at the end of the full rental period and not during the period of the rental. Monthly rental credits are to be applied during the final months of a rental period (a 24 to 60-month period may be involved), if the plan is continued on a year by year basis throughout the entire rental period. Under this arrangement the Government would not be obligated to continue the rental beyond the fiscal year in which made, or beyond any succeeding fiscal year, unless or until a purchase order is issued expresaly continuing such rental during the following fiscal year. In effect, the company is proposing a 1-year rental contract with option to renew. Also, under this proposal rental for any contract year would not exceed the lowest rental otherwise obtainable from Company "C" for 1 fiscal year. We have no legal objection to this type of rental plan for ADP equipment.
>
> Leases of automatic data processing equipment under fiscal year appropriations must be restricted to the period of availability of the appropriation involved. With respect to the revolving funds we have no legal objection to contracting for reasonable periods of time in excess of 1 year subject to the conditions that sufficient funds are available and are obligated to cover the costs under the entire contract. See 48 Comp. Gen. 657, 661. Nor, as stated above, would we have any objection under revolving funds to contracts for a basic period with renewal options, provided funds are obligated to cover the costs of the basic period, including any charges payable for failure to exercise the options.

48 COMP. GEN. 494, 501-502 (1969).

ments.[169] The annual appropriations for operation and maintenance and for military personnel ordinarily make no such provision.

5. Contract Termination.

Where it becomes necessary to terminate a contract for default, the funds originally obligated with the cost of the terminated contract generally remain available for a replacement contract, although executed in the following fiscal year.[170] The theory on which this principle rests is that the obligation created by the original contract is not extinguished by reason of the default termination; the replacement contract is made for the account of the defaulted contractor so that it represents merely a continuation of the original obligation. Accordingly, where the terminated contract was not made to fulfill a current need, the funds obligated thereunder are obviously not available for the cost of the replacement contract.[171] And where the replacement contract is awarded on a different basis[172] or after undue delay,[173] the funds available for obligation are those current at the time of its execution.

Consistent with this rationale, funds originally obligated with the cost of a contract which is thereafter terminated for convenience are not available for completion of the terminated portion of the contract under a new procurement.[174]

6. Price Adjustments.

During the course of contract performance, the government may become liable to make equitable adjustments in the contract price for changes in specifications, delay in furnishing government property, changed conditions at the work site, and so forth. The relief to which the contractor is entitled in these situations is governed by standard

---

[169] 41 U.S.C. § 12 (1970). *See* 20 COMP. GEN. 95 (1940) where the relevant authorization and appropriation legislation authorized the acquisition of facilities.

[170] Ms. COMP. GEN. B-105555 (Sept. 26, 1951); 2 COMP. GEN. 130 (1922); 32 COMP. GEN. 565 (1953); 34 COMP. GEN. 239 (1954).

[171] 32 COMP. GEN. 565 (1953); 35 COMP. GEN. 692 (1956).

[172] 19 COMP. GEN. 702 (1940); 35 COMP. GEN. 692 (1956); 44 COMP. GEN. 399 (1965).

[173] 32 COMP. GEN. 565 (1953) (unexplained delay of four and one-half years from the execution of the defaulted contract to the proposed reprocurement).

[174] 24 COMP. GEN. 555 (1945). Funds obligated under a contract terminated for default remain available for a reprocurement even though the default termination is subsequently converted to one for convenience. 34 Comp. Gen. 239 (1954).

clauses of the contract, such as the "Changes" clause or the "Government Property" clause. These clauses represent contingent liabilities, and do not operate to firmly obligate the funds charged with the cost of the contract. When a contract covers a period beyond the fiscal year and the contractor becomes entitled to a price adjustment through the operation of the "Changes" clause, the Comptroller General has authorized payment from the appropriation current when the agreement was made even though the change was not ordered until after the end of the fiscal year.[175] This result rests on the theory that the Government becomes legally obligated to adjust the contract price at the time the original contract is executed, through the operation of a clause permitting the government to make such changes and providing the contractor a measure of relief. The change order itself creates no new liability, but merely serves to render a preexisting liability fixed and certain. Thus, in deciding that an assignment of all amounts payable under a contract included amounts due under changes thereafter ordered, the Comptroller stated:

> It is true that at the time the contract was executed it was not known that there would, in fact, be any changes ordered under said article 2 [the "Changes" clause] for which the contractor would be entitled to be paid an amount in addition to amounts otherwise payable under the contract. Also, it is true that said article 2 contemplates the execution of amendments to the contract from time to time covering such changes. However, the fact remains that the obligations and liabilities of the parties respecting such changes are fixed by the terms of the original contract, and the various amendments merely render definite and liquidated the extent of the Government's liability in connection with such changes.[176]

Since the rationale for obligating the original funds in such cases is a liability of the government imposed within the period of availability by the terms of the original contract, changes which are not within the general scope of the contract or are otherwise not authorized by the "Changes" clause, and other contract amendments which are not based on any antecedent liability, obligate only the funds current when such change is ordered.[177] In an early ruling

---

[175] Ms. COMP. GEN. A-15225 (Sept. 24, 1926). *See also* 18 COMP. GEN. 363 (1938) (indemnification clause); 21 COMP. GEN. 574 (1941) (definitization of letter contract).

[176] 23 COMP. GEN. 943, 945 (1944).

[177] 25 COMP. GEN. 332 (1945); 37 COMP. GEN. 861 (1958); *compare* para. 2-9a(1) *with* para. (4), Army Reg. No. 37-21 (1 Dec. 1970).

that a change ordered after the close of the fiscal year sought to be charged properly obligated the original funds, the Comptroller stated that his conclusion was based on the assumption that "the project was such that the work done under the original contract would be utilized and form a part of the work to be done under the contract as proposed" and that "the purpose of the proposed modification or supplemental contract was not to increase the number or quantity of the articles to be furnished under the original contract but to provide for certain improvements in the design thereof." [178]

7. Bona Fide Needs Exceptions.

In addition to statutory exceptions, for example, tuition[179] and subscription or other charges for newspapers, magazines, periodicals and other publications,[180] in recent Defense Department Appropriation Acts, Congress has granted some very limited exceptions to the bona fide needs rule:

a. Lease of property.

Leases of property to the Government are considered severable by fiscal years, unless there is specific statutory authority authorizing leases for a term longer than one year. Thus, the courts and the Comptroller General have consistently maintained that, in the absence of specific statutory authority to the contrary, the Government can execute a lease only to the end of the fiscal year concerned, and that the execution of a lease for a term of years, without statutory authority, must be construed as a lease to the end of the current fiscal year with an annual option to renew until the end of the term.[181] Where leases for a term of years contained clauses providing for their termination at the end of each fiscal year if no further appropriations were available, the Supreme Court has held that the original lease must, in effect, be adopted in each subsequent year by some affirmative act if the Government is to bound.[182]

---

[178] Ms. Comp. Gen. A-15225 (Sept. 24, 1926).

[179] 31 U.S.C. § 529i (1970).

[180] 31 U.S.C. § 530a (1970).

[181] McCollum v. United States, 17 Ct. Cl. 92 (1881); Reed Smoot v. United States, 38 Ct. Cl. 418 (1903); 24 Comp. Gen. 195 (1944); 19 Comp. Gen. 758 (1940).

[182] Leiter v. United States, 271 U.S. 204 (1926); Goodyear Tire and Rubber Company v. United States, 276 U.S. 287 (1928). Although the Supreme Court did not construe an option into the leases in these cases, the Comptroller General has cited them as wholly supporting the option theory. 24 Comp. Gen. 195, 197 (1944).

An exception to this rule was granted in Department of Defense Appropriation Act of 1973.[183] Section 707 provides:

> Appropriations for the Department of Defense for the current fiscal year shall be available . . . (e) for leasing of buildings and facilities including payment of rentals for special purpose space at the seat of government, . . . rentals may be paid in advance.

Also payments under leases for real or personal property for twelve months beginning at any time during the fiscal year has been authorized by Section 707.[184]

b. Maintenance of tools and facilities.

Another exception to the bona fide needs rule contained in Section 707 concerns maintenance of tools and facilities. The pertinent part of the section provides that:

> Appropriations for the Department of Defense for the current fiscal year shall be available . . . (f) payments under contracts for maintenance of *tools and facilities for twelve months beginning at any time during the* fiscal year; . . .[185]

IV. THE MAJOR APPROPRIATIONS

A. RESEARCH, DEVELOPMENT, TEST, AND EVALUATION (RDTE)

The RDTE appropriation, set forth in Title V of the annual appropriation act, is available for the following general purposes:

(1) The conduct and support of research and development, including basic and applied research; theoretical, feasibility, and design studies; scientific experiments; systems engineering; developmental engineering (including developmental engineering in connection with procurement, production and modification); weapons systems analysis and operations research, except when conducted by activities directly attached to military commands; and fabrication of experimental models and prototypes.

(2) Procurement, production, and modification of articles under development for planned requirements for research, development, test, and evaluation of the article under development.

---

183 Pub. L. No. 92-570, 86 Stat. 1184 (1972).

184 Defense Appropriation Act of 1973, § 707. ("Appropriations for the Department of Defense for the current fiscal year shall be available . . . (j) payments under leases for real or personal property for twelve months beginning at any time during the fiscal year.").

185 *Id.*

(3) Procurement and installation of specialized equipment required for research, development, test, and evaluation activities, except for articles which are centrally procured for use by both non-RDTE and RDTE activities and for which reimbursement by RDTE customer activities is not required under current operating practices.

(4) Conduct of testing, including scientific, technical and weapons effects testing; developmental testing; service testing; engineer testing; operational suitability testing; and testing for the evaluation of articles commercially procured or received from foreign sources.

(5) Operation and maintenance of RDTE organizations, facilities, and installations, including those operated by contracts. The appropriation is available for product improvements of materiel which are *developmental* in nature.[186]

The RDTE appropriation is a multi-year appropriation, available for obligation for a period of two years. It was formerly available until expended, until the FY 71 DoD Appropriation Act changed the "no-year" appropriations for procurement and for research and development to multi-year appropriations in order to reduce the level of unobligated balances at the close of each fiscal year and to provide an additional measure of Congressional fiscal control.[187]

The Office, Chief of Research and Development is responsible for formulation of the RDTE budget and for program and financial management of the appropriation.

The basic working unit within the RDTE appropriation is the program element, which corresponds to the budget subactivity account indicated in the Army Management Structure (Fiscal Code), Army Regulations 37-100 series. Each program element is a combination of forces, equipment and facilities which together constitute an identifiable military capability or support activity. The program element is the basic structural unit of the Five Year Defense Plan (FYDP), and has been discussed in general terms in

---

[186] *See generally* Army Reg. No. 700-35, Product Improvement of Materiel (12 March 1971).

[187] The Defense Appropriation Act, 1971, Pub. L. No. 91-668, 84 Stat. 2020 provided that all Fiscal Year 1971 and prior year funds would expire for obligational purposes as of 30 June 1972. The Defense Authorization Act, 1972, Pub. L. No. 92-156, amended the permanent law, 31 U.S.C. § 649c (1970), to provide that unless otherwise provided in the appropriation RDTE funds would be available for obligation for a period of two years. The rationale for these actions is expressed in H.R. REP. No. 91-1570, 91st Cong., 2d Sess. 8 (1970).

connection with the discussion of the formulation of the FYDP. Congress reviews and approves the RDTE appropriation at the program element level. It is also at the program element level that authority to incur obligations is granted; consequently, it is at this level that obligational authority is administratively controlled pursuant to the Antideficiency Act. Program approval and reprogramming actions, however, are in terms of each project.

Research and development has traditionally been programmed and budgeted on an incremental basis, as distinguished from full funding, or funding for the total cost to completion at the time a program is initially authorized. This means that the annual increment for any RDTE program element or project is limited to the obligation authority necessary to cover all costs expected to be incurred during that increment. In this connection, "costs" include not only the direct costs of labor and materials to be used or consumed, but all liabilities which will be created during the incremental period involved to further the project—such as orders placed and subcontracts awarded for material and equipment related to the project—as well.

The rationale for incrementally funding research and development programs is that research and development is a continuing process, with each succeeding phase of the total effort usually dependent on the success or failure of proceeding phases. As work progresses, more information becomes available on the basis of which succeeding phases may be specifically planned. While this is possible after the work has progressed, it is generally not practicable to attempt to predict at the outset the exact course of experience over a long period of time. Since the total amount of funds available at any given time is limited, it is undesirable to commit more than the funds reasonably required to pursue any given line of research. If excessive funds are committed to one line of research, then it is axiomatic that another line of effort must be deferred so long as there are finite limits to the total financial resources available in any given period.

During its consideration of the RDTE portion of the FY 1972 Defense Authorization bill, the Senate Armed Services Committee determined that the military services and Defense agencies pursued a wide range of policies in applying the incremental funding concept in executing RDTE programs.[188] Accordingly, the Senate Report on the bill set forth the following principles, with a view to stand-

[188] S. REP. No. 92-359, 92d Cong., 2d Sess. 98 (1971).

ardizing the practice of incrementally funding defense research and development.[189] These principles apply to RDTE program development, budget preparation, authorization and appropriation requests, and program execution:

1. General Rule.

Tasks to be performed in-house or under contract are to be programmed in increments designed to be accomplished within a twelve-month period or less. Provision is made for two exceptions to this general rule: first, for those infrequent circumstances which require extension, such as the inability to separate the total procurement requirement into smaller segments of not more than twelve months; and second, for those instances in which no responsible contractor will accept a contract for a twelve-month period. In either instance, the contract period may be extended beyond a twelve-month period only after specific approval in writing by the official with source selection authority. The identity of this official will generally depend on the estimated cost of the procurement. In no case, however, may any incremental period exceed eighteen months. Thus, contractual effort may overlap into a succeeding fiscal year by no more than six months.

2. Multi-year Contracts.

Where the program is to be accomplished under a multi-year contract the initial increment will be programmed and funded for performance during the first twelve-month period for which funds are made available. This incremental period should be coincident with the fiscal year in programs involving major weapons systems procurement; otherwise, the initial increment may partially overlap the succeeding fiscal year, but in no event may it extend beyond the close of that fiscal year. Second and succeeding increments may be programmed for accomplishment in periods of up to twelve months but in no event may any such period overlap the succeeding fiscal year for more than six months.

The requirement that increments of major weapons systems procurements coincide with the fiscal year creates peculiar difficulties in procurement planning. Assume, for example, that a new weapons system requirement is proposed in the Defense budget for $100 million to support the first twelve months of effort of a total require-

---

[189] *Id.* at 98, 99.

ment of 33 months work. The contract had been planned for award on 1 October 1972, with the period of performance extending through the first quarter of fiscal year 1974 to 30 September. Award is not actually made, however, until 1 April 1973, the beginning of the 4th quarter of the fiscal year. The procuring activity must elect one of two alternative courses of action. In the first place, the initial contract could be programmed for a full twelve-month period of performance. However, since the foregoing policy prohibits the second increment funded in the FY 74 program from extending beyond six months into the succeeding fiscal year, this increment would be limited to a period of nine months. The third increment, funded in the FY 75 program, would then extend for a period of twelve months. Alternatively, the initial contract may be awarded for a nine-month period of performance using FY 73 funds. The second and third increments would then cover a full twelve months each.

3. Defense Research Sciences.

These programs constitute primarily basic research and are generally conducted on a level-of-effort basis through contractual arrangements with colleges and universities. Such programs may be initially funded for a period not to exceed 36 months, but annual renewal increments may not exceed twelve months. To the extent that such programs are executed under contracts with noneducational institutions and private contractors, the principles stated in the preceding paragraphs apply.

4. In-house Costs.

The day-to-day operation and maintenance of RDTE installations and projects in support of assigned missions and functions, are programmed and funded on an annual basis coincident with the fiscal year.

The incremental time periods for application of the foregoing principles commence on the date of the obligation of funds. In all other respects, however, incremental funding relates to the period of time in which the effort is actually accomplished, not the period of time within which funds are obligated or expended.

A significant part of the RDTE program is executed by installations operating under the Army Industrial Fund. Incremental funding principles apply to project orders placed for execution with these installations with respect both to in-house effort and to contracts

supporting the in-house effort. Thus, the RDTE activity placing a project order for work or services on an industrially-funded installation must include provisions in the order to satisfy the incremental funding policy. This means that the ordering activity will include in the order a statement that it will finance all in-house costs, including civilian labor and related costs, for a maximum period of twelve months into the next succeeding fiscal year. The project order is not required to cover a period coincident with the fiscal year. For project orders that include contracts in support of in-house effort, the contract portion will be treated the same as all other contractual effort under the incremental funding principles. In the event that a delay in program execution is encountered during the current fiscal year which will cause the work to extend beyond the twelve-month expiration date, it is the responsibility of the performing activity to notify the ordering activity of that fact. The ordering activity then must either amend or terminate the project order.

B. PROCUREMENT OF EQUIPMENT AND MISSILES, ARMY (PEMA)

The PEMA appropriation, contained in Title IV of the annual appropriation act, provides funds for the procurement, manufacture, and conversion of major end items of combat and combat support equipment, ammunition, and missiles which are centrally procured for operational issue, general service use, or added to inventory upon delivery. The appropriation includes provision for necessary production facilities not available in industry or in standby reserve. And it provides funds for the initial provisioning of spare parts peculiar to new weapons systems on the initial procurement or production order. PEMA does not, however, include locally determined requirements for installation operating equipment—for example, office equipment—which is financed instead under the Operations and Maintenance, Army (OMA) appropriation; nor does it include provision for the cost of procurement functions, such as contract administration, which is also financed by OMA.

PEMA is a continuing appropriation and remains available for obligation for a period of three years. Financial management of the PEMA appropriation is assigned to the Comptroller of the Army, who is thus responsible for the issuance and control of fund allocations. Funds are allocated to commands and activities which receive PEMA programs for execution, usually simultaneously with release of the approved program. The allocation includes the

unobligated balance of funds carried forward in addition to new obligational authority. Suballocations are issued to general operating agencies which execute budget line items within a given program; suballocations are normally issued at the same budget classification level as the allocation received from Headquarters, Department of the Army, and only one suballocation will be generally issued to a general operating agency by any one source. Administrative controls on the use of PEMA funds are applied at the appropriation level within the allocation, suballocation or allotment received. The accounting for and control of commitments and obligations are required at the allotment level. No formal commitment accounting is maintained at functional levels such as Headquarters, Department of the Army, Army Materiel Command—which executes the major portion of the PEMA program—or the general operating agencies.

PEMA funds are utilized almost exclusively by the Army wholesale logistics system and the items procured are issued as unfunded items to the user installation. PEMA requirements are thus not budgeted at the installation level. The basis of issue is contained in appropriate authorization documents, such as tables of organization and equipment and tables of allowance.

Funds are made available for programs financed under the PEMA appropriation in accordance with the "full funding" principle. This means that Congressional action on budget requests for major procurement is taken on the basis of total programs presented for approval, and that funds necessary to execute the approved program are provided at the outset on the basis of its total estimated cost. Application of the full funding principle is to be contrasted with the practice of appropriating for a long-term program only the funds required to cover the estimated expenditures of a given fiscal year. While this method would have the advantage of maintaining a relatively low level of unobligated balances at the end of a fiscal year, it would also make effective executive or legislative control over the military programs difficult, since funds would be made available without full realization of the total cost of a program.

An important distinction must be made between full funding and fully obligating the funds received. The fiscal control achieved when Congress fully finances a major procurement program at the time it is initially approved would be lost if efforts were made to obligate all available funds as quickly as possible. Sound program

and financial management requires that actual obligations are carefully timed to assure that maximum return is received for each dollar obligated. For example, contracts for short lead-time components are awarded at a later date than contracts for larger lead-time components. To do otherwise would be wasteful, since some components would become unusable because of design changes in the end item or obsolescent because of technological improvements. Funds should be reserved to assure that orders for shorter lead-time components can be placed at the appropriate time in order to take advantage of the latest technological advancements. In addition, funds should be reserved to meet the following general requirements:

(1) Subsequent engineering changes: Engineering changes in a major item after it has been placed in production are frequently required as a result of technological improvement or deficiencies in design that are discovered after initial testing.

(2) Transportation: Reservation of funds to cover transportation of long lead-time items which will be delivered in a later fiscal year permits the contracting officer to specify whatever method of delivery is most advantageous to the government. Otherwise, there would be a tendency to specify delivery f.o.b. plant, since this would avoid a charge against current funds, even though this method might not be most advantageous to the Government.

(3) Spares and replacement items: It has been considered sound procurement practice to provide for certain spares and replacement items together with initial equipment. This permits ordering of spares while the dies, jigs and tools are available and in place, and to insure successful operation of the equipment when delivered. Before funds are obligated for spares, however, definitive lists of the items and quantities required are worked out with the manufacturers. This requires a period of time during which all of the elements involved in determining the numbers of various spares must be finalized. It is only after these negotiations and determinations have been completed that funds are obligated for spare parts. In the intervening period, the necessary funds are set aside in order to assure that these items may be ordered and will be available in the inventory or maintenance depots at the time the basic end item is delivered for use.

(4) Contracting delays: Particularly with respect to newly developed items, production may commence on the basis of a letter contract, and only the amount of the letter contract can properly

be obligated. Although production will go forward on the basis of the letter contract to the extent of the stated maximum liability of the government, considerable time may elapse before a mutually satisfactory definitive contract can be executed and the remaining funds obligated. Where this process overlaps the closing months of one fiscal year and the early part of the next fiscal year, adequate funds must be reserved to cover the full costs of the contract under negotiation.

In summary, sound program and financial management requires (1) that procurement programs be fully funded in terms of new obligational authority at the time the programs are approved by Congress; and (2) that sufficient funds be reserved for obligation beyond the current fiscal year to assure completion of projects justified to the Congress.

The full funding policy is expressed in a Department of Defense Directive.[100] Among other things, the Directive makes clear that (1) the procurement of long lead-time components in advance of the fiscal year in which the related end item is to be delivered is permitted if the circumstances justifying advance procurement are identified in budget and apportionment requests; and (2) in the case of fully funded multi-year contracts, funds need not be programmed and reserved to cover the cancellation charge necessary to cover the nonrecurring costs of items to be procured in fiscal years not yet funded.

C. OPERATIONS AND MAINTENANCE (OMA)

OMA is an annual appropriation which supports most of the day-to-day operations of the Army, including the operation and maintenance of organizational facilities and equipment, procurement of supplies and equipment, production of training films and aids, operation of service-wide and establishment-wide activities; medical activities; operation of depots, schools, training, recruiting, and programs related to the operation and maintenance of the Army. The appropriation also provides for welfare and morale, information, education, and religious activities, for the expenses of courts, boards, and commissions, and for the pay of civilian personnel.

---

[100] Dep't of Defense Directive No. 7200.4, Full Funding of DOD Procurement Programs (Oct. 30, 1969).

Operations and maintenance funds are administratively controlled on the basis of approved operating budgets issued by the Comptroller of the Army through successively subordinate commands to each installation and activity. An approved operating budget establishes an annual limitation on the amount of funds that may be obligated for each specific program during the fiscal year. It does not, however, actually make funds available or authorize the incurrence of obligations unless it is also used to issue allotments. OMA funds are allotted on a quarterly basis; the purpose of an approved operating budget is to insure the effective management of funds for the entire fiscal year.

OMA funds are distributed almost exclusively on a specific allotment basis. A specific allotment provides authorization to the head of an installation or activity for the incurrence of obligations within a specific amount and for a specified purpose. Specific allotments are accounted for and controlled at the installation level. In the administration of specific allotments, obligating documents require individual certification of the availability of sufficient funds before an obligation may properly be incurred.

D. MILITARY PERSONNEL (MPA)

The military personnel appropriation, an annual appropriation contained in Title I of the regular Department of Defense Appropriation Act, provides for military pay, allowances, individual clothing, subsistence, permanent change of station travel, and temporary duty travel between permanent duty stations.

Responsibility for military personnel programming, budgeting, accounting, and reporting are retained at Headquarters, Department of the Army level. The MPA budget is formulated by the appropriation director, the Deputy Chief of Staff for Personnel, on the basis of statistical reporting data reflecting anticipated strengths by grade, PCS moves, and similar data, developed from the same fund status reports that are submitted for accounting and control purposes, and without the benefit of budget estimates prepared by activities in the field. Military personnel costs are thus unfunded costs to the installation. Open allotment procedures are applied in administering nearly all of the activities financed by the military personnel appropriation. Under open allotment procedures, the management and control of funds remain the responsibility of the head of the operating agency. However, an open allotment account number is published, which permits any disbursing officer

to make authorized individual payments without any prior certification of fund availability. The publication of the account number is in effect a certification that funds are available for the specified purpose. The head of the operating agency who establishes the open allotment is responsible to assure that obligations will not exceed the amount of the open allotment. The principal control device is a requirement for frequent fund status accounting and reporting in such a manner as will assure the head of the agency that sufficient notice prior to the time such allotment may become over-obligated to permit his taking such action as may be necessary to prevent the incurrence of a deficiency.

V. ADMINISTRATIVE CONTROL AND DISTRIBUTION OF FUNDS

When the appropriations bill has been enacted, an appropriations warrant is drawn by the Treasury and is transmitted to the department or agency for which the appropriation is made as a means of placing the amounts of the various appropriations to the credit of proper accounts on the books of the Treasury Department and of advising the department or agency concerned. The appropriations warrant must be countersigned by the Comptroller General. The Comptroller General may withhold his signature if the act fails to make the appropriation intended or the terms of the law are not complied with. In such case, the law must be complied with before the funds can be made available for obligation.

A. APPORTIONMENT

Upon receipt of the appropriations warrant, the agency reviews and revises its budget in light of the appropriation and submits to the Office of Management and Budget a request for apportionment.

Central control over the obligational authority made available by the appropriations act is maintained by a process of apportioning authority. Under the Antideficiency Act, the law requiring the apportionment of funds appropriated by Congress, the Director, Office of Management and Budget has authority to make, waive, or modify apportionments, and appropriations are not available for obligation or expenditure until the apportionment has been approved by the Director. An apportionment has been defined as "a distribution made by the Office of Management and Budget of amounts available for obligation in an appropriation or fund account into amounts available for specified time periods, activities, functions,

projects, objects, or combinations thereof." In practice such distributions are generally made on a quarterly basis. The objective of the apportionment process is to plan the effective and orderly use of available funds and, with respect to annual and multi-year appropriations, to prevent so far as possible the need for deficiency or supplemental appropriations. The law provides that apportionments or reapportionments which might involve the need for deficiency or supplemental appropriations may be made only in limited circumstances: when it is determined "that such action is required because of (A) any laws enacted subsequent to the transmission to the Congress of the estimates for an appropriation which require expenditure beyond administrative control; or (B) emergencies involving the safety of human life, the protection of property, or the immediate welfare of individuals in cases where an appropriation has been made to enable the United States to make payment of, or contributions toward, sums which are required to be paid to individuals either in specific amounts fixed by law or in accordance with formulae prescribed by law." Obligations may not be incurred in excess of the amount apportioned. Apportionment is thus one of the principal devices for timing the availability of funds for obligation.

The law provides that while apportionments of funds are to be made by the Director, Office of Management and Budget, the head of each agency is required to submit to OMB information in such form and manner as the latter may prescribe. The requirements for this information are set forth in an Office of Management and Budget Circular.[191] In this instruction, OMB prescribes the apportionment schedules to be used by the departments and agencies in providing the information prescribed by OMB in meeting the requirements of the law.

Apportionment schedules are required to be submitted to OMB not later than 15 days after enactment of the appropriation, and OMB is to act on the schedules within 30 days after enactment. As a practical matter, the military departments start the preparation of their apportionment schedules and supporting data sometime before the appropriations for any given fiscal year are enacted, but after the Defense Appropriation bill has been passed by the House.

Prior to transmission to OMB, each apportionment schedule is reviewed within the Office of the Secretary of Defense. In making

---

[191] Office of Management and Budget Circular No. A-34.

this review, a determination must be made that each apportionment request is consistent with the overall Defense financial plan which is presented to the Appropriations Committees of Congress as an integral part of the Defense appropriations request. And where changes have been made in programs, it must also be determined that the apportionment request is consistent with the latest approved programs as reflected in the Five Year Defense Program. When major program changes occur subsequent to the date on which appropriations become available, the necessary reprogramming action must be made before funds are apportioned. In this connection, it should be noted that the law specifically requires that such changes be taken into account in the apportionment process. Finally, it must be determined that the rate of obligation proposed in the apportionment request is consistent with the expenditure estimates incorporated into the budget submitted to Congress. Following this review, the apportionment request is reviewed and either approved or revised by OMB, and the department or agency is notified of the decision. Apportionments are cumulative in that amounts not obligated in one period remain available for obligation in later periods of the fiscal year.

At the end of each month the department or agency must report the current status of its budgetary authorizations, and the cumulative apportionments, obligations, expenditures, and unliquidated obligations, as well as unobligated and unexpended balances. These reports, sent to the Treasury and to OMB, provide the basis for a reexamination of apportionment status, and if appropriate an adjustment in the apportionment schedule. In addition, agencies may at any time request a reapportionment in order to adapt their programs to changed conditions. OMB acts on such changes in the same manner as on the original request for apportionment. OMB must also examine the current status of apportionment requests each quarter to ascertain whether a reapportionment is necessary.

The law also gives to OMB as part of the apportionment process the authority to establish reserves and to withhold amounts of obligational authority not needed. Such reserves are established when circumstances indicate that an agency may not need all the obligational authority made available in the immediate fiscal year, for example, to provide for necessary obligations for emergency or unforeseen purposes that may arise from time to time; or, with respect to a multi-year appropriation, to insure that sufficient funds will be available for obligation in future fiscal years when needed. The establishment of such a reserve does not necessarily deprive

the department or agency from the use of the reserved funds, since they may subsequently be released if necessary, but only for the purposes of the appropriation.

While the apportionment procedures and concepts discussed above are applicable to all appropriations, the programs financed from military construction appropriations are subject to modified apportionment procedures that have been tailored to meet their specific needs. The currently applicable procedures are outlined in DoD Directive 7150.3, September 26, 1970, and involve lump-sum apportionment action on military construction appropriations under major program categories. In other words, military construction appropriations are controlled by programs, rather than by location.

B. ALLOCATIONS, ALLOTMENTS, AND OTHER FUND SUBDIVISIONS

Within each department or agency, the obligational authority apportioned by OMB is further distributed by a system of allotments. An allotment is defined in OMB Circular Number A-34 as "authority delegated by the head or other authorized employee of an agency to agency employees to incur obligations within a specified amount pursuant to an apportionment or reapportionment of an appropriation." The allotment authority is usually administered by the budget officer of the agency, acting on authority delegated by the head of the agency. Allotments are issued to organizational units of the agency, and are expressed in terms of a period of time, which is usually coincident with the period of time for which the apportionment is made, a maximum amount of funds which may be obligated, and a description of the authorized objects for which obligations may be incurred.

Within the Department of Defense, this initial step in the process of distributing authority to incur obligations is referred to as allocation, rather than allotment. When the apportionment schedules have been approved by OMB—with assistance provided by the Department of Defense as to the amounts to be apportioned to the separate military departments, referred to as the DoD Release of Funds—the Comptroller of the Army allocates funds to the special operating agencies and to those general operating agencies funded directly by Headquarters, Department of the Army. Special operating agencies may then suballocate these funds to operating agencies within their command jurisdiction. Funds received by suballocation may not be further suballocated, but they may be further dis-

tributed by means of allotments. General operating agencies may, upon receiving an allotment of funds from Headquarters, Department of the Army or a suballocation from a special operating agency, issue allotments to installations and activities under their command jurisdiction. The recipient of an allotment may further distribute funds by creating suballotments. Funds received by suballotment may not be further suballoted.

The recipient of an allotment or suballotment of funds is responsible for the administrative control of such funds. In this connection, allocations or suballocations which are not further subdivided by suballocation or allotment will be treated as allotments.

VI. APPROPRIATION TRANSFERS, REIMBURSEMENTS, AND RECEIPTS

A. TRANSFERS BETWEEN APPROPRIATIONS

Besides granting new obligational authority in the appropriations bills, Congress frequently grants to the departments and agencies a degree of flexibility in expending appropriated funds in the form of authority to transfer funds out of one appropriation account and into another.

A transfer of funds between appropriations does not represent an expenditure for goods and services received, or to be received, but serves only to adjust the amounts available in the appropriation accounts for obligation and expenditure, and is classified for accounting and reporting purposes as a nonexpenditure transaction.[192] Such a transfer may not properly be recorded as an obligation or expenditure of the transferor appropriation or as a receipt of the transferee appropriation.[193] Transfers between appropriations are thus to be distinguished from withdrawals from appropriations which represent payments to other appropriations, revolving funds, or working capital funds to carry out the purposes of the payor appropriation, which are not transfers but are disbursements and are classified as expenditure transactions.[194] Included in this category are

---

192 7 GAO MANUAL FOR GUIDANCE OF FEDERAL AGENCIES § 8.1. Accounting principles and procedures governing nonexpenditure transfers are set forth in 2 GAO MANUAL § 4020.80 and in DEPARTMENT OF DEFENSE ACCOUNTING GUIDANCE HANDBOOK, DoD 7220.9-H (August 1, 1972).

193 *Id.*

194 Office of Management and Budget Circular No. A-34, § 21.1 (July 10, 1971). The effect of project orders issued against revolving funds and under authority

payments for goods or services received on orders issued under Section 601 of the Economy Act.[195]

The statutory restriction on the purpose of appropriations requires that any transfer of funds between appropriations be specifically authorized by law.[196]

Authority for transfers may be granted in permanent, recurring or nonrecurring provisions of the law; most transfer authorities affecting the Department of Defense, however, are contained in the annual appropriation legislation. The most sweeping of these provisions is a general transfer authority found in Section 736:

> During the current fiscal year upon determination by the Secretary of Defense that such action is necessary in the national interest, he may, with the approval of the Office of Management and Budget, transfer not to exceed $750,000,000 of the appropriations or funds available to the Department of Defense for military functions (except military construction) between such appropriations or funds, to be merged with and to be available for the same purposes, and for the same time period, as the appropriation or fund to which transferred: Provided, That the Secretary of Defense shall notify the Congress promptly of all transfers made pursuant to this authority.[197]

Authority to transfer funds from one appropriation to another may be provided solely for administrative convenience and flexibility in obtaining funds necessary to meet emergency or unforeseen conditions.

B. MISCELLANEOUS RECEIPTS

The general rule with respect to repayments to appropriations from sources outside the government is set forth in 31 U.S.C. § 484, which requires that all monies received for the use of the United States shall be deposited into the Treasury as miscellaneous receipts.[198] Monies thus deposited cannot be withdrawn except in

---

of § 601 of the Economy Act as obligations is discussed *infra* at Chapter III, Section C, paragraph 11.

[195] Act of June 30, 1932, § 601, 47 Stat. 417, *as amended*, 31 U.S.C. § 686 (1970).

[196] 31 U.S.C. § 628 (1970). *See, e.g.*, 33 COMP. GEN. 216 (1953) (in the absence of express provision of law, the transfer of funds between appropriations is not authorized); 23 COMP. GEN. 694 (1944) (an unauthorized transfer amounts to an improper augmentation of the receiving appropriation).

[197] Department of Defense Appropriation Act, 1972, § 736, Pub. L. No. 92-204, 85 Stat. 733 (1971).

[198] 31 U.S.C. § 484 (1964) provides in part:

> The gross amount of all moneys received from whatever source for the use of the

consequence of appropriations made by law.[199] As a consequence, collections from outside sources, other than refunds discussed below, cannot be credited to an appropriation account unless specifically authorized by law.

Repayments to appropriations fall within two general categories; reimbursements and refunds.[200] Reimbursements are repayments for commodities, work, or services furnished, or to be furnished, by the agencies, usually under contracts or agreements. They are not necessarily directly related to any particular expenditure previously made. These transactions operate to augment the original amount appropriated by Congress, and accordingly such repayments may be credited to an appropriation only when authorized by law. All collection documents involving reimbursements to appropriations which are credited to the appropriation should contain a citation of the authority permitting the amounts involved to be credited to an appropriation. *Refunds* are directly related to expenditures previously made, and represent adjustments for payments in excess of what actually was due, such as collections for (1) payments in error, (2) overpayments, (3) items rejected and returned, (4) allowances on articles retained but which are not completely satisfactory, (5) recoveries on payment for contractual services where such contracts are cancelled and adjustments made for the unused portion, and (6) any amounts collected in excess of what is actually due under contracts as adjusted for final settlement. Collections representing refunds do not operate to augment the appropriation involved. It has long been the rule that if a collection involves a refund of monies paid from an appropriation in excess of what actually was due, such refunds are properly for credit to the appropriation originally charged.[201]

Amounts recovered from defaulting contractors as the excess costs of replacement contracts may not be applied to the cost of a reprocurement, but are for deposit into the Treasury as miscellane-

---

United States, except as otherwise provided in section 487 of this title, shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim or any description whatever. . . .

31 U.S.C. § 487 (1964) provides generally that proceeds from the sale of public property, with certain exceptions, shall be deposited into the Treasury as miscellaneous receipts in the absence of authority to the contrary.

[199] U.S. CONST. art. I, § 9, cl. 7.

[200] 7 GAO 13.2 (1967).

[201] 5 COMP. GEN. 734, 736 (1926).

ous receipts.[202] Perhaps the strongest argument against this proposition from a practical standpoint—that fulfillment of the objects for which an appropriation is made available is frustrated when, because of the failure of a contractor to satisfactorily perform, the funds appropriated are used merely to increase the revenues of the Treasury rather than for the performance of work—proved not to be persuasive in an early decision:

> [T]he appropriations are chargeable with the actual amount necessary for the procurement of the supplies or the doing of the work for which the appropriations are made available and the actual amount chargeable is the amount paid for the goods or services obtained under [the terminated] contract or otherwise.[203]

Some of the decisions which restate this principle have authorized recoveries from defaulting contractors to be credited to the appropriation originally charged with the cost of the contract when the recovery is in the nature of a contract price adjustment in an amount representing payments to the contractor in excess of the value of work performed, on the theory that the appropriation has been erroneously charged with such payments in the first instance. Thus, the Comptroller has permitted a credit to the appropriation of amounts recovered from a construction contractor or its surety for the cost of corrections to work which failed to meet specifications after the contractor had received final payment on the contract.[204] The Comptroller emphasized in that decision that payment to the contractor had not been authorized by the contracting agency, thus reinforcing the rationale that the recovery represented the refund of an improper overpayment. A later decision involving similar facts arrived at the same conclusion simply on the basis that the recovery represented payments to the contractor in excess of the value of the work satisfactorily performed under the contract.[205]

These decisions involve contracts terminated for default after payment has been made to the defaulting contractor for all or part

---

[202] 8 COMP. GEN. 284 (1928); 10 COMP. GEN. 510 (1931); 14 COMP. GEN. 106 (1934); 14 COMP. GEN. 729 (1935); 27 COMP. GEN. 117 (1947); 40 COMP. GEN. 590 (1961); 46 COMP. GEN. 554 (1966).

[203] 10 COMP. GEN. 510, 511 (1931).

[204] 34 COMP. GEN. 577 (1955).

[205] 44 COMP. GEN. 623 (1965). *See also* 27 COMP. GEN. 117 (1947) (funds received from surety represented recovery of advance payment of the entire contract consideration and were available for reprocurement; recovery of amounts in excess of advance payment were for deposit as miscellaneous receipts).

of the unsatisfactory performance; amounts recovered are credited to the appropriation involved only to the extent that they include payments for unsatisfactory work and are thus in the nature of price adjustments. When the defaulting contractor has received no payments or when contract payments have been made only on account of delivered work, any excess costs of reprocurement are considered as damages resulting from a breach of contract rather than adjustments made in the contract price on account of a previous overpayment, and are for deposit as miscellaneous receipts.

Similarly, refunds accruing to the Government under contracts containing guaranty or warranty provisions are for credit to the appropriation charged with the contract. In a decision concerning the disposition to be made of refunds under a contract for the overhaul of aircraft engines—which contained a warranty clause providing for a pro rata reduction in the contract price for parts which become inoperative during the effective period of the warranty—the Comptroller concluded that since refunds under the clause were in the nature of a price adjustment equivalent to the value of service remaining due under the contract, they were properly for credit to the appropriation originally charged with the work, if still current.[206]

The rule that a refund of payments improperly made from an appropriation is to be returned to the appropriation has also been applied to refunds resulting from contract price redeterminations.[207] The cited decision arrived at this result with respect to a voluntary refund made by a contractor prior to negotiating a final price revision under a fixed-price, redeterminable contract: such a refund is the return of an admitted overpayment.[208] This rationale does not, however, extend to refunds involving contracts which do not require a price revision and which are completely voluntary in nature:

> It is assumed that in such cases the payment to the contractor was made pursuant to an agreement reached between the United States and the contractor as to the purchase price to be paid; and if thereafter the contractor elects to return a part of the purchase price there would seem to be no justification for regarding the amount returned as an overpayment . . . .[209]

---

[206] 34 COMP. GEN. 145 (1954); *cf.* 27 COMP. GEN. 384 (1948).

[207] 33 COMP. GEN. 176 (1953).

[208] *Id.* at 176.

[209] 24 COMP. GEN. 847, 851 (1945).

Amounts which represent liquidated damages recovered from defaulting contractors should generally be credited to the appropriation charged with the contract, since they represent adjustments in the contract price and because in this way they remain available for return to the contractor in the event it is relieved from liability.[210] Accordingly, where no repayments have been made under the contract and a request for remission has been denied, liquidated damages are for deposit as miscellaneous receipts.[211]

Funds received by a cost-reimbursement contractor as compensation for damages to Government property from a third party are for deposit into the Treasury, and may not be retained by the contractor in reduction of the contract price.[212]

The general rule that refunds of improper payments should be returned to the appropriation originally charged with the payment remains applicable when that appropriation has expired.[213] Formerly, the rule was that repayments of any nature to a lapsed appropriation were to be credited to miscellaneous receipts instead of to the appropriation.[214]

Title 31, Section 484 of the United States Code precludes the conduct of a program or activity for which Congress appropriates funds on a self-sustaining basis with revenues generated from its own operations. If funds received by a department or agency as a result of contracts made by it to furnish commodities or services to others were retained in its own appropriation account, the use of such funds for the same purposes for which the appropriation is made would operate to augment the appropriation.

A decision which illustrates this principle[215] concerned the availability of a revolving fund to finance a silver recovery program conducted by the Veterans' Administration. X-ray film contains a small quantity of pure silver which, when the film is exposed and developed, washes from the film into the chemical firing solution and is thus economically recoverable. The Veterans' Administration proposed to establish a recovery program as a revolving fund op-

---

210 44 COMP. GEN. 623 (1965) and decisions therein cited.

211 46 COMP. GEN. 554 (1966).

212 48 COMP. GEN. 209 (1968).

213 31 U.S.C. § 701(c) (1973 Supp.).

214 31 U.S.C. § 690 (1964) (repealed). *See also* 34 COMP. GEN. 145 (1954). *But see* 44 COMP. GEN. 623 (1965), where, even prior to the repeal of 31 U.S.C. 690, the Comptroller held that excess costs of reprocurement or liquidated damages may be deposited in a successor account.

215 40 COMP. GEN. 356 (1960).

eration, with expenses of the program financed by the fund and proceeds from the sale of silver credited to the fund.[216] The revolving fund was then being used for the procurement of, *inter alia*, X-ray supplies and equipment, with reimbursement from the appropriation chargeable for the cost of the items and for the cost of maintaining the fund. The Comptroller reasoned that since the statute authorizing the fund[217] qualified the purposes for which it was available to those which were reasonably connected with and incident to the accomplishment of the regular activities of the VA, it was not authority for industrial-type operations having no relation to the care and treatment of patients, such as silver reclamation. Accordingly, neither the revolving fund nor the appropriation charged with the cost of the X-ray film or developing solution was available for the cost of the program. Any proceeds from the sale of silver were for deposit as miscellaneous receipts, rather than for retention by the VA for further recovery operations.

Similarly, the purchase of postage stamps for the same purpose for which a specific amount has been appropriated to cover the cost of penalty mail has been held to be on unauthorized augmentation of the penalty mail appropriation.[218] And contracts for food services which required the contractor to deposit into a special account a specified percentage of receipts as a reserve to be used for the repair and replacement of government owned equipment have been held improper.[219]

The Comptroller has stated, in connection with an exchange of old property for new that

> [t]he exchange of old property in partial payment for new property is in effect the sale of the old property and the application of its sale price to the purchase price of the new property and as it is obvious that such procedure directly augments the appropriations otherwise made available by the Congress for the purposes of the spending agency and thus clearly contravenes the statutory provisions cited, such procedure may not be viewed as lawful except where it is expressly authorized by statute.[220]

---

[216] The revolving fund concept represents the major exception to the miscellaneous receipts rule, since revenues from operation of the fund are retained to avoid its depletion. *See generally* Ch. II, Section F *supra*.

[217] 38 U.S.C. § 5011 (1964).

[218] 27 COMP. GEN. 722 (1948).

[219] 35 COMP. GEN. 113 (1955).

[220] 16 COMP. GEN. 241, 243 (1936). However, 40 U.S.C. 481(c) provides that: [I]n acquiring personal property, any executive agency, under regulations to be prescribed by the Administrator, may exchange or sell similar items and may apply the exchange allowance or proceeds of sale in such cases in whole or in part payment

Similar reasoning has been applied in a number of decisions holding that the costs of preparation of property for sale were not "expenses of such sales" within the meaning of 31 U.S.C. § 489[221] so as to be chargeable to the proceeds of sale.[222] It was in the light of these decisions that the following provisions included in the appropriation "Ordnance Service and Supplies, Army" contained in the Military Appropriation Act, 1948:

> *Provided,* That, notwithstanding the provisions of any other law, not more than $25,000,000 of the amounts received by the War Department during the fiscal year 1948 as proceeds from the sale of scrap or salvage material shall be available for expenses of transportation, demilitarization, and other preparation for sale or salvage of military supplies, equipment, and materiel.[223]

Similar provisions have been included in all subsequent annual appropriation acts for the military departments with no major changes other than the elimination of the dollar limitation.[224]

C. *REPROGRAMMING*

1. Definition.

Reprogramming is the diversion of appropriated funds by a department or agency from the specific purpose for which originally justified to a different use.[225] Reprogramming does not involve the transfer of funds between appropriations, which requires statutory authority.[226] Instead, the diversion in use of funds takes place within the legal confines of an appropriation. There is no change in the total amount available in the appropriation account, since in any reprogramming action the amount of funds to be added to a program must be offset with deletions from another program. And

---

for property acquired: *Provided,* that any transaction carried out under the authority of this subsection shall be evidenced in writing.

ASPR Section IV, Part 2, prescribes procurement policies and procedures governing exchange/sale authority within DoD.

221 Act of June 8, 1896, § 1, 29 Stat. 268, *as amended,* 31 U.S.C. § 489 (1970).

222 5 COMP. GEN. 680 (1926) and decisions therein cited; 28 COMP. GEN. 594 (1949); 33 COMP. GEN. 31 (1953); 37 COMP. GEN. 59 (1957).

223 Act of July 30, 1947, 61 Stat. 562.

224 Section 712, Department of Defense Appropriation Act, 1973, Pub. L. No. 92-570, 86 Stat. 1204 (Oct. 26, 1972).

225 DEPARTMENT OF DEFENSE REPROGRAMMING OF APPROPRIATED FUNDS, A CASE STUDY, REPORT OF SUBCOM. FOR SPECIAL INVESTIGATIONS OF THE HOUSE COMM. ON ARMED SERVICES, 89th Cong., 1st Sess. 1 (1965).

226 31 U.S.C. § 628 (1970).

because the purpose of such actions may in no way deviate from the appropriation language descriptive of the purposes for which the funds have been provided, the funds are applied only for purposes for which the appropriation is legally available.

2. Reprogramming and the Congress.

The Authorization and Appropriation Acts for the Department of Defense provide funds in terms of lump-sum amounts for broad appropriation accounts, for example, operations and maintenance, military personnel. Detailed justifications and cost breakdowns are presented to the Armed Services and Appropriations Committees of the House and Senate to support the Department's request for funds, and the decisions of the Committees and the Congress are based on these justifications. The funds provided to the Department of Defense then, are the totals of the costs of programs approved by the Committees and the Congress. The acts do not, however, carry forward the language of these justifications.

The traditional view with respect to a lump-sum appropriation is that the legal availability of funds for a particular obligation does not depend on whether the obligation is related to particular programs justified before Congress, but whether the obligation is necessary or incidental to the purposes for which the appropriation is made. Thus, the Comptroller General has held that budget estimates and related justifications are not binding on administrative officers in deciding questions of availability of the use of funds, unless carried into the language of the act making the appropriation.[227]

But Congress has insisted on maintaining the integrity of the justifications presented in support of budget requests.[228] In so doing, it has emphasized that the Department of Defense is committed to programs justified to Congress, and that any significant deviation from approved programs is beyond the normal authority of the Department.[229]

On the other hand, Congress recognizes that flexibility must be provided within the terms of the appropriation acts because of the lengthy period between justification of a program and the obligation of funds. The Department must be able to meet changing

---

[227] 17 COMP. GEN. 147 (1937).

[228] *See, e.g.*, H.R. REP. No. 493, 84th Cong., 1st Sess. 8 (1955).

[229] DEPARTMENT OF DEFENSE REPROGRAMMING OF APPROPRIATED FUNDS, A CASE STUDY, *supra* note 225.

conditions without coming back to Congress for a formal change in the appropriation act or for a supplemental appropriation. Reprogramming may be dictated by a change in requirements, a technological breakthrough, a discovery that price estimates supporting the original justification were incorrect, an increase in wages or the cost of materials, or by legislative changes enacted subsequent to the authorization or appropriation act.

3. Current Reprogramming Procedures.

DoD Directive 7250.5 and DoD Instruction 7250.10 describe procedures for submitting reprogramming actions to the Armed Services and Appropriations Committees of each House, either as a request for prior approval or simply as notification for informational purposes, depending on the nature of the action. The procedural limitations outlined in the Directive for Congressional surveillance of reprogramming is the result of informal agreements with Congress concerning the degree of discretion the Department would exercise in the execution of budget programs.

Any reprogramming action must first be specifically approved by the Secretary of Defense, or the Deputy Secretary of Defense, before being submitted to the Armed Services and Appropriations Committees.

The prior approval of the Armed Services and the Appropriations Committees is required with respect to any reprogramming action involving the application of funds, irrespective of the amount, to (a) items or activities deleted by Congress from programs as originally presented; (b) items or activities for which specific reduction in amounts originally requested were made by Congress; (c) any increase in procurement of aircraft, missiles, naval vessels, tracked combat vehicles, or other weapons for which appropriations are authorized by legislation pursuant to Section 412(b) of Public Law 86-149, as amended;[280] and (d) reprogramming no-year funds from an earlier fiscal year program to a later fiscal year program.[281]

When approval of the committees is required, they are notified by the armed services of the requested reprogramming. The commit-

---

[280] Act of Nov. 19, 1969, Pub. L. No. 91-121, § 405, 83 Stat. 207.

[281] This results from Department of Defense Appropriation Act, 1970, Act of December 29, 1969, Pub. L. No. 91-171, § 642, 83 Stat. 487, providing that certain unobligated balances of appropriations for procurement be identified in the annual DoD budget submission and recommended for rescission.

tees then have 15 days to object to the reprogramming. If the committees object to the reprogramming it cannot be undertaken. If the Department of Defense does not receive notice of objection or approval within 15 days, it can assume that there is no objection to the proposed reprogramming.

For other types of reprogramming, the Armed Services and Appropriations Committees, as appropriate, are to be notified promptly (within two working days) of approval by the Secretary or Deputy Secretary of reprogramming actions that involve shifting of funds in significant amounts, as described in Department of Defense Instruction 7250.10, including: (a) an increase of $5 million or more in a budget activity in the military personnel or operations and maintenance appropriation; (b) an increase of $5 million or more in a procurement line item, or an addition to the procurement line item base of a new item in the amount of $2 million or more; and (c) an increase of $2 million or more in any budget subactivity line item in an appropriation for research, development, test and evaluation, including the addition of a new budget subactivity line item, the cost of which is estimated to be $10 million or more within a three-year period.

While prior approval of the committees is not specifically required for such reprogrammings, if any of the committees indicates objection to the reprogramming within fifteen days, such reprogramming must be reconsidered by the Secretary of Defense.

In the case of construction funds, for which authorizations and appropriations are made by line item, the reprogramming procedure is somewhat different. The authorization and appropriation acts specifically provide authority for reprogramming in the form of transfer fund limitations, and the Department can reprogram funds within that limitation.[232] The amount of this transfer authority constitutes an absolute ceiling on the extent of reprogramming. As in the case of reprogramming funds provided under a lump-sum appropriation, the total amount of funds available in the construction appropriation account remains constant; the amount of funds to be added to a program must be offset with a corresponding deletion from another program.

---

[232] For example, in the Military Construction Authorization Act, 1973, the authority allowed was $10 million. Act of October 25, 1972, Pub. L. No. 92-545, § 102, 86 Stat. 1137. Because 31 U.S.C. § 628 limits the use of appropriations to the objects for which made and no others, there could be no reprogramming within a specific appropriation without such statutory authority.

The procedure with respect to reprogramming construction funds requires the Department to notify the Committees of its intent to reprogram with detailed information on where funds are to be added and from which line items funds are to be deleted. The Department then withholds action for 30 days. If the Committees do not object to the reprogramming within that period, the Department can then proceed with the reprogramming. If any of the Committees objects, the action cannot be undertaken.

In addition, there exists permanent authority for restoration or replacement of facilities damaged or destroyed.[238] When this authority is used, the Armed Services Committees are notified by the military departments. The notice includes a description of the work and an estimate of the cost. The Secretary of Defense requests the Appropriations Committees' approval to finance the work from funds available in the construction account involved, and indicates the source of funds to cover the estimates.

---

[238] 10 U.S.C. § 2673 (1970).

BOOKS RECEIVED*

1. Bekker, Cajus, *Hitler's Naval War*. New York: Doubleday & Co., Inc., 1975. Pp. 386.
2. Bentley, John, *The Thresher Disaster*. New York: Doubleday & Co., Inc., 1975. Pp. 365.
3. Edwards, Roger, *German Airborne Troops*. New York: Doubleday & Co., Inc., 1975. Pp. 160.
4. Gregory, Barry, *British Airborne Troops*. New York: Doubleday & Co., Inc., 1975. Pp. 160.
5. Kurzmann, Dan, *The Race for Rome*. New York: Doubleday & Co., Inc., 1975. Pp. 486.
6. Marks, Anne W. (ed.), *NBT: Paradoxes and Problems*. Washington: Arms Control Association, 1975. Pp. 106.
7. Petersen, Peter B., LTC, *Against the Tide: An Argument in Favor of The American Soldier*. New Rochelle: Arlington House, 1974. Pp. 284.
8. Russ, Martin, *Line of Departure: Tarawa*. New York: Doubleday & Co., Inc., 1974. Pp. 201.

---

* Mention of a work in this section does not preclude later review in the *Military Law Review*.

By Order of the Secretary of the Army:

FRED C. WEYAND
General, United States Army
Chief of Staff

Official:

VERNE L. BOWERS
Major General, United States Army
The Adjutant General

DISTRIBUTION:

Active Army: To be distributed in accordance with DA Form 12-4 requirements for the Military Law Review.
ARNG & USAR: None

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975—621-288/3 REGION NO. 3-11.