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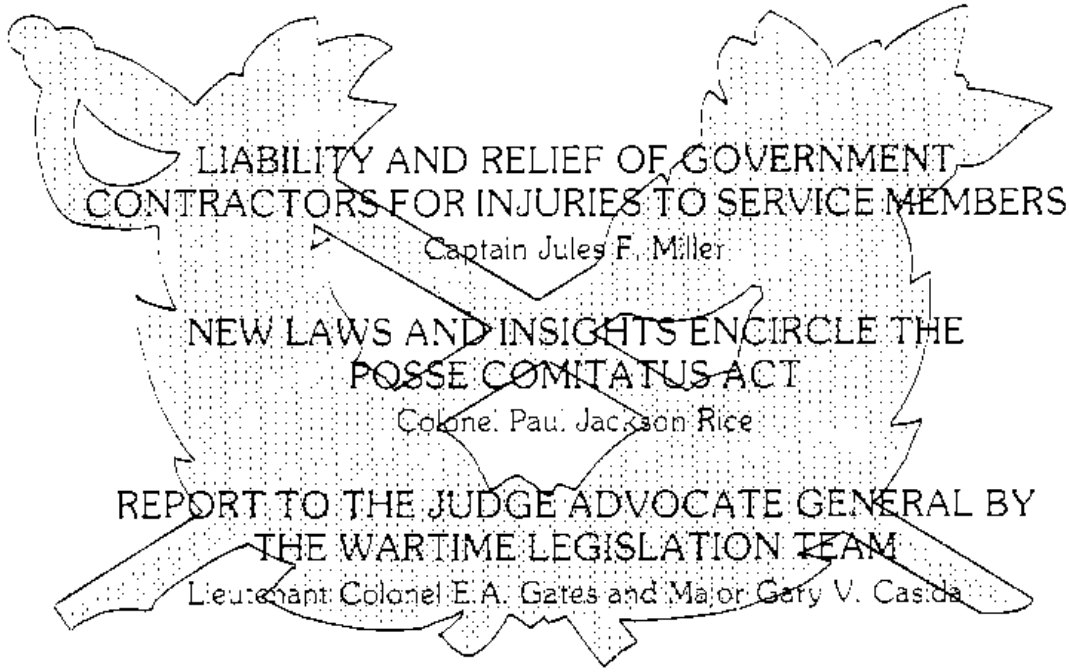
MILITARY LAW REVIEW



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LIABILITY AND RELIEF OF GOVERNMENT CONTRACTORS FOR INJURIES TO SERVICE MEMBERS*

by Captain Jules F. Miller**

I. INTRODUCTION

The recent litigation by Vietnam veterans suffering from exposure to the chemical Agent Orange is but one example of a trend by victims of the harmful effects of the research and products of government contractors to seek damages directly from the contractors. The government's demand for research on the fringes of technology and for products at the state of the art increases the likelihood of injury or death.

Anyone can be harmed by a government contractor's research and products. Since military members are the most frequent users of such research and products, however, they are the most likely victims. Because these persons are not a party to the contract between the government and the contractor, they are considered third-party victims.

The purpose of this article is to examine the liability and the relief from liability of government contractors for their research and products. The first section examines the immunity of the government from liability since the government's ability to avoid liability is becoming directly proportional to the attempts to establish liability in a contractor. The second section considers the methods of placing liability on a contractor as well as the contractor's defenses to those methods. The last two sections focus on the means by which a contractor held liable for third-party damages may obtain relief either through insurance or by indemnification or contribution from the government.

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*The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of the Department of Defense or any of the military departments. This article is based upon a thesis submitted by the author in partial satisfaction of the requirements for the LL.M. degree at The George Washington University.

**Judge Advocate General's Department Reserve, United States Air Force. Currently General Counsel, Defense Audiovisual Agency, and currently attached as an Air Force reservist to the Air Force Litigation Division, Washington, D.C. Formerly, Attorney-Advisor, Navy Office of General Counsel, Washington, D.C., 1981-1982; Chief of Contract Law, Office of the Staff Judge Advocate, Hickam Air Force Base, Hawaii, 1977-1980; Assistant Staff Judge Advocate, Office of the Staff Judge Advocate, Eglin Air Force Base, Florida, 1975-1976. LL.M., The George Washington University, 1983; J.D., Saint Louis University School of Law, 1975; A.B., Saint Louis University, 1972. Member of the bars of the state of Missouri and the United States Court of Military Appeals.

II. GOVERNMENT IMMUNITY

The ability of the government to avoid liability for injuries to third parties resulting from contractor research or products has had the obvious consequence of causing injured plaintiffs to look for other defendants. In such instances, the contractor providing the research or product is the most logical candidate. The broader the government's immunity from suit by injured third parties, the more likely that a suit will be filed against the contractor.

A. SOVEREIGN IMMUNITY

Based on the principle recognized over 150 years ago by the United States Supreme Court in *Cohens v. Virginia*,[1] the United States enjoys sovereign immunity from suit. While the Supreme Court has based this immunity on some occasions upon the theory that the United States is the institutional descendant of the English Crown[2] and on other occasions upon the theory that there is no legal right against the authority that makes the law,[3] the protection has remained intact. The government is immune from suit, at least insofar as it has not specifically consented to be sued.[4]

The Congress has enacted a number of express waivers of the government's immunity from suit, such as the Tucker Act[5] and the Federal Tort Claims Act.[6] The Tucker Act permits suits on contracts, but this is little relief to injured third parties not in privity with the United States. Tort actions are permitted by the Federal Tort Claims Act, but important judicial and statutory exceptions restrict the availability of this relief. The Federal Tort Claims Act and the limitations thereof are the principal subjects of the remainder of this section.

Of at least minor significance, however, is the Military Claims Act.[7] While the Act is not a waiver of sovereign immunity, it does provide a statutory means of compensating victims injured or killed by the noncombatant activities of the military services.[8] The harm

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[1]19 U.S.(6 Wheat.) 264, 412 (1821).
[2]Langford v. United States, 101 U.S. 341, 343 (1880).
[3]Kawananakoa v. Polyblank, 205, U.S. 349, 353 (1907).
[4]Although the government enjoys such immunity, it is still a privilege susceptible to confinement. Government-created corporations, therefore, are not immune from suit absent an express statement of immunity in their charters. Kiefer & Kiefer v. Reconstruction Finance Corp., 306 U.S. 381 (1939).
[5]28 U.S.C. §§ 1346(a), 1491 (1976). *See also* Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613 (Supp. III 1979).
[6]28 U.S.C. §§ 1346(b), 2671-2680 (1976).
[7]10 U.S.C. §§ 2731-2737 (1976).
[8]*Id.* at § 2733(a).

must be caused by service members or civilian employees of the military acting in the scope of their employment.[9] Military members and civilian employees may not obtain relief if their injury or death is incident to service,[10] such as when a sailor is struck by a Navy vehicle while the sailor is walking to work.[11] Recovery under the Act is limited to $25,000.[12] Nonetheless, third parties whose damages are less than this amount will not seek to recover from government contractors.

B. FEDERAL TORT CLAIMS ACT

1. Effect of the Federal Tort Claims Act.

Subject to numerous exceptions, the government has waived its sovereign immunity from suit for actions sounding in negligence. This waiver was accomplished by the Federal Tort Claims Act (FTCA), which provides:

> [T]he district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[13]

The FTCA makes the government liable to the same extent as if it were a private party under state law.[14] The law of the jurisdiction where the act or omission occurred will govern.[15] The source of the government's duty, then, is a matter of state law.

The FTCA, however, does not create any new causes of action. The most that it does is waive the government's sovereign immunity, so that otherwise recognized causes of action may proceed. It does not bring novel or unprecedented liabilities upon the government.[16]

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[9]*Id.*
[10]*Id.* at § 2733(b).
[11]Welch v. United States, 446 F. Supp. 75 (D. Conn. 1978).
[12]10 U.S.C. at § 2733(a).
[13]28 U.S.C. § 1346(b) (1976).
[14]*Id.*
[15]Watson v. United States, 346 F.2d 52, 53 (5th Cir. 1965), *cert. denied*, 382 U.S. 976 (1966).
[16]Dalehite v. United States, 346 U.S. 15 (1953).

Indeed, the waiver of sovereign immunity is predicated upon a tort cause of action cognizable under state law.[17] Consequently, the FTCA should be viewed as a procedural rather than a substantive statute.

The waiver of sovereign immunity is possible only when the plaintiff proves that he or she was harmed due to the negligent acts or omissions by government employees.[18] The act or omission must be operational in character rather than discretionary.[19] Furthermore, the government employees must be acting within the scope of their employment.[20] If the government employees are military members, acting within the scope of employment would generally encompass acts performed while in the line of military duty.[21]

2. Operation of the Federal Tort Claims Act.

An administrative claim must be filed with the government as a prerequisite to suit under the FTCA.[22] Suit may be initiated six months thereafter or upon the final denial of the claim, whichever occurs first.[23] Suit only may be filed in a federal district court.[24] Trial is by judge alone[25] and neither punitive damages nor prejudgment interest are recoverable.[26]

All claims under the FTCA must be asserted administratively no later than two years after the claim accrues.[27] A "sum certain" must be claimed[28] and a failure to do so will result in dismissal.[29] Claims for relief other than money damages are not permitted.[30]

Although federal district courts have exclusive jurisdiction over FTCA actions, state courts may become intrinsically involved in the proceedings. This involvement results because liability and its ancillary issues are determined by state law. Federal courts may consequently defer to or even seek the opinion of state courts in relevant jurisdictions. In *United States v. Aretz*,[31] for example, a federal

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[17]Contemporary Mission, Inc. v. U.S. Postal Service, 648 F.2d 97 (2d Cir. 1981).
[18]McGarry v. United States, 370 F. Supp. 525 (D. Nev. 1973), *aff'd in part, rev'd in part on other grounds*, 549 F.2d 587 (9th Cir. 1976), *cert. denied*, 434 U.S. 922 (1977).
[19]*See* text accompanying notes 38-48 *infra*.
[20]United States v. Orleans, 425 U.S. 807 (1976).
[21]Lutz v. United States, 685 F.2d 1178 (9th Cir. 1982).
[22]22 U.S.C. § 2675(a) (1976).
[23]*Id.*
[24]28 U.S.C. at § 1346(b).
[25]28 U.S.C. § 2402 (1976).
[26]28 U.S.C. § 2674 (1976).
[27]28 U.S.C. § 2401(b) (1976).
[28]28 C.F.R. § 14.2(a) (1983).
[29]Avril v. United States, 461 F.2d 1090 (9th Cir. 1972).
[30]Fitch v. United States, 513, F.2d 1013 (6th Cir.), *cert. denied*, 423 U.S. 866 (1975).
[31]503 F. Supp. 260 (S.D. Ga. 1977).

district court found the government liable under the FTCA for an explosion and fire at a plant operated by a contractor. After damages were awarded to one of the contractor's employees under the FTCA,[32] the case was appealed to the Fifth Circuit, which affirmed,[33] but later granted a rehearing *en banc*.[34] Finally, the panel certified question to the Supreme Court of Georgia[35] and asked whether, under the law of Georgia, the United States owed a duty to the plaintiff and whether the breach of such duty was the proximate cause of the explosion. Answering that the United States did owe a duty and that the breach of that duty was the proximate cause of the injury, the state court essentially disposed of the action under the FTCA.[36]

3. Specific Exceptions to the Federal Tort Claims Act.

The large number of statutory and judicial exceptions to the FTCA have made it something other than the broad waiver of sovereign immunity that a first reading may indicate it to be. The exceptions are of critical importance, since that which is excepted from the FTCA remains subject to the government's sovereign immunity. In other words, whatever falls within an exception may not be brought as an action against the government.

In most cases, military personnel and government civilian employees fall, respectively, within a judicial exception and a statutory exception.[37] Additionally, a number of other exceptions are specified within the FTCA.

(a) Discretionary functions.

The government is not liable for harm resulting from the performance of or failure to perform "discretionary" functions.[38] When an act is determined to be other than discretionary, it is classified as "operational".[39] Government activity can involve both discretionary and operational aspects. As an example, in an action by a shipowner for the negligent operation of a lighthouse, the government's decision to put a lighthouse where it did was discretionary, but its maintenance of that lighthouse was operational.[40]

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[32]456 Supp. 397 (S.D. Ga. 1978).
[33]604 F.2d 417 (5th Cir. 1979).
[34]616 F.2d 254 (5th Cir. 1980).
[35]635 F.2d 485 (5th Cir. 1981).
[36]248 Ga. 19, 280 S.E.2d 345 (1981).
[37]*See* text accompanying notes 65-116 *infra*.
[38]28 U.S.C. § 2680(a) (1976).
[39]*See* note 16 *supra*.
[40]Indian Towing, Inc. v. United States, 350 U.S. 61 (1955).

Even if government employees were grossly negligent in conducting a pre-award survey, the decision to award a contract to any particular contractor is a discretionary function.[41] Likewise, the enforcement of a Department of Defense safety manual incorporated into a contract is a discretionary function.[42]

Some confusion does exist on the question of whether the drafting and approval of contract specifications is a discretionary function. In *Irzyk v. United States*,[43] the Tenth Circuit cited *Dalehite v. United States*[44] and concluded that, in the absence of unusual conditions, the matter of contract specifications is generally a discretionary function. In *Seaboard Coast Line Railroad Co. v. United States*,[45] the Fifth Circuit also cited *Dalehite*, but reached the opposite conclusion.

Nonetheless, a reconciliation of both *Irzyk* and *Seaboard* is possible. What is most helpful is inquiry about the level at which the specifications were drafted and approved, rather than inquiry into whether specification preparation, *per se*, is discretionary. A review of two Ninth Circuit cases helps to focus the inquiry. In *United States v. Hunsucker*,[46] the Ninth Circuit held that, while the decision to activate an Air Force base was made at the "planning level," the directive authorizing base construction did not specifically authorize a drainage ditch. The decision to install a drainage ditch, therefore, was made at the "operational level," *i.e.*, the base level rather than the headquarters level. As a result, the government was not immune from suit. Similarly, in *Driscoll v. United States*,[47] the decision of the civil engineer at Luke Air Force Base not to install a street crosswalk or warning device was held by the Ninth Circuit to be a decision made at the operational and not the planning level. Again, the government had no immunity pursuant to the discretionary function exception because the decision was an operational decision.

Applying the decision-level approach to *Irzyk* and *Seaboard*, any inconsistency can be removed. In *Irzyk*, the design of a sewer line caused flooding on plaintiff's property. The specifications for the sewer line were prepared by the Bureau of Indian Affairs. Although a local project officer was assigned, he had no authority to change the specifications. Even though a local inspector negligently inspected the sewer line and failed to find the defect, the preparation of the

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[41]McMichael v. United States, 521 F. Supp. 1273 (D. Ark. 1981), *aff'd in part, rev'd in part on other grounds*, 679 F.2d 736 (8th Cir. 1982).

[42]*Id.*

[43]412 F.2d 749 (10th Cir. 1969).

[44]346 U.S. 15 (1953).

[45]473 F.2d 714 (5th Cir. 1973).

[46]314 F.2d 98 (9th Cir. 1962).

[47]525 F.2d 136 (9th Cir. 1975).

specifications was held to be discretionary.[48] Considering the absence of authority in the on-site government employees, such a result should not be unexpected. Conversely, in *Seaboard*, the decision to build a helicopter hangar with a drainage ditch system at Fort Rucker was made at higher Army headquarters. The actual design of the ditch, including the placing of it next to the railroad tracks which later collapsed, was made at Fort Rucker. It should not be surprising, then, that such a low level decision was held to be outside the discretionary function exception. Consequently, the decision level approach appears to be a useful tool for making discretionary/operational determinations, at least where specifications are involved.

(b) Contractor Torts.

Since the FTCA waives sovereign immunity for the torts of government employees, the government is not liable under the FTCA for the torts of its contractors.[49] Some plaintiffs have attempted to avoid this exception by demonstrating a "personal services" relationship is actually involved, so that the contractor is nothing more than a government employee.[50] Resolution of this issue usually depends on the degree of control the government exercises over the contractor's performance.[51] The government generally avoids liability when it neither possesses the authority to control nor actually does control the employees of the contractor.[52]

Sometimes, however, the opposite can be true and the government will escape liability because it retains a high degree of supervisory control. In *Lewis v. United States*,[53] an injured contractor employee sued the United States for negligent inspection and maintenance of safety conditions. Under Nevada law, an employee of a subcontractor is considered an employee of the principal contractor and independent contractors are included in the term "subcontractors". Nevada law also limited the total recovery of such an employee to a share in a compensation fund. Focusing on the high degree of control the government retained over its contractor, the court concluded that the government was a "principal contractor" within the mean-

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[48]The facts are detailed at United States v. Irzyk, 388 F.2d 982 (10th Cir. 1968).
[49]Logue v. United States, 412 U.S. 521 (1973).
[50]*See, e.g.*, Kropp v. Douglas Aircraft Co., 329 F. Supp. 447 (E.D.N.Y. 1971).
[51]*See* text accompanying note 45 *supra*.
[52]Harris v. Pettibone Corp., 488 F. Supp. 1129 (E.D. Tenn. 1980); White v. United States, 472 F. Supp. 259 (W.D. Pa. 1979).
[53]501 F. Supp. 39 (D. Nev. 1980), *rev'd on other grounds*, 680 F.2d 68 (9th Cir. 1982).

ing of state law and thus immune from tort liability.[54] Consequently, the court granted the government's motion for summary judgment.[55]

(c) Strict Liability.

The language of the FTCA limits the waiver of government immunity to a "negligent or wrongful act of omission."[56] Accordingly, the waiver of sovereign immunity does not extend to strict liability.[57] This means that the exception to the FTCA for strict liability permits the government to maintain its sovereign immunity when it is without fault.[58]

(d) Other Exceptions.

In certain specific factual situations, the United States also is afforded refuge from FTCA liability. For example, FTCA jurisdiction is excluded for claims arising in a foreign country[59] or involving the combatant activities of the armed forces during war.[60] Likewise, claims based upon deceit and misrepresentation as well as assault, battery, false imprisonment, and interference with contract rights are excluded;[61] the government retains its sovereign immunity over such claims. In addition, special exceptions exist for the Post Office Department,[62] the Tennessee Valley Authority,[63] and federal land banks.[64]

C. FERES DOCTRINE

1. Application of the Feres Doctrine.

The death of Lieutenant Rudolph J. Feres more than thirty years ago has had a profound and detrimental effect on military members and their estates seeking recovery under the FTCA. Considering that military members are the most likely victims of contractor

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[54]Admittedly, the precedential value of *Lewis* may be limited by the unique circumstances of Nevada law, but the case demonstrates that surprising exceptions to the Federal Tort Claims Act may be found through operation of state laws.

[55]The Ninth Circuit found that genuine issues of fact existed regarding the amount of the government control at the jobsite and reversed the summary judgment. The Ninth Circuit did not take exception to the lower court's holding that a high degree of control by the government would render the government immune from tort suit.

[56]28 U.S.C. at § 1346(b).

[57]Laird v. Nelms, 406 U.S. 797 (1972).

[58]Gowdy v. United States, 412 F.2d 525 (6th Cir. 1969), *cert. denied*, 369 U.S. 160, *reh'g denied*, 396 U.S. 1063 (1970).

[59]28 U.S.C. § 2680(k) (1976).

[60]*Id.* at § 2680(j).

[61]*Id.* at § 2680(h); *See* Block v. Neal, 75 L.Ed.2d 67 (1983); *United States v. Neustadt*, 366 U.S. 696 (1961).

[62]*Id.* at § 2680(b).

[63]*Id.* at § 2680(l).

[64]*Id.* at § 2680(n).

research and products, the *Feres* Doctrine is the most important exception to the FTCA for government contractors as well as military members.

While billeted in his Army quarters at Pine Camp, New York, Lieutenant Feres died in a fire that swept through his room. His widow filed suit under the FTCA, introducing evidence of Army negligence in the maintenance of an unsafe building. Dismissing the widow's claim, the Supreme Court found an exception to the FTCA's waiver of sovereign immunity for "injuries to servicemen where the injuries arose out of or are in the course of activity incident to military service".[65]

In his majority opinion, Justice Jackson listed a number of reasons for the seemingly harsh prohibition of *Feres*. First, the FTCA is based on the liability that any private party would incur under state law, but military activities have no counterpart in state law.[66] Second, since the FTCA incorporates the law of the place of injury and since such laws vary greatly among the states, it would be irrational to base recovery upon geographical considerations because soldiers have no control over where they are stationed or sent.[67] Third, the relationship between the government and its military members is distinctly federal in character and should not depend on state laws.[68] Finally, the Veterans Benefits Act[69] was enacted as a uniform compensation scheme and should be viewed as the exclusive remedy for injured soldiers.[70]

It is a very common misconception that *Feres* was decided on the basis of the need for military discipline and the imperative that the armed services remain free from the interference of the courts. Such consideration was not made in *Feres*, but appeared four years later in *United States v. Brown*.[71] In *Brown*, the Supreme Court considered its rationale in *Feres* and concluded that the adverse effect on discipline of suits by military members against their superiors justified a bar against suits by military members under the FTCA.[72]

In 1977, in *Stencel Aero Engineering Corp. v. United States*,[73] the Supreme Court again reconsidered the *Feres* Doctrine and found it

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[65]Feres v. United States, 340 U.S. 125, 144 (1950).
[66]*Id.* at 141.
[67]*Id.* at 142.
[68]*Id.* at 143.
[69]38 U.S.C. §§ 101-5228 (1976).
[70]340 U.S. at 144.
[71]348 U.S. 110 (1954).
[72]*Id.* at 112.
[73]431 U.S. 666 (1977).

valid. The reasons articulated in *Stencel* for retaining the doctrine, however, were a hybrid of *Feres* and *Brown*. Immunity from FTCA suit was justified because it preserves the distinctly federal character of the relationship between the government and its soldiers,[74] the Veterans Benefits Act represents the upper limit of liability,[75] and the allowance of suits by military members for injuries would erode discipline.[76]

The *Feres* Doctrine has stood the test of time and even has been expanded to deny FTCA relief in a variety of other situations. In *Jaffee v. United States*[77] the *Feres* Doctrine was applied to bar a claim for the knowing, deliberate, and reckless exposure of a serviceman to risk. In *Lewis v. United States*,[78] it was applied to bar a claim for an intentional tort. In *Davis v. United States*,[79] an alleged malicious prosecution was insufficient to overcome the bar. Indeed, as recently as June 1983, the Supreme Court has considered the *Feres* Doctrine and been guided by its analysis.[80]

2. Avoidance of the Feres Doctrine.

Within very narrow limits, a few precise factual situations may permit the military plaintiff to avoid the application of the *Feres* Doctrine. To the extent *Feres* is avoided, FTCA suit is permitted and the government's sovereign immunity is pierced.

(a) Off-Duty Torts.

Since Lieutenant Feres was off-duty and asleep in his quarters at the time of his death, it would seem that a soldier's status of being on or off-duty would make little difference.

Nonetheless, in *Brooks v. United States*,[81] FTCA suit was permitted to several servicemen on leave who were struck on a public highway by a government employee negligently driving a government truck. That the plaintiffs also sought and received compensation under the Veterans Benefits Act did not defeat their claims.

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[74] *Id.* at 672.
[75] *Id.* at 673.
[76] *Id.*
[77] 663 F.2d 1226 (3d Cir. 1981).
[78] 663 F.2d 889 (9th Cir. 1981).
[79] 667 F.2d 822 (9th Cir. 1982). *Cf.* 28 U.S.C. § 2680(h) (1976).
[80] Chappell v. Wallace, 76 L.Ed.2d 586 (1983). This case is particularly significant for injured military personnel because it closes still another possible avenue of relief. In *Chappell*, several Navy enlisted personnel filed a constitutional tort suit against their superiors for alleged racial discrimination. Dismissing their suit, the Supreme Court applied *Feres* and held that the relief of Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), was not available to military members seeking damages from their superiors.
[81] 337 U.S. 49 (1949).

Meeting *Feres* directly, the Ninth Circuit in *Johnson v. United States*,[82] held, in May 1983, that the bases of the distinctly federal relationship between government and troops and the availability of the Veterans Benefits Act are unpersuasive bases upon which to deny relief and the need for discipline is irrelevant unless the service member was engaging in activity related in some way to his or her military duty.

During his off-duty time, Sergeant Freddie Johnson worked as a bartender at the Non-Commissioned Officers Club on Malmstrom Air Force Base, Montana. In violation of state law and military regulations, he attended a drinking party at the Club after the required closing time. He then entered a car driven by another person who had become intoxicated at the party and suffered serious injuries in an automobile accident. Finding the proximate cause to be the negligence of Air Force personnel in permitting the party, the Ninth Circuit also found *Feres* inoperable. Since Sergeant Johnson's work at the Club in his off-duty hours was essentially a civilian job, the court found no threat to military discipline and refused to apply the *Feres* Doctrine.

(b) Post-Discharge Torts.

As early as 1954, the Supreme Court declined to apply *Feres* to a veteran who received negligent treatment after military discharge at a Veterans Administration hospital for an injury suffered while on active duty.[83] Most attempts to prove a post-discharge tort, however, have failed as courts usually classify them as continuing torts.[84]

Probably the most frequent alleged post-discharge tort is that of a failure to warn. In *Schwartz v. United States*,[85] a serviceman was exposed to a carcinogen during his treatment for sinusitis while on active duty. He later developed cancer and lost an eye and his voice before his disease was detected. Agreeing with his allegation that the government owed a duty to review all medical records to see who had been treated with the carcinogen and to warn them after it was discovered as such, the court held the *Feres* bar inapplicable.

Nonetheless, there is a deep split among the courts on the duty to warn as a device to avoid *Feres*. The Ninth Circuit permitted a suit based on the government's failure to warn an officer exposed to

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[82]704 F.2d 1431 (9th Cir. 1983). *See also* Parker v. United States, 611 F.2d 1007 (5th Cir. 1980).

[83]United States v. Brown, 348 U.S. 110 (1954).

[84]Laswell v. Brown, 524 F. Supp. 847 (W.D. Mo. 1981); Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979).

[85]230 F. Supp. 536 (E.D. Pa. 1964), *aff'd*, 381 F.2d 627 (3d Cir. 1967).

radiation while on active duty after he left the service,[86] but the District of Columbia Circuit held the FTCA was not waived for failure to warn a soldier who handled plutonium.[87] One court has held that the *Feres* Doctrine barred suit for failure to warn or provide care after discharge to a soldier who received an hallucinogen during a test,[88] but two other courts held a cause of action could be maintained under the FTCA for failure to monitor an experimental subject after his discharge.[89]

Most failure to warn cases now being brought involve "atomic veterans" who were exposed to nuclear weapons tests while members of the armed forces.[90] In *Everett v. United States*,[91] FTCA claims for intentional and constitutional torts based upon exposure to atomic tests at Camp Desert Rock in Nevada were dismissed, but a claim based on post-service negligence by failure to warn amounted to a "distinctly separate pattern of conduct"[92] and was thereby actionable despite *Feres*. *Targett v. United States*[93] held that the failure to warn is not based on the continuation of in-service tortious conduct since the government learned of the hazards after the plaintiff's discharge and failed to warn. *Kelly v. United States*,[94] however, dismissed an atomic veteran's claim, noting that the distinctions between pre-discharge and post-discharge failures to warn were artificial. Similarly, a number of other recent decisions have held that *Feres* bars a claim based on failure to warn.[95]

Consequently, it is virtually impossible to predict whether any veteran may pursue a failure to warn claim against the United States or must seek his or her remedy from a contractor. The diversity of decisions makes this area ripe for another Supreme Court review of *Feres*.

(c) Family Torts.

One innovative, but ultimately unsuccessful, method attempted to avoid *Feres* is to sue for the tortious impact upon the service

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[86]Broudy v. United States, 661 F.2d 125 (9th Cir. 1981).

[87]Lombard v. United States, 690 F.2d 215 (D.C. Cir. 1982).

[88]Sweet v. United States, 528 F. Supp. 1068 (D.S.D. 1981).

[89]Stanley v. Central Intelligence Agency, 639 F.2d 1146, 1154 (5th Cir. 1981); Thornwell v. United States, 471 F. Supp. 344 (D.D.C. 1979).

[90]As many as 400,000 veterans may have been exposed to nuclear tests in the southwestern United States and the Pacific Ocean. N.Y. Times, Apr. 22, 1979, Sec. 6 (Magazine) at 70.

[91]492 F. Supp. 318 (S.D. Ohio 1980).

[92]*Id.* at 326.

[93]551 F. Supp. 1231 (N.D. Cal. 1982).

[94]512 F. Supp. 356 (E.D. Pa. 1981).

[95]Gaspard v. United States, 544 F. Supp. 55 (E.D. La. 1982); Sheehan v. United States, 542 F. Supp. 18 (S.D. Miss. 1982).

member's family rather than upon the service member. In *Hinkie v. United States*,[96] for example, an atomic veteran's children were allowed to sue for their genetic defects. The district court found that the federal relationship was unimportant to children not conceived at the time their father was exposed to radiation. It further noted that no government liability under the Veterans Benefits Act had been established and it doubted that discipline would suffer because suit occurred many years after the order to stand exposed to radiation. The Third Circuit, however, reversed the decision.[97]

Nevertheless, most courts find *Feres* to be a bar suit for family torts related to injuries incident to service. The District of Columbia Circuit, utilizing a "but for" test in *Lombard v. United States*,[98] disagreed with the district court's rationale in *Hinkie* because claims for children's genetic damage would not have accrued but for the injury to the serviceman. Even more significantly, on the same day that the Ninth Circuit recognized the possibility of a failure to warn claim in favor of a former service member,[99] it refused to grant relief on a daughter's genetic defect claim in *Monaco v. United States*.[100] The daughter, suffering from various birth defects, contended that the *Feres* Doctrine was inapplicable because she could not recover under the Veterans Benefits Act and because no danger to military discipline was posed because she was a civilian. The court rejected the first argument, since the Veterans Benefits Act was meant to limit the government's liability and such a purpose would be defeated through recovery. The court rejected the second argument because the *Feres* Doctrine was designed to prevent judicial examination of military activity and a suit such as the daughter's would require a court to examine the government's activity in relation to military personnel on active duty.

Still, recovery for family torts may be possible when that concept is combined with a failure to carry out a post-discharge duty to warn. Such was the result in *Seveney v. Department of the Navy*,[101] in which *Feres* was held not to bar an action by a daughter and grandchildren for genetic damage where the Navy negligently failed to warn a

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[96]524 F. Supp. 277 (E.D. Pa. 1981), *rev'd*, 715 F.2d 96 (3d Cir. 1983).

[97]715 F.2d 96 (3d Cir. 1983). *See also* Laswell v. Brown, 524 F. Supp. 847 (W.D. Mo. 1981), which dismissed a claim for risk of cellular damage to children not because the claim had its genesis incident to their father's service, but because the claim merely alleged the possibility of future harm.

[98]690 F.2d 215 (D.C. Cir. 1982).

[99]661 F.2d 125 (9th Cir. 1981).

[100]661 F.2d 129 (9th Cir. 1981).

[101]550 F. Supp. 653 (D.R.I. 1982).

sailor after he left active duty of the dangers of his exposure to atomic tests near Bikini Atoll in the Pacific.[102]

(d) Reliance on Another Tort Statute.

Finally, it must be stressed that the *Feres* Doctrine was developed as an exception to the FTCA. It does not necessarily bar tort claims of military personnel when based upon another statute. Consequently, the District of Columbia Circuit in *Hunt v. United States*[103] expressly held that *Feres* did not bar the claim of military members against the government brought under the Swine Flu Act.[104]

3. Implications for Contractors.

Precluded by *Feres* from a remedy against the government, the Agent Orange veterans are now seeking their relief from the contractors.[105] It is likely that any success in those claims should inspire the atomic veterans, as well as all other military claimants blocked by *Feres*, to turn their attention to the contractors.

D. FEDERAL EMPLOYEES COMPENSATION ACT

The Federal Employees Compensation Act (FECA)[106] provides a comprehensive scheme for the payment of benefits to federal employees who have been injured in the performance of their duties. The FECA is limited to situations involving personal injuries and does not cover loss or destruction of property.[107] Exceptions from FECA coverage are found for an injury or death caused by the willful misconduct of the employee, the intent to injure the employee or another, or the intoxicated state of the employee.[108]

The statutory language of the FECA specifically precludes all other remedies against the government:

> The liability of the United States or an instrumentality

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[102]*See also* Kohn v. United States, 680 F.2d 922 (2d Cir. 1982). Although involving neither genetic defects nor failure to warn, *Kohn* demonstrates another example of post-discharge negligence giving rise to a family tort not barred by *Feres*. After a soldier on a drug suppression team was shot to death by another soldier, the Army lost his personal effects, failed to provide an honor guard for his funeral, prevented personnel from discussing the death with his family, incorrectly told the family the death was an accident, and wrongfully sent autopsy photographs to the family. Under these circumstances the court rejected the government's *Feres* defense to the family's claim for severe emotional distress.

[103]636 F.2d 580 (D.C. Cir. 1980).

[104]*See* text accompanying notes 531-38 *infra*.

[105]*See* text accompanying notes 285-340 *infra*.

[106]5 U.S.C. §§ 8101-8149 (1976).

[107]*Id.* at § 8102(a).

[108]*Id.*

> thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in an admiralty, or by an administrative or judicial proceeding under a workman's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.[109]

For employees entitled to benefits under the FECA, this provision is a complete bar to action under the Federal Tort Claims Act.[110]

The purpose of the FECA is to limit government damages; an injured employee does not have the right to avoid claiming under the FECA and to elect instituting an action under the Federal Tort Claims Act.[111] An injured employee may avoid the limitation of the FECA for injuries not in the performance of duties, but an on-base automobile collision between a government vehicle and a private vehicle driven by an employee on her way to work may be considered to be within the performance of her duties.[112] Furthermore, the FECA bars action for injuries occurring during a federal employee's performance of duties even if a particular injury is not compensable under the FECA.[113] The FECA, however, does not bar causes of action by federal employees based on the Swine Flu Act.[114]

Of particular importance to contractors are the government's rights in cases where a contractor is the proximate cause of the employee's injury. The FECA permits the government to require the employee either to prosecute the case against the contractor or to assign the cause of action to the government.[115] As a motivating factor for the government, the FECA also permits the government to

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[109]*Id.* at § 8116(c).

[110]Vantrease v. United States, 400 F.2d 853 (6th Cir. 1968); United States v. Udy, 381 F.2d 455 (10th Cir. 1967).

[111]Avasthi v. United States, 608 F.2d 1059 (5th Cir. 1979).

[112]Etheridge v. United States, 177 F. Supp. 734 (5th Cir. 1959).

[113]*See* Postgate v. United States, 288 F.2d 11 (9th Cir.), *cert. denied*, 368 U.S. 832 (1961) (FECA was held to bar an action for impotency following an automobile accident even though impotency was not compensable under the FECA).

[114]Wallace v. United States, 669 F.2d 947 (4th Cir. 1982).

[115]Boeing Airplane Co. v. Perry, 322 F.2d 589 (10th Cir. 1963); Wagner v. City of Duluth, 300 N.W. 820 (Minn. 1941).

recover from any proceeds of a suit against the contractor the amount it has paid the employee in compensation.[116]

III. LIABILITY

A. DETERMINING THE APPLICABLE LAW

1. State v. Federal Law.

(a) General Applicability of State Law.

There is no body of general federal law controlling product liability. Consequently, state law is usually applied in litigation involving government contractors. This requires reference to both state statutes and state court interpretations.

Attempts have been made, always with little success, to discover a federal common law for government contractor product liability. Despite these attempts, the Second Circuit specifically held there is no federal common law of product liability for government contractors in the appeal of *In re "Agent Orange" Product Liability Litigation.*[117] In *Agent Orange*, the Second Circuit reversed the decision of the District Court for the Eastern District of New York that an action by veterans against numerous chemical companies for injuries sustained as a result of the government's use of the defoliant known as "Agent Orange" during the Vietnam War was governed by federal common law. The lower court had held federal common law applicable based on a three-factor test involving substantial federal interest in the outcome of the litigation, the effect on the federal interest if state law were applied, and the effect on the state interest should state law be displaced. The Second Circuit accepted this test, but found that the first factor of substantial federal interest had not been satisfied, since there had been no showing of an identifiable and specific federal interest. Since the litigation was between private parties and did not involve substantial governmental rights or duties, there was no federal interest in uniformity for its own sake.[118] Similarly, it could not be said that the government had a particular substantive interest, instead, it was concerned with the contrasting interests of the welfare of its veterans and the protection of its suppliers. Thus, state law governed the action.

The facts of *Agent Orange* are significant because the large

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[116] 5 U.S.C. § 8131 (1976).

[117] 635 F.2d 987 (2d Cir. 1980), *cert. denied sub nom.* Chapman v. Dow Chem. Co., 454 U.S. 1128 (1981).

[118] Although later dismissed as a third party, the United States had been impleaded by the defendants in *Agent Orange*.

number of plaintiffs will require the application of the laws of the majority of the American jurisdictions. Veterans from the fifty states and the District of Columbia were affected, suits in thirty federal district courts had been filed, defendants were some of the largest chemical companies in the country, injuries were sustained as the result of a war implementing national policy, and Congress had assumed certain responsibilities for veterans by the establishment of the Veterans Administration. Notwithstanding the almost overwhelming procedural difficulties created, the application of state law was required.

At least one lower court has sharply criticized the Second Circuit's refusal to apply a federal common law to product liability actions affecting large numbers of persons. *In re Swine Flu Immunization Product Liability Litigation*[119] involved a suit under the Swine Flu Act,[120] a law specifically adopting liability under state law. In its decision, the court decried the *Agent Orange* rationale because of practical considerations. While applying Utah law the court noted:

> The field of national immunology cries out for a more expeditious and fairer way of determining legitimate claims and compensating victims of vaccination. National legislation is necessary to achieve this objective lest a patchwork approach be taken by the individual states in their salutory efforts in providing essential immunization programs.[121]

In *Agent Orange*, likewise, it was contended without success that the health and safety of military personnel is a pressing national concern which should not be subject to the variances of state law.

At least one other federal circuit has since embraced the rationale of *Agent Orange* that federal law has no vitality in an action by an injured military member against a government contractor. In *Brown v. Caterpillar Tractor Co.*,[122] an Army reservist receiving week-end training was injured while riding as a passenger in an Army bulldozer. As the bulldozer was clearing some land, a felled tree came over the bulldozer blade and struck the reservist. He sued the contractor under Pennsylvania law for failing to equip the bulldozer with a protective structure around the passenger seat. After noting that *Feres* actions[123] are resolved uniformly under federal

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[119]533 F. Supp. 703 (D. Utah 1982).
[120]*See* text accompanying notes 531-38 infra.
[121]533 F. Supp. at 727.
[122]696 F.2d 246 (3d Cir. 1982).
[123]*See* text accompanying notes 65-102 *supra*.

law, the Third Circuit found no need for such uniformity in a suit against a government contractor. Such suits do not involve the possibility of second-guessing military decisions, nor do they expose the government to liability beyond that found in the Veterans Benefits Act. Furthermore, the court even implied that, if uniformity were desired, the application of state law was appropriate. Manufacturers trying to market their products throughout the country regularly are subjected to different standards of liability in different jurisdictions. To not apply state law in actions by injured military plaintiffs would result in a lack of uniformity of treatment. Finally, the Third Circuit noted that in no action brought by a military plaintiff against a government contractor has federal law displaced state law.[124]

(b) Statutory Preemption.

Nonetheless, several significant exceptions to the general rule requiring application of state product liability law exist for government contractors. These exceptions take the form of federal preemption of state law under specific circumstances. Basically, state law will apply then unless there is a federal statute to the contrary.

The concept of federal preemption is grounded in the Supremacy Clause of the United States Constitution, which provides At Article VI, Clause 2:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

By contrast, the Tenth Amendment to the Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Preemption through federal regulations first requires congressional action in a particular field undertaken pursuant to the power

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[124]The Army did not consider the plaintiff in *Brown* to be on active duty at the time of his injury. Reservists attending a summer camp are considered "on active duty" for the duration of the encampment, but reservists engaged in a weekend activity are not considered to be on active duty. A reservist engaging in a weekend training session is not under formal orders for that particular training, is legally classified as attached for training rather than assigned for duty, and does not share in all the same privileges and benefits as an active duty member. There is no mention of this factor in the court's decision, so it is uncertain whether the court was even aware of this distinction.

delegated to the United States by the Constitution.[125] Only when this first requirement is met will further inquiry be made.

When compliance with both federal regulation and state law or regulation is impossible, preemption is easily found.[126] If federal and state regulations are not mutually exclusive, an unequivocal and express declaration by Congress that its conferred authority is exclusive results in preemption.[127] Even if there is no express declaration, preemption may be found by implication when congressional intent is revealed by legislative history, the federal regulatory scheme is pervasive as authorized by the legislation and implemented by an agency, the subject matter demands exclusive federal regulation to achieve uniformity vital to national interests, or state law is an obstacle to the accomplishment of the congressional purpose.[128]

(1) Recovery Limitations

The Price-Anderson Act[129] preempts state tort law by limiting the amount of recovery under state law for damages caused by major nuclear accidents. This limit, $560,000,000, was attacked by an environmental organization, a labor union, and various individuals living near certain nuclear plants against what is now the Nuclear Regulatory Commission and a public utility. The attack, focused on due process grounds, took to task the statute's failure to rationally relate the recovery limit to potential losses and, on equal protection grounds, the requirement that victims of nuclear accidents bear damages for the development of nuclear power which benefits the entire society. The Supreme Court, however, upheld the constitutionality of the Price-Anderson Act's recovery limitation in *Duke Power Co. v. Carolina Environmental Study Group*.[130] The unlikelihood of a nuclear accident with damages in excess of $560,000,000 and the probability that Congress would provide relief in such an accident met the necessary due process guarantees.[131] In addition, the congressional purpose of encouraging private participation in the development of nuclear energy resources justified different treatment between those injured in nuclear accidents and those injured other-

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[125]Rice. v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

[126]Florida Lime & Avocado Growers Inc. v. Paul, 373 U.S. 132 (1963).

[127]Campbell v. Hussey, 368 U.S. 297, 302 (1961).

[128]Northern States Power Co. v. State of Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.*, 405 U.S. 1035 (1972).

[129]42 U.S.C. § 2210 (1976).

[130]438 U.S. 59 (1978).

[131]By way of comparison the evacuation costs and the lost income from the Three Mile Island incident were approximately $18,000,000. That incident, of course, did not amount to an extraordinary nuclear occurrence. Note, 14 Mich. J.L. Reform 609, 619 (1981).

wise and thus precluded an equal protection violation.

The Price-Anderson Act, therefore, established the important principle that the United States can limit the amount of compensatory recovery under state law. In *Silkwood v. Kerr-McGhee*,[132] the Tenth Circuit expanded this principle to deny the recovery of punitive damages under state law. Such an award of punitive damages would be as intrusive as a direct legislative act of a state competing with the Nuclear Regulatory Commission's regulation of nuclear material the court held. In addition, since the NRC has power to punish and prohibit unsafe practices involving the handling of nuclear material, there was no need for punitive damages.

(2) Litigation Limitations.

The Price-Anderson Act's limitation of damages operates when damages are caused by major nuclear accidents. In the event of an incident less than an "extraordinary" nuclear accident, however, there is no preemption.[133]

In *Silkwood*,[134] a union activist who worked as a laboratory analyst at defendant's nuclear plant suffered plutonium contamination under uncertain circumstances. One week after exposure, she died in an automobile accident on her way to meet a newspaper reporter and a union leader. Her estate brought action in federal district court; the court applied Oklahoma law. A jury verdict awarded damages for personal injury and property losses, as well as punitive damages. On appeal, the defendant claimed that the Price-Anderson and Atomic Energy Acts preempted state law so as to preclude the rights of individual citizens to litigate. Disagreeing with these contentions, the Tenth Circuit held that the Price-Anderson Act does preempt private lawsuits in cases of major nuclear accidents, but that these facts did not amount to a major nuclear accident. The court also held that the Atomic Energy Act[135] did not preempt state law because compensatory tort liabilty would not interfere with federal regulation of the nuclear plant and the Atomic Energy Commission's (now the Nuclear Regulatory Commission's) lack of authority to compensate victims of less than extraordinary nuclear accidents would have left plaintiff without a remedy. Consequently, there was no preemption of the right to sue for other than an extraordinary nuclear

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[132]667 F.2d 908 (10th Cir. 1981).
[133]*Id.*
[134]*Id.*
[135]42 U.S.C. §§ 2011-2281 (1976).

accident.[136] The plaintiff was permitted recovery for property damage, although not for personal injuries, under Oklahoma's workmen's compensation law. Hence, state tort law remedies apply in at least some nuclear incidents.

The same court that decided *Silkwood* expanded its precedent in *McKay v. United States*.[137] In *McKay*, the United States contracted with various companies to manufacture nuclear weapons at a government-owned plant. A group of landowners surrounding the plant alleged that the operation of the plant caused radioactive uranium, plutonium, and americium to infest their land. The landowners files suit against the United States and its contractors, but defendants secured summary judgment denying the right to private civil actions for damages.[138] The bases for summary judgment were a determination of preemption due to the military purposes of the plant and a determination of the applicability of the political question doctrine since the plant's operation involved national security.

Citing *Silkwood* and finding no legally significant facts to distinguish between the two cases, the court reversed the summary judgment by refusing to find that the plant's operation for military purposes or national defense caused a preemption of Colorado law. In addition to noting that the imposition of tort liability would not interfere with the federal interest, the *McKay* court emphasized the need for preemption to be specific and positive. In the words of the court: "Thus there is no preemption in the abstract."[139]

Furthermore, *McKay* held that neither the Atomic Energy Act nor the political question doctrine operate to preempt state law in this area. As a result, landowners may maintain a suit against government contractors for the contamination of their land with radiation during the production of nuclear weapons.

(3) Removal of Defenses.

Federal preemption of state tort law need not accrue only to the benefit of defendant government contractors. Preemption may remove defenses that otherwise would be available under state law. Federal statutory provisions have waived certain specified defenses

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[136]Even if the accident was not an extraordinary nuclear occurrence, federal jurisdiction is present under 28 U.S.C. § 1337 (1976), which grants U.S. district courts original jurisdiction of a civil action arising under any Act of Congress regulating commerce. *In re* Three Mile Island Litigation, 87 F.R.D. 433 (M.D. Pa. 1980).

[137]703 F.2d 464 (10th Cir. 1983).

[138]Good Fund Ltd.-1972 v. Church, 540 F. Supp. (D. Colo. 1982).

[139]703 F.2d at 469.

for extraordinary nuclear occurrences. Consequently, defenses based on the conduct of the injured parties, charitable or governmental immunity, and most periods of limitation are waived.[140] On the other hand, defenses based on plaintiff's failure to mitigate or intentional and wrongful acts causing the incident are not waived.

The Swine Flu Act[141] provides an interesting example of federal preemption that does not reduce a plaintiff's remedy. Plaintiffs are precluded from recovering against program participants although they are granted a remedy against the United States. This exclusive remedy against the United States predicates liability on the law of the state in which the act or omission occurred. The Swine Flu Act preempts state procedural law as to which party is defendant, but specifically adopts the substantive aspects of state product liability law. In addition, the United States has the right to recover from the program participants damages awarded by the government based on the negligence of the program participants.

(4) Fact-Finding Limitations.

Likewise, federal law may preempt a state's ability to find the facts in a product liability or any other case. Such is the situation under the Atomic Energy Act. The determination of the Nuclear Regulatory Commission that an "extraordinary nuclear occurrence" has resulted is final and conclusive as to all state courts.[142] Nonetheless, a state court is not precluded from making findings about a "nuclear incident" that does not involve an "extraordinary nuclear occurrence."[143]

(5) Product Liability Limitations.

A number of other congressional statutes have preempted state laws in areas of product liability. To varying degrees, they eliminate state substantive law in particular areas.

The Federal Hazardous Substances Act[144] preempts state law on the labeling of hazardous substances. A hazardous substance is defined as any substance or mixture of substances which is toxic, corrosive, irritating, strongly sensitizing, flammable or combustible, or capable of generating pressure by means such as decomposition or heat.[145] Consequently, a local ordinance specifying how

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[140]42 U.S.C. § 2210(n) (1976).
[141]*See* text accompanying notes 531-38 *infra*.
[142]42 U.S.C. § 2014(j) (1976).
[143]*Id.* at § 2014(q).
[144]15 U.S.C. §§ 1261-2173 (1976).
[145]*Id.* at §§ 1261(f)(1)(A).

ingredients shall be listed is ineffective.[146]

The Magnuson-Moss Warranty-Federal Trade Commission Improvement Act[147] preempts state law on the minimum standards for written warranties and provides a federal private cause of action for the failure of a warrantor to comply with a written warranty. It does not preempt state laws regarding implied warranties and the requirements therefore such as privity.[148] The Act is limited to consumer products which are defined as tangible personal property normally used for personal, family, or household purposes.[149] An airplane engine, for example, does not meet this definition.[150]

One of the most significant preemptions in the field of product liability occurred by the enactment of the Product Liability Risk Retention Act of 1981.[151] This Act preempts state insurance laws to the extent they apply to product liability insurance.[152]

Examples of other federal preemption efforts in product liability are the Federal Insecticide, Fungicide, and Rodenticide Act,[153] the Flammable Fabrics Act,[154] and the Consumer Products Safety Act.[155]

(c) Constitutional Preemption.

Certain other specific provisions of the Constitution authorize preemption without reliance on the Supremacy Clause.[156] Article III, section 2, for example, extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction. This grant implies a legislative authority in Congress to deal with admiralty.[157]

One exercise of the admiralty preemption authority is found in the Death on the High Seas Act.[158] This statute makes actionable a death occurring on the high seas which is the result of a wrongful act. As a result, the estates of military members killed at sea in accidents involving weapons systems may bring suit under the Act against the

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[146]Chemical Specialties Mfrs. Ass'n, Inc. v. Clark, 482 F.2d 325 (5th Cir. 1973).
[147]15 U.S.C. §§ 2301-2312 (1976).
[148]Mendelson v. General Motors Corp., 105 Misc. 2d 346, 432 N.Y.S.2d 132 (Sup. Ct. Nassau County 1980).
[149]*See* 15 U.S.C. § 2301(1) (1976).
[150]Patron Aviation, Inc. v. Teledyne Indus., Inc., 267 S.E.2d 274 (Ga. 1980).
[151]15 U.S.C. §§ 3901-3904 (Supp. V 1981).
[152]*See* text accompanying notes 376-95 *infra*.
[153]7 U.S.C. §§ 121-135k (1976).
[154]15 U.S.C. §§ 1191-1200 (1976).
[155]15 U.S.C. §§ 2051-2081 (1976).
[156]*See also* U.S. Const. art. I, § 8.
[157]Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).
[158]46 U.S.C. §§ 761-768 (1976).

contractors providing those systems. The substantive law is federal.[159] State law has some applicability, however, in resolving issues such as the identity of the beneficiaries.[160]

2. Conflict of State Laws.

Since the product liability of government contractors is usually determined on the basis of the applicable state law without reference to federal considerations, the multiplicity of state laws guarantees a lack of uniformity in the treatment of such cases. The diversity of state law in product liability litigation makes the choice of law extremely important. Plaintiffs will seek to bring actions in jurisdictions that expand the rights of the injured parties or restrict the defenses available to the defendants. Defendant contractors, conversely, will attempt to remove these actions to states limiting the right of recovery or providing broader bases for defense.

(a) Rules.

A determination of which state law to apply depends not only on the facts of each case but also on the various conflict of law rules adopted by the competing jurisdictions.

The traditional rule applies the law of the jurisdiction where the injury to the person or property occurred.[161] This rule, sometimes called the *lex loci delictus* rule, was followed in virtually every jurisdiction until recently as thirty years ago. Thus, in *Boeing Airplane Co. v. Brown*,[162] an action by the estate of an Air Force major killed in the crash of a B-52 in California was held governed by the California law of negligence. Likewise, in *Whitaker v. Harrell-Kilgore, Corp.*,[163] an enlisted man undergoing basic training at Fort Benning, Georgia was injured when the grenade he was throwing exploded prematurely. His breach of warranty action against the assembler of the hand grenade with a faulty fuse was characterized as analogous to a tort action in order to apply the *lex loci delictus* rule.

A different rule has been adopted in a few states which applies the law of the jurisdiction where the product causing the harm was

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[159]Lawson v. United States, 88 F. Supp. 706 (E.D.N.Y. 1950), *Modified on other grounds*, 192 F.2d 479 (2d. Cir. 1951), *cert. denied*, 343 U.S. 904 (1952); Stoddard v. Ling-Temco Vought, Inc., 513 F. Supp. 335 (C.D. Cal. 1981).

[160]Spiller v. Thomas M. Lowe, Jr. & Assoc., 466 F.2d 903 (8th Cir. 1972). *See also* The Vessel V/M Tungus v. Skovgaard, 358 U.S. 588 (1959), in which a state's substantive liability law was applied in an action for wrongful death on the navigable waters within a state.

[161]American Banana v. United Fruit, 213 U.S. 347 (1918).

[162]291 F.2d 310 (9th Cir. 1961).

[163]418 F.2d 1010 (5th Cir. 1969).

manufactured.[164] This was the rule applied in *Vrooman v. Beech Aircraft Corp.*,[165] where a pilot residing in Missouri and injured in a plane crash in Indiana was able to sue under the law of Kansas, the state in which the airplane was built.

The rule beginning to emerge as the most widely accepted is the rule of dominant contacts. Under this rule, the law of the jurisdiction with the greatest contacts with the issues in litigation is applied.[166] This is the approach followed by the Restatement (Second) Conflict of Laws at Section 379:

> (2) Important contacts that the forum will consider in determining the state of most significant relationship include: (a) the place where the injury occurred, (b) the place where the conduct occurred, (c) the domicile, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered.
> (3) In determining the relative importance of the contacts, the forum will consider the issues, the character of the tort, and the relevant purposes of the tort rules of the interested states.

Possibly the simplest rule is the rule of domicile. This rule merely applies the law of the state in which the plaintiff was a legal resident. While this rule is rarely used independently today, it can be one of the most significant factors in the rule of dominant contacts.[167]

A rule related to the rule of domicile is the rule of the place of the contract. Under the place of contract rule, the law of the place where the contract was entered into governs. The place of contract rule also may involve consideration of place of performance or delivery. To the extent the focus is upon the place of performance, the similarity with the rule of where the product causing the harm was manufactured is seen. For example, in *Quadrini v. Sikorsky Aircraft Division, United Aircraft Corp.*,[168] while the court applied the law of North Carolina to the claim based in tort, the court applied the law of

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[164] *See, e.g.*, McGee v. International Life Ins. Co., 355 U.S. 220 (1957).

[165] 183 F.2d 479 (10th Cir. 1950).

[166] Equitable Trust Co. v. G & M Constr. Co., 544 F. Supp. 736, 741 (D. Md. 1982). *See also* Global Commerce Corp. v. Clark-Babbitt Industries, Inc., 239 F.2d 716 (2d Cir. 1956).

[167] *See* Paris v. General Elec. Co., 54 Misc. 2d 310, 282 N.Y.S.2d 348 (Sup. Ct. N.Y. County), *aff'd*, 290 N.Y.S.2d 1015 (App. Div. 1st Dep't 1967), in which New York law was applied to the crash in Massachusetts of an Air Force pilot domiciled in New York. According to the court, the place of the crash was merely fortuitous.

[168] 425 F. Supp. 81 (D. Conn. 1977).

Connecticut to the claim based on breach of warranty. Connecticut was the place where the contract was concluded and where the allegedly defective helicopter causing the deaths of two Marine Corps officers was delivered.

Sometimes, an attempt is made to apply the law of a foreign country. In *Melton v. Borg-Warner*,[169] Army Captain Glen Melton, a domiciliary of Texas, was severely injured when the helicopter he was co-piloting crashed in Germany. Defendant Borg-Warner, a Delaware corporation licensed to do business in Texas, allegedly manufactured a defective part in Illinois, its principal place of business. Defendant Textron, a Delaware corporation licensed in Texas but with its principal place of business in Rhode Island, assembled the helicopter from parts in Texas. Captain Melton and his wife invoked Texas law, but defendants urged the application of German law under the *lex loci delictus* rule.[170] Finding a legislative mandate to reject the *lex loci delictus* rule and determining it had extraterritorial force, the court specifically adopted the "most significant contacts test," *i.e.*, dominant contacts. Under this test, the law of Texas was applied.[171]

(b) Federal Installations.

Federal law specifically applies state law in certain instances involving federal installations. A federal installation, such as an Army post or Air Force base, will be subject to one of three types of jurisdiction: property, concurrent, or exclusive. Proprietary jurisdiction attaches when the United States has no right to the land other than as a lessee. Concurrent jurisdiction attaches when a state cedes land to the United States, but retains some legal rights therein. Exclusive jurisdiction attaches when the United States holds title to the land without any remnant of state rights in the land.

In a proprietary jurisdiction, state law applies as fully as it would in an area of the state in which the federal government had no legal interest. Both federal and state law apply in a concurrent jurisdiction, subject to whatever reservation of rights has been made by the state. At the very least, a state will reserve the right to serve process. Usually, a state will also reserve the right to enforce its criminal law

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[169]467 F. Supp. 983 (W.D. Tex. 1979).

[170]Unlike Texas law, German law recognized the selection of employees with due care as a defense to negligence, required privity for breach of warranty, and had no theory of strict liability.

[171]*See also* Challoner v. Day & Zimmerman, Inc., 512 F.2d 77 (5th Cir. 1974), *vacated on other grounds*, 423 U.S. 3 (1975), in which an attempt to apply Cambodian law was rejected.

in a concurrent jurisdiction. To the extent there is no federal product liability law, state product liability law will govern.

Only federal law applies in an exclusive jurisdiction except to the extent congress has specifically incorporated state law. This has been done for actions involving death or personal injury by section 457 of Title 16, U.S. Code:

> In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, such right of action shall exist as though the place were under the jurisdiction of the State within whose exterior boundaries such place may be; and in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be.

(c) Choosing the State Law.

Regardless of which state's law is determined applicable, three important points must be remembered. First, the fact that a court located in one state has jurisdiction to hear the case does not determine the applicable law. For example, a contractor incorporated in Delaware and doing business in California may be sued in either jurisdiction, but the law applied may be that of Texas, or Missouri, or whichever state's law is determined applicable. Second, a distinction must be made between the substantive law of another state and that state's conflict or choice of law rules. Merely because a court with jurisdiction may apply the substantive law of another state does not mean it will defer to that state's conflict of law rules. Finally, the inquiry into the applicable law does not end with a determination of which state has the applicable law. A further determination of which law of the state to apply is necessary. This includes in some instances repealed or currently inoperable law.

For example, in *Quadrini v. Sikorsky Aircraft Division, United Aircraft Corp.*,[172] the court retroactively applied North Carolina law as it existed in 1941. In *Quadrini*, two Marine Corps majors died in the crash of a helicopter sold to the United States by the defendant contractor. Action was filed in federal district court in Connecticut, which determined that North Carolina law was applicable under section 457 of Title 16, U.S. Code. Unfortunately for plaintiffs, the

[172]425 F. Supp. 81 (D. Conn. 1977).

court decided to apply North Carolina law as it existed on April 3, 1941; that was the law of the place of the crash at the time it became a federal enclave. The significance of the retroactivity was to defeat the plaintiffs' cause of action based on strict liability, which was not North Carolina law as it existed in 1941.

While the decision in *Quadrini* was not appealed, the Second Circuit strongly criticized the *Quadrini* principle in *Vasina v. Grumman Corp.*,[173] a later case involving the crash of Navy lieutenant. While piloting his aircraft over the Boardman Bombing Range in Oregon, Lieutenant William Vasina's portwing separated in flight resulting in his crash and death. The federal District Court for the Eastern District of New York applied Oregon law as of the time of the crash and awarded Lieutenant Vasina's widow and daughter $1,184,270 plus six percent interest from the time of death. In its appeal to the Second Circuit, defendant Grumman Corporation cited section 457 and argued that the precedent of *Quadrini* required the application of 1846 Oregon law, the law at the time the property was ceded to the United States. Agreeing that section 457 was controlling, the Second Circuit refused to incorporate nineteenth century law because the purpose of section 457 was not to make military reservations pockets of outdated legislation. The purpose of the law was to make the wrongful death law of a federal enclave identical to the law of the surrounding state; that required incorporation of the current law.

Conversely, at least one court has held that a decision based on what was current state law at the time of the decision allowing recovery by a plaintiff against the United States may be reversed when the state's supreme court later adopts a different principle of law. In *Bramer v. United States*,[174] the United States contracted with the University of California to operate the Los Alamos Scientific Laboratory in New Mexico. A radiation leak developed at the laboratory causing the plaintiff, a university employee, to inhale plutonium. Plaintiff sued the United States in federal district court under the Federal Tort Claims Act. The district court applied New Mexico case law that the employer of an independent contractor for work involving a peculiar risk of harm owed a duty to the contractor's employees. The district court, however, denied recovery on the grounds the Atomic Energy Act permitted the United States to contract out responsibility for safety and this had been done. Plaintiff appealed this judgment in favor of the United States. After this

[173] 644 F.2d 112 (2d Cir. 1981).
[174] 595 F.2d 1141 (9th Cir. 1979).

judgment, the New Mexico Supreme Court, in an unrelated case, considered the principle relied on by plaintiff and held the duties of employers of independent contractors did not run to contractor employees. The Ninth Circuit then applied this new principle and affirmed the lower court's denial of relief on the grounds that plaintiff was not entitled to recovery on state case law, as changed.

Which state's law a party will seek to apply depends in large part on the plaintiff's theory of the case. Depending on the basis for liability chosen,[175] various rules for resolving the conflict of laws become more pertinent than others. The *lex loci delictus* rule and the rule of the place of manufacture usually resolve actions sounding in tort such as negligence and strict liability. Many jurisdictions that have recognized strict liability have also adopted the rule of dominant contacts. The rule of domicile and the rule of the place of contract usually resolve actions sounding in contract such as breach of warranty.[176]

B. BASES FOR LIABILITY

1. Negligence.

Negligence is the failure to exercise the ordinary care that a reasonable prudent person would be expected to exercise. An injured plaintiff pleading under a theory of negligence must establish four elements to recover: that defendant owed a duty to plaintiff, that defendant breached that duty, that plaintiff suffered damages, and that the breach was the proximate cause of the damages. In the context of product liability, the duty of a manufacturer is to produce a product with no foreseeable defects.

(a) The Duty Requirement.

Historically, the first element has proven the most difficult task in extending the concept of negligence to product liability. The first principal case recognizing the possibility of allowing recovery for

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[175]*See* text accompanying notes 185-245 *infra*.

[176]Occasionally, the laws of several jurisdictions will apply in the same case to different elements of different theories. This occurred in the decision of *In re* Air Crash Disaster at Washington, D.C., 559 F. Supp. 333 (D.D.C. 1983), in which various actions were consolidated. With respect to actions originally filed in the District of Columbia and the states of Illinois, Maryland, Texas, Massachusetts, and Pennsylvania, District of Columbia law governed the issues of negligence, product liability, and punitive damages. With respect to those actions, the laws of Florida, Texas, and Washington governed the apportionment of liability and contribution. With respect to actions originally filed in the federal or state courts of Virginia, District of Columbia law governed all issues. With respect to actions filed in Georgia, District of Columbia law governed all issues except the apportionment of liability and contribution.

negligence in product liability, *Winterbottom v. Wright*,[177] slammed shut the same door it opened by holding privity a condition precedent to liability.

In *Winterbottom*, a mailman was crippled when thrown from the seat of his mail coach. The coach had been sold to the Post-Master General for the delivery of mail and defendant had contracted to keep the coach in good repair. After establishing that the seat was defectively constructed in a manner not obvious, that the defective condition caused the accident, and that the accident was the proximate cause of his injuries, the mailman alleged the defendant owed him a duty to keep the coach in a safe and secure state. The court accepted the allegation that product liability was actionable under a theory of negligence, thereby providing one of the earliest judicial recognitions of product liability as an actionable wrong. Unfortunately for the mailman, the court also found the defendant to be in privity with the Post-Master General, but not the mailman. Without privity between plaintiff and defendant, negligence was not supportable. This case emphasized that, while the court was willing to hear product liability cases brought under tort, it was unwilling to ignore what was thought to be essentially its character in contract. As stated by the *Winterbottom* court:

> [T]here is also a class of cases in which the law permits a contract to be turned into a tort; but unless there has been some public duty undertaken, or public nuisance committed, they are all cases in which an action might have been maintained upon the contract.[178]

As long as the requirement for privity was recognized, it served as an almost absolute bar to recovery unless the plaintiff purchased the defective product directly from the manufacturer. Eventually, public policy considerations forced some exceptions to the bar. In *Thomas v. Winchester*,[179] a manufacturer of poison erroneously labeled it as harmless and sold it to a druggist who then sold it to a man who consumed it and died. Focusing on the inherently dangerous nature of poisons, the court ignored the lack of privity between the wife of the deceased and the manufacturer and permitted recovery under negligence. Likewise, exceptions to the requirement for privity came to include not only inherently dangerous substances such as poisons, but food and drink as well.[180]

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[177]10 Mees & W 109, 152 Eng. Rep. 402 (Ex. 1841).
[178]152 Eng. Rep. at 187.
[179]6 N.Y. 397 (1852).
[180]Jackson Coca Cola Bottling Co. v. Chapman, 106 Miss. 864, 64 So. 791 (1914); Tomlinson v. Armour & Co., 75 N.J.L. 748, 70 A. 314 (1908).

Finally, the wall of privity crumbled entirely following the landmark decision of Judge Cardozo in *MacPherson v. Buick*.[181] In *MacPherson*, the defendant manufactured defective wooden spokes in an automobile wheel and then transferred a car with the wheel to a dealer. The dealer sold it to the plaintiff who was injured when thrown from his car after the spokes had broken. Obviously, there was no privity between the manufacturer and plaintiff and the facts did not fall within any recognized exceptions to the requirement for privity. Nonetheless, Judge Cardozo completely dismissed the privity issue:

> If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. . . If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing is under a duty to make it carefully.[182]

In other words, the manufacturer of a product owes a duty to the ultimate user not to manufacture the product in an unsafe fashion. Thus, recovery was possible against a remote manufacturer. All American jurisdictions now allow recovery for negligence in cases of product liability.

(b) Proximate Causation.

If *MacPherson* and its progeny resolved the issue of when defendant owes a duty to a distant plaintiff in a product liability situation, confusion still remains over the issue of when the breach of that duty is the proximate cause of the plaintiff's damages. This issue is succinctly noted by the Restatement (Second) of Torts, which states at Section 402a(1): "[O]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer. . . is subject to liability for physical harm *thereby caused* to the ultimate user or consumer."

Proximate causation may be found when injury follows defective design, manufacture, or assembly, or inspection that fails to disclose defects. All of these circumstances regarding defects may lead to the conclusion that the harm was caused by the defects. For example, this result may be reached when the design is defective because it is not consistent with the state of the art[183] or when the risks of the

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[181] 217 N.Y. 382, 111 N.E. 1050 (1916).
[182] *Id.* at 386, 111 N.E. at 1053.
[183] Schneider v. Chrysler Motors Corp., 401 F.2d 549 (8th Cir. 1968).

product outweigh its utility.[184]

Manufacturing defects usually involve construction or production flaws which ultimately result in product failure, such as the crash of a helicopter due to a defective weld in the tail section.[185] Moreover, the manufacturer's liability is not relieved by intervening government negligence in repair or maintenance unless that negligence is both substantive and decisive in the causal chain of events leading to the injury. This was the holding in *Vasina v. Grumman Corp.*,[186] where the Navy made faulty repairs on an aircraft's wing that had been damaged in the Vietnam War. The wing later separated, resulting in the pilot's death. The defendant contractor urged that the faulty repairs were unforeseeable intervening and superseding negligence. The Second Circuit was unpersuaded, however, pointing out that the Navy's negligence had to more than "slight or irrelevant" and that the jury was instructed on the legal criteria for superseding negligence but still found for the plaintiff.

A government contractor who merely assembles parts from its suppliers or subcontractors does not escape liability by demonstrating the defects were caused by the suppliers or subcontractors.[187] Indeed, one court has gone so far as to say that the assembler of components defectively produced by a different manufacturer is subject to liability as though it were the manufacturer of the component.[188]

The failure of an assembler to inspect parts such as a cylinder for housing a guided missile has been found to have been the proximate cause of injury when those parts were defective.[189] Likewise, the failure of any manufacturer to inspect or to do so in a careful manner may be found to have been the proximate cause of the harm if a reasonable inspection would have disclosed the defect.[190]

Nonetheless, in a suit for breach of a duty to test, the Ninth Circuit in *McKay v. Rockwell International Corp.*,[191] declined to impose a duty on a Navy contractor to test for latent defects because the Navy

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[184]Dorsey v. Yoder Co., 331 F. Supp. 753 (E.D. Pa. 1971), *aff'd*, 474 F.2d 1339 (3d Cir. 1973).

[185]Krause v. Sud-Aviation, Societe Nationale de Constructions Aeronautiques, 413 F.2d 428 (2d Cir. 1969).

[186]664 F.2d 112 (2d Cir. 1981).

[187]O'Keefe v. Boeing Co., 335 F. Supp. 1104 (S.D.N.Y. 1971).

[188]Boeing Airplane Co. v. Brown, 291 F.2d 310 (9th Cir. 1969).

[189]Guarnieri v. Kewanee Ross Corp., 263 F.2d 413 (2d Cir. 1959).

[190]Sieracki v. Seas Shipping Co., 57 F. Supp 724 (E.D. Pa.), *aff'd in part, rev'd in part*, 149 F.2d 98 (3d Cir.), *aff'd*, 328 U.S. 878 (1944).

[191]704 F.2d 444 (9th Cir. 1983).

was constantly testing the system and such a duty would make the defendant a virtual guarantor of the proper performance by the Navy of its duty. Although not cited in the Ninth Circuit's decision, such a holding seems contrary to its opinion in *Boeing Airplane Co. v. Brown*[192] that government negligence in inspecting a bomber produced by a contractor will not relieve the contractor of its liability for the negligent manufacture of the bomber. Similarly, *Harris v. Pettibone Corp.*[193] held that, unless government standards at a government-owned contractor-operated plant are shown to be for the benefit of contractor employees, the standard will be found to have been intended to assure performance of the work and not to create a duty of care on the part of the government.

(c) Foreseeability.

Finally, it must be noted that a government contractor's duty under a negligence theory is not to deliver a product without defects. Rather, the duty is to deliver a product without defects that are foreseeable. This factor of foreseeability requires the contractor to anticipate the uses to which the product may be put.[194] If it is not foreseeable that a plane will be overloaded and such overloading resulted in a crash, the contractor can escape liability.[195] Nonetheless, foreseeability may include uses of the product unintended by the contractor as indicated by Comment h to Section 402(A) of the Restatement (Second) of Torts:

> A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from the abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable. Where, however, he has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, he may be required to give adequate warning of the danger and a product sold without such a warning is in a defective condition.

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[192]291 F.2d 310 (9th Cir. 1969).

[193]488 F. Supp. 1129 (E.D. Tenn. 1980).

[194]Brown v. Chapman, 304 F.2d 149 (9th Cir. 1962); Smith v. Hobart Mfg. Co., 185 F. Supp. 751 (D. Pa. 1960).

[195]335 F. Supp. 1104 (S.D.N.Y. 1971).

Foreseeability, however, would not include dangers inherent in the product that either are obvious to the user or generally known to the public.[196]

(2) Breach of Warranty.

Breach of warranty is the occurrence of some event despite an assurance that the event would not occur. In the context of product liability, it is the occurrence of a physical injury in the use of a product after some representation, either express or implied, that the product was safe against that type of injury. An injured plaintiff pleading product liability under a theory of breach of warranty must establish four elements to recover: that a representation about the product was made by the seller, that the plaintiff, a buyer or possibly another user, relied on the representation, that the representation was erroneous, and that the plaintiff was injured because of his or her reliance on the representation.[197]

(a) Elimination of Negligence and Privity.

The case of *Henningsen v. Bloomfield Motors, Inc.*[198] is significant for two reasons. First, it eliminated the need to prove negligence as a prerequisite to recover for product liability injuries. Second, it greatly reduced the requirement for privity in breach of warranty actions. In *Henningsen*, manufacturer transferred an automobile to a dealer. The dealer in turn sold it to a man whose wife was injured while driving it. The wife brought suit under an implied warranty of merchantability against both the manufacturer and the dealer.

The elimination of the need to prove negligence in *Henningsen* logically flowed from consideration of the suit as one brought in contract rather than tort. The reduction of the requirement for privity was more difficult. It required extension of whatever warranty the buyer received to the ultimate user of the product. This also was logical in the mind of the court which stated:

> [I]t is our opinion that an implied warranty of merchantability chargeable to either an automobile manufacturer or a dealer extends to the purchaser of the car, members of his family, and to other persons occupying or using it with his consent. It would be wholly opposed to reality to say that use by such persons is not within the anticipation of parties to such a warranty of reasonable suitability of an

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[196]Jamieson v. Woodward & Lothrop, 247 F.2d 23 (D.C. Cir. 1957).
[197]*See* Mannsz v. MacWhyte Co., 155 F.2d 445 (3d Cir. 1946).
[198]32 N.J. 358, 161 A.2d 69 (1960).

> automobile for ordinary highway operation. Those persons must be considered within the distributive chain.[199]

Under this rationale, a user could sue the manufacturer even though he neither purchased the product from the manufacturer nor had any contact with the manufacturer. In other words, users such as military personnel could now sue the government contractor that furnished the equipment and systems that injured them. In *Paris v. General Electric Co.*,[200] defendant-contractor sold an aircraft engine to the United States. The government provided it to another contractor that inserted it in a plane. The plane later crashed. An Air Force officer's estate sued on the ground the defendant had breached its implied warranty that the engine was suitable for its intended use. The contractor defended on the basis of lack of privity, but the court held that, since when put to its intended use it was a source of danger to many persons, the warranty ran to all intended users.

Nonetheless, the elimination of the requirement for privity in breach of warranty actions has not been universally adopted. At least two jurisdictions have considered the matter and determined that privity of contract is still a prerequisite to recovery under breach of warranty actions against government contractors.[201]

Under the Uniform Commercial Code (UCC), the extent to which such warranties extend beyond the immediate buyer depends on which of three alternate provisions has been adopted. Section 2-318, Alternate A, states that a seller's warranty, whether express or implied, extends to any natural person who is in the family or household of the buyer or who is a guest in his home if it is reasonable to expect such a person may use the product. A seller may not exclude or limit this first provision. Section 2-318, Alternate B, states that a seller's warranty, whether express or implied, extends to any natural person who may reasonably be expected to use the product. A seller may not exclude or limit this second provision. Section 2-318, Alternate C, states that a seller's warranty, whether express or implied, extends to any person who may reasonably be expected to use the product. A seller may not limit the operation of the third provision with respect to injury to the person of an individual to whom the warranty extends. Comment 3 to section 2-318 states that the third alternative follows the trend of modern decisions.

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[199] *Id.* at 389, 161 A.2d at 100.

[200] 54 Misc. 2d 310, 282 N.Y.S.2d 348 (Sup. Ct. N.Y. County), *aff'd*, 290 N.Y.S.2d 1015 (App. Div. 1st Dep't 1967).

[201] Miles v. Bell Helicopter Co., 385 F. Supp. 1029 (N.D. Ga. 1974); Tarbert v. Ingraham Co., 190 F. Supp. 402 (D. Conn. 1960). *See also* Whitaker v. Harvell-Kilgore Corp., 418 F.2d 1010 (5th Cir. 1969) (applying Georgia law).

(b) Types of Warranties.

Even if breach of warranty is a viable theory for product liability, the type and the breadth of the warranty must still be determined. The best way to ascertain these warranties and their remedies is by reference to the UCC, which has been enacted in every American jurisdiction.[202] Both express and implied warranties are recognized under the UCC.

(1) Express Warranties.

An express warranty is a specific representation about the characteristics of the product that is more than a mere expression of the seller's opinion. In the language of UCC Section 2-313:

> 1. Express warranties by the seller are created as follows: (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes a part of the basis of the bargain creates an express warranty affirmation or promise. (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description. (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
> 2. It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

The purchaser must rely on the express warranty for the plaintiff to have a cause of action. A breach occurs when the representation proves to be untrue. A misrepresentation in an express warranty, even if innocently made, renders the seller liable for breach. The representation must be made before or during the sale, but it need not be in writing.[203]

Express warranties on weapons systems have been very rare. Recently, however, the Air Force Systems Command has begun encouraging the use of such express warranties.[204] Pratt & Whitney

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[202]Louisiana has adopted only Articles 1, 3, 4, 5, 7, and 8 of the UCC.
[203]Wat Henry Pontiac Co. v. Bradley, 210 P.2d 348 (Okla. 1949).
[204]826 BNA Fed. Contracts Rep. A-3 (Apr. 7, 1980).

became the first contractor to respond to this effort by offering a "900 cycle" (approximately two-year operational use) warranty on jet fighter engines for the F-15 and F-16.[205] Although these are life cycle warranties rather than quality warranties and the primary motivation for seeking these warranties is to drive down the costs of a weapons system over its entire life, the decline of the requirement for privity may permit injured military personnel to share in the benefits of these warranties under certain circumstances. For example, an airplane engine failure resulting in a crash within the warranty period should be expected to give rise to at least a third party liability theory of recovery.

(2) Implied Warranties.

Unlike an express warranty, an implied warranty is always the creature of law. It is neither written into the contract nor based on any statement made by the seller. There are two basic kinds of implied warranties: an implied warranty of merchantability and an implied warranty of fitness.

An implied warranty of merchantability guarantees the product for ordinary use. As stated in section 2-314 of the UCC:

> 1. Unless excluded or modified...a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind...
>
> 2. Goods to be merchantable must be at least such as (a) pass without objection in the trade under the contract description; and (b) in the case of fungible goods, are of fair average quality within the description; and (c) are fit for the ordinary purposes for which such goods are used; and (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and (e) are adequately contained, packaged and labeled as the agreement may require; and (f) conform to the promises or affirmations of fact made on the container or label if any.
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> 3. Unless excluded or modified...other implied warranties may arise from course of dealing or usage of trade.

In other words, the implied warranty of merchantability guarantees the product is essentially similar to other such products found within the trade.

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[205] 834 BNA Fed. Contracts Rep. A-5 (June 2, 1980).

An implied warranty of fitness guarantees the product for a specified use. Section 2-315 of the UCC provides:

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

The implied warranty of fitness only attaches then when the seller knows of or has reason to know of the specific use of the product and of the fact that the purchaser is relying on the seller's judgment that the product would satisfy that specific use.

Efforts have been made to extend the concept of breach of implied warranty to actions in admiralty under the Death on the High Seas Act.[206] *Noel v. United Aircraft Corp.*[207] held that breach of implied warranty does not apply to federal maritime law. The opposite result was reached in *Montgomery v. Goodyear Tire & Rubber Co.*[208] and *Sevits v. McKiernan-Terry Corp.*[209]

Whether a warranty is express or implied is especially important in litigation for breach. Plaintiffs would always prefer to find an express rather than an implied warranty. Express warranties may go beyond the legally imposed standards.[210] Express warranties usually are communicated to the user, so the issue of privity does not arise.[211] Finally, while implied warranties may be disclaimed if done in writing and in a manner that will be readily understood, it is virtually impossible to disclaim an express warranty since that is inconsistent with the very wording of the express warranty.[212]

3. Strict Liability.

Strict liability is the ultimate focusing upon causation in the finding of liability for an injury caused by a defective product. Liability attaches without a finding of duty, representation, or lack of care.

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[206]46 U.S.C. §§ 761-768 (1976).
[207]204 F. Supp. 929 (D. Del. 1962).
[208]231 F. Supp. 447 (S.D.N.Y.), *aff'd*, 392 F.2d 777 (2d Cir. 1964), *cert. denied*, 393 U.S. 841 (1968).
[209]264 F. Supp. 810 (S.D.N.Y., 1966). *See also* McKay v. Rockwell International Corp., 704 F.2d 444 (9th Cir. 1983).
[210]Uniform Commercial Code. (U.L.A.) § 2-317(c).
[211]Haufer v. Zogarts, 120 Cal Rptr. 681, 534 P.2d 377 (1975).
[212]Uniform Commercial Code (U.L.A.) § 2-316.

The only elements necessary to establish strict liability in a jurisdiction permitting such a cause of action are a product in a defective condition, a connection between the manufacturer or seller and the product, the existence of the defect at the time of sale, an injury to the plaintiff, and the defect being the proximate cause of the injury.

(a) Development of Strict Liability.

The first judicial acceptance of strict liability did not occur until 1963 in *Greenman v. Yuba Power Products, Inc.*[213] In *Greenman*, the operator of a combination power tool sustained head injuries when he used the machine as a wood lathe. The plaintiff had no remedy under negligence because the defendant-manufacturer had exercised all possible care in producing the power tool. Neither did the plaintiff have a remedy in breach of warranty because there was no representation relevant to the defect and the plaintiff failed to provide notice of any defect as required by the sale. In fact, the plaintiff only prevailed because the California Supreme Court was willing to establish an entirely new theory of product liability known as strict liability. In the words of Justice Traynor:

> To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the [product] in the way it was intended to be used and as a result of a defect in the design and manufacture of which the plaintiff was not aware that made the [product] unsafe for its use.[214]

Significantly, *Greenman* specifically placed the action in tort rather than in contract:

> Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law, and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.[215]

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[213]59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).
[214]*Id.* at 901, 27 Cal. Rptr. at 701, 59 Cal.2d at 64.
[215]*Id.*, 27 Cal. Rptr. at 701, 59 Cal.2d at 63.

In addition to avoiding the need for a representation or timely notice, placing the action in tort also avoided whatever privity requirements might still exist. Furthermore, by requiring plaintiff to show only a defect in the product rather than that the defect resulted from the defendant's lack of care, the need to prove the primary element in the usual tort remedy of negligence was eliminated.

The justification for strict liability was based at least in part on the novel public policy consideration that the party most able to bear the costs is responsible: "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that produce such products on the market rather than by the injured persons who are powerless to protect themselves."[216] Regardless of the justification for strict liability, it rapidly was adopted in the majority of the jurisdictions.

Only two years after the *Greenman* decision Section 402A of the Restatement (Second) of Torts was drafted to set forth the principle:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to strict liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The swift acceptance of the theory of strict liability is demonstrated by the fact that the vast majority of states have adopted strict liability in the very short time since it was first enunciated. Nevertheless, there are a few recent decisions that still reject the concept.[217]

In addition, at least one line of cases recognizes an exception to strict liability for an unavoidably unsafe product that is vitally important to the community. Application of this rule in those jurisdictions adopting it usually requires the defendant use the best

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[216] *Id.*

[217] Smith v. Fiber Controls Corp., 300 N.C. 669, 268 S.E.2d 504 (1980); Wiska v. St. Stanislaus Social Club, Inc., 7 Ma.A. 813, 390 N.E.2d 1133 (App. Ct. 1979).

known methods of product preparation and warn all users of the hazards.[218]

(b) Characteristics of Strict Liability.

It is important to understand that strict liability does not mean absolute liability. Manufacturers or sellers are not insurers of the product. They are not automatically liable because the plaintiff is injured using the product. The defect must at least be attributable in some way to the manufacturer to hold the manufacturer liable. In other words, strict liability is not a doctrine of liability without fault. Instead, it merely removes the necessity for proving negligence.[219]

Strict liability improves the plaintiff's chances for recovery not only by eliminating the requirement to prove lack of care or representation but by expanding the category of defendants who may be sued. Any commercial seller in the chain between the party responsible for the defect and the plaintiff is liable as long as that seller is engaged in the business of selling such products.

In *Vandermark v. Ford Motor Co.*[220] the plaintiff was injured in his automobile when the brakes unexpectedly failed. The dealer's attempt to avoid liability was thwarted on the basis of the same public policy discussed above:

> Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products... In some cases the retailer may be the only member of the enterprise reasonably available to the injured plaintiff. In other cases the retailer himself may play a substantial part in insuring that the product is safe or may be in a position to exert pressure on the manufacturer to that end; the retailer's strict liability thus serves as an added incentive to safety. Strict liability on the manufacturer and retailer alike affords maximum protection to the injured plaintiff and works no injustice to the defendants, for they can adjust the costs of such protection between them in the course of their continuing business relationship.[221]

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[218]*See* Belle Bonfils Mem. Blood Bank v. Hansen, No. 81-SC-370 (Colo. June 13, 1983), in which the need for transfused blood was held sufficient to defeat a suit in strict liability for blood contaminated with hepatitis virus.

[219]Foster v. Day & Zimmerman, 502 F.2d 867 (8th Cir. 1974).

[220]61 Cal.2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964).

[221]*Id.* at 171, 37 Cal. Rptr. at 899, 61 Cal.2d at 262.

The manufacturer in *Vandermark* defended on the grounds that it had passed the duties of final inspection and adjustments to its dealers. The California Supreme Court rejected this argument by denying a manufacturer can delegate such duties:

> Since Ford as manufacturer of the completed product cannot delegate its duty to have its cars delivered to the ultimate purchaser free from dangerous defects, it cannot escape liability on the ground that the defect . . . may have been caused by something one of its dealers did or failed to do.[222]

Likewise, the assembler of products, such as an ammunition manufacturer who assembled government supplied material into howitzer shells, also have failed to escape strict liability.[223]

Knowledge of the defect is irrelevant to the theory of strict liability. Even if there is no reason to find the manufacturer or seller should have known of the defect, liability attaches:

> On whatever theory, the justification for strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum protection at the hands of someone, and the proper persons to afford it are those who market the products.[224]

Controversy does remain over the requirement that the product be in a defective condition. Under the Restatement definition and the law of most states, the defective condition must be "unreasonably dangerous." At least three jurisdictions, including California, the birthplace of strict liability, do not require the defective condition to

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[222]*Id.*, 37 Cal. Rptr. at 899, 61 Cal.2d at 261.

[223]Challoner v. Day & Zimmerman, 512 F.2d 77 (5th Cir.), *rev'd on other grounds*, 423 U.S. 6 (1975).

[224]Restatement (Second) of Torts § 402A, comment C.

be unreasonably dangerous. As reasoned by the California Supreme Court in *Cronin v. J.G.E. Olson Corp.*:[225] "We think the requirement that a plaintiff also must prove that the defendant made the product "unreasonably dangerous" places on him a significantly increased burden and represents a step backward in the area pioneered by this court."[226]

Regardless of whether the defective condition must be unreasonably dangerous, the determination of a defect depends on the intended use of the product. For example, an Army jeep must be judged by its use in a military environment rather than on civilian roads to determine if it is defective.[227] Still, it may not be necessary to prove a particular defect caused the injury as long as it is proved that the injury was caused by a defective product. In *Lindsay v. McDonnell-Douglas Aircraft Corp.*,[228] the widow of a Navy commander killed in the crash of an aircraft filed an action in strict liability against the manufacturer of the crashed aircraft that killed her husband. Although she could not prove a particular defect in the plane, the Eighth Circuit refused to dismiss her action:

> Plaintiff however is entitled to have her case considered on the theory she has presented of strict liability in tort without the requirement that she show the specific defect which caused the crash and that the defendant had knowledge of it. If she can show that the crash was caused by some unspecified defect and that no other cause is likely, she has made a submissible case.[229]

(c) Application to Military Members.

Traditionally, a plaintiff's military status has not been relevant to the application of strict liability. Specifically rejecting defendant's argument that a grenade made for the Army is not placed in the stream of commerce so strict liability should not attach, the Eighth Circuit, in *Foster v. Day & Zimmerman, Inc.*,[230] held:

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[225]8 Cal.3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1973).

[226]*Id.* at 1162, 104 Cal. Rptr. at 442, 8 Cal.3d at 133. *See also* Berkebile v. Brantley Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975); Glass v. Ford Motor Co., 123 N.J. Super. 599, 304 A.2d 562 (1973).

[227]Sanner v. Ford Motor Co., 144 N.J. Super. 1, 364 A.2d 43, *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (1977), *cert. denied*, 75 N.J. 616, 384 A.2d 846 (1978).

[228]460 F.2d 631 (8th Cir. 1972).

[229]*Id.* at 640.

[230]502 F.2d 867 (8th Cir. 1974).

> In making the grenade and its component parts the defendant knew that it was made for military personnel and that it was to be used by them. We believe the public interest in human life and health requires the protection of the law against the manufacture of defective explosives, whether they are to be used by members of the public at large or members of the public serving in our armed forces.[231]

Significant judicial opposition to the imposition of strict liability in actions against government contractors by service members has arisen in the Ninth Circuit. In *McKay v. Rockwell International Corp.*,[232] two Navy widows sued the aircraft manufacturer for the deaths of their pilot-husbands during ejections from the RA-5C "Vigilante." The planes of both pilots caught fire in separate incidents, causing them to bail out. Navy investigators found that the deaths were most likely caused by failure of the ejection systems. Nonetheless, the court first considered the policy reasons for imposing strict liability and then concluded they weren't appropriate for military members.

Citing a law review article,[233] the *Rockwell* court identified the four principal reasons for imposing strict liability as enterprise liability, market deterrence, compensation, and implied representation. The court noted, but did not include as a reason, the reduction of transaction costs by relieving a plaintiff of the problem of proving negligence or warranty violations.

The first principal reason, enterprise liability, refers to the belief that, since a product's price reflects the costs of accidents, an unsafe product will increase in price with a corresponding reduction in the number of purchases due to the higher price. The Ninth Circuit found this irrelevant to the military contracting process because the military tests its equipment. Thus, it is aware of the risks regardless of price. In addition, demand for military equipment is not elastic, such that including the costs of accidents in the price would not deter the purchase of the equipment.

Such logic betrays a lack of knowledge about the military acquisition process. Military requirements for weapons systems may be inelastic, but the military does possess elasticity of choice. The mil-

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[231] *Id.* at 871.

[232] 704 F.2d 444 (9th Cir. 1983).

[233] Note, *Protecting the Buyer of Used Products: Is Strict Liability for Commercial Sellers Desirable?*, 33 Stan. L. Rev. 535 (1981).

itary is not required to buy their weapons systems from any particular contractor; other contractors and competitors would be quite willing to meet the services' needs. Furthermore, the benefit of higher prices for unsafe products is not that they increase the purchaser's awareness of dangers, but that they cause purchasers to buy elsewhere at lower prices thereby driving the unsafe product from the market on economic grounds. The military is not unburdened by budgetary constraints. If the Navy can buy twelve squadrons of safer planes from one contractor for the same price it can buy ten squadrons of unsafe planes from another contractor, the choice should not be in doubt.

The second principal policy reason considered for strict liability in *Rockwell* is that it deters the marketing of unsafe products by encouraging the use of safety features which lower the cost of accidents. These features should lower price and increase sales. The court was not persuaded by this rationale, believing that the military balances the imperatives of national defense against safety features.

Again the court's thinking is flawed, this time by assuming that performance is always inversely proportional to safety. The military may occasionally sacrifice some safety to obtain a weapons system that flies faster, manuevers tighter, or carries more armament. However, this scenario is completely irrelevant to the facts in *Rockwell*. The aviators in *Rockwell* died apparently because of the failure of their ejection systems, not because the performance requirements of their aircrafts rendered them unsafe. An ejection seat bears little relation to performance. A faster aircraft may use wings swept back at a greater angle making it more difficult to land and increased armament may pose a greater threat of explosion from enemy cannon fire, but an ejection system neither improves nor degrades performance. Indeed, the very purpose of an ejection system is to promote safety. If the military is buying such a safety feature, it makes little sense to say strict liability ought not to apply because the military is not interested in safety.

The third principal policy reason for strict liability is compensation of the victims of accidents caused by defective products. The Ninth Circuit was unpersuaded by the compensation rationale under these facts because Congress has already provided compensation through the Veterans Benefits Act.[234] While acknowledging that strict liability would increase that compensation, the court stated its doubt that any such increase was anticipated at the time of enlistment.

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[234] 38 U.S.C. §§ 101-5228 (1976).

Without even addressing the issue of what service members expect when they enlist or take their oaths as officers, the actual and current amount of compensation received by the widow of the highest ranking victim in *Rockwell* under the Veterans Benefits Act is $658 per month with an additional $84 per month for each dependent child. It is left to the reader's judgment whether this is sufficient compensation. It also is left to the reader's judgment whether any consumer anticipates the amount of recovery for injury or death before buying or using any product.

Finally, the court considered implied representation as a basis for strict liability. Under this concept, it is reasoned that suppliers impliedly represent that the product is safe for its intended use. If the product is defective, consumers should receive compensation for the disappointment of their reasonable expectation of safety.

Finding military members distinguishable from "consumers," the *Rockwell* court decided:

> Members of the armed forces are not ordinary consumers with respect to military equipment. Their "reasonable expectations of safety" are much lower than those of ordinary consumers. They recognize when they join the armed forces that they may be exposed to grave risks of danger, such as having to bail out of a disabled aircraft. This is part of the job. The Nation sometimes demands their very lives. This is an immutable feature of their calling. To regard them as ordinary consumers would demean and dishonor the high station in public esteem to which, because of their exposure to danger, they are justly entitled.[235]

In dissent, Circuit Judge Alarcon called the majority to task for this justification noting:

> Military personnel are honored and esteemed because they are willing to fight for their country and risk their lives doing so. They are not so respected because they are sometimes forced by calling to use unsatisfactory or unsafe equipment. It is the Military's, Rockwell's and this court's duty to insure that our servicemen are provided with reliable and safe equipment. Just as the Military can make any parachute packer take one that he has just folded and make him jump with it, the court should

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[235] 704 F.2d at 453.

> require that Rockwell stand behind the products for which it voluntarily contracts and provides at a profit.[236]

It is too early to know whether other courts will follow *Rockwell* and its faulty logic or rely on more traditional expressions of strict liability for military equipment as in *Foster v. Day & Zimmerman*. Nonetheless, a spectre has arisen for the military plaintiff; strict liability may be the ultimate tool of the injured plaintiff unless, of course, the plaintiff is in the military.

C. BASES FOR DEFENSE

1. Sovereign Immunity.

As indicated in the first section, the government enjoys a great degree of immunity from product liability suits. Since government contractors perform a public function and usually perform it in accordance with government specifications, it is only natural that they would attempt to share in the government's immunity. Traditionally, this attempted defense has been called sovereign immunity.

(a) Traditional Sovereign Immunity.

Such a defense was recognized in *Yearsley v. W.A. Ross Construction Co.*,[237] where a Corps of Engineers contractor diverted the course of the Missouri River thereby eroding plaintiff's land. According to the Supreme Court, whether the defendant-contractor was liable depended only on whether the diversion of the river was outside the scope of the defendant-contractor's authority:

> [I]t is clear that if this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will- . . . Where an agent or officer of the Government purporting to act on its behalf has been held to be liable for his conduct causing injury to another, the ground of liability has been found to be either he exceeded his authority or that it was not validly conferred.[238]

Likewise, in *Dolphin Gardens Inc. v. United States*,[239] the court granted the defendant-contractor's motion for summary judgment on the basis of sovereign immunity. Damages were allegedly caused

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[236] *Id.* at 461.
[237] 309 U.S. 18 (1940).
[238] *Id.* at 19.
[239] 243 F. Supp. 824 (D. Conn. 1965).

by fumes emanating from sludge the contractor deposited on its land pursuant to its performance of a government contract. According to the court, it was the government which had failed to provide additional precautions in the plans to safeguard against the subsequent escape of the fumes. All the contractor did was perform its contract. In addition, the imposition of liability on such contractors would only result in their including contingencies in their prices to cover losses from liability. This would increase contract prices and render meaningless the government's immunity from such suits. Likewise, *Myers v. United States*[240] affirmed on sovereign immunity grounds the denial of recovery from a government contractor for trespass and waste in the construction of a federal road.

(b) Rationales for Sovereign Immunity.

There appear to be three separate rationales used to support the extension of sovereign immunity to government contractors. First, by performing the government's work, the contractor is considered the alter ego or at least the agent of the government. Second, whatever common law or contractual right to indemnity and contribution the contractor may enjoy, the likely increases in the costs to the government would invalidate the government's immunity if suit were permitted against its contractors. Third, there usually is some lack of care on the part of the government in addition to whatever lack of care the contractor may have, and it is inequitable to make only the contractor liable.

(1) Alter Ego/Agency.

The alter ego/agency rationale rests on the premise that the contractor's relationship with the government is so great that it has become almost a part of the government. Conversely, since by performing the contracted for work the contractor is bearing and discharging a government burden, it should, likewise, share in the government's benefits. Despite the initial apparent appeal of this line of reasoning, the Supreme Court, in *Powell v. United States Cartridge Co.*,[241] put this argument in perspective:

> In these great projects built for and owned by the Government, it was almost inevitable that the new equipment and materials would be supplied largely by the Government and that the products would be owned and used by the Government. It was essential that the Government supervise closely the expenditures made and the specifications

[240] 323 F.2d 580 (9th Cir. 1963).
[241] 339 U.S. 497 (1950).

> and standards established by it. These incidents of the program did not, however, prevent the placing of managerial responsibility upon independent contractors.[242]

The dismantling of the alter ego/agency argument was taken even farther in *Whitaker v. Harvell-Kilgore Corp.*[243] The facts in that case could hardly have been better for the defendant-contractors seeking to rely on alter ego/agency. In *Whitaker*, a grenade injured a Fort Benning soldier when it exploded prematurely. The fuses manufactured under contract by one defendant were inspected by the government on government-provided and certified X-ray equipment. The second contractor manufactured the grenades from the fuses and other government-owned material in a government-owned plant. The government had contractually agreed to indemnify the second contractor against losses arising from performance of the contract.

Nonetheless, the Fifth Circuit held the contractors liable, refusing to find either one the alter ego of the government. The basic reason for this appears to be the court's distaste for sovereign immunity and its refusal to expand the doctrine in any way that it was not required to do: "Although hoary, sovereign immunity still retains a place in our legal scheme, however, it must be maintained in its proper place."[244] Its proper place, the court concluded, was not to protect government contractors. A similar result was reached in *Foster v. Day & Zimmerman, Inc.*,[245] another case involving a defective hand grenade, where the Eighth Circuit held that sovereign immunity would not cover the fault of private corporation no matter how intimate its connection with the government.

Although these decisions seemed to put to rest the concept as a basis for the sovereign immunity defense, a resurgence of interest in alter ego/agency has recently been generated. In *Sanner v. Ford Motor Co.*,[246] an action by a soldier thrown from an Army jeep, the court cited with approval the *Yearsley*, *Dolphin Gardens*, and *Myers* decisions. Although *Sanner* disposed of the matter through its consideration of the government design defense rather than sovereign immunity, the resurrection of *Yearsley* and its progeny was significant.

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[242] *Id.* at 507.
[243] 418 F.2d 1010 (5th Cir. 1969).
[244] *Id.* at 1011.
[245] 502 F.2d 867 (8th Cir. 1974).
[246] 144 N.J. Super. 1, 364 A.2d 43, *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (1977), *cert. denied*, 75 N.J. 616, 384 A.2d 846 (1978).

The District Court for the District of Columbia has gone so far as to find that a government contractor can be both an independent contractor and an agent. In *Johnson v. Bechtel Associates Professional Corp.*,[247] the Washington Metropolitan Transit Authority (Metro) was created by compact among Virginia, Maryland, and the District of Columbia, with the express approval of Congress to develop and operate a transportation system. The compact provided a limited waiver of Metro's sovereign immunity as the exclusive remedy for torts of its agents but did not otherwise waive the immunity of the jurisdictions entering the compact. Metro then contracted with Bechtel to oversee the safety of the subway project and administer various construction contracts. Plaintiff allegedly contracted silicosis from exposure to high levels of silica dust and sued Bechtel for negligent performance of its duties as safety overseer. Bechtel defended on the grounds it acted as agent and was entitled to immunity.

The court first noted that basic agency law required the two elements of consent and control. The parties must clearly manifest their intent that the agent will act on behalf of the principal and the principal must retain the right to control the agent in its performance of its duties. While the principal's right to control is essential, the amount of control actually exercised need not be great.[248]

Next, the court focused on both the contract terms and the manner in which the contract was performed. The contract provided that Bechtel could conduct operations in the name of Metro subject to the approval of Metro, Bechtel had to keep Metro fully informed of contractual operations, and Metro possessed right of approval over the Bechtel operations manual. While Bechtel had the right to order a shutdown for safety violations, it rarely did this without the prior approval of the contracting officer. Under these circumstances, the court concluded that Bechtel had acted as Metro's agent on safety matters and as such was entitled to immunity from suit. The fact that Bechtel might also be classified as an independent contractor for other matters did not change this result.

Admittedly, the facts are significant in the court's holding and indicate a degree of control greater than in many government contracts. It is submitted, however, that the ruling is more important to research and development contracts than to supply or services contracts. The degree of government control over research and development contractors tends to be much greater than over other

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[247] 545 F. Supp. 783 (D.D.C. 1982).
[248] *Id.* at 785.

contractors. The greater willingness of research and development contractors to submit to government control over operations which are novel and not an established company practice may permit these contractors the additional benefit of establishing a sovereign immunity defense in actions for third-party injuries.

Johnson is significant for several different reasons. It indicates a reemergence of the ability of a defendant-contractor to utilize the alter ego/agency basis for the sovereign immunity defense, it is precedent for a contractor to obtain immunity despite its classification as an independent contractor, and the fact it was decided in the District of Columbia gives its holding a greater impact on government contractors.

(2) Invalidation of Government Immunity.

Attempting to obtain sovereign immunity for a contractor on the basis that the government would lose its immunity because of common law or contractual indemnification appears to be a false argument. A contractor's common law right to government indemnity and contribution is very limited.[249] The existence of any contractual right to indemnification or contribution actually helps defeat the contractor's attempt to use the defense because it demonstrates the nonavailability of a defense to suit. If a contractor enjoyed sovereign immunity, there would be no need for an indemnity agreement.[250]

An agreement based on increased costs to the government in its future contracts may still have some vitality as indicated by *Sanner*. Quoting *Dolphin Gardens*,[251] the *Sanner* court agreed with the cost argument:

> To impose liability on the contractor under such circumstances would render the Government's immunity for the consequences of acts in the performance of a "discretionary function" meaningless, for if the contractor was held liable, contract prices to the Government would be increased to cover the contractor's risk of loss from possible harmful effects of complying with decisions of executive officers authorized to make policy judgments.[252]

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[249] *See* text accompanying notes 396-589 *infra*.

[250] Whitaker v. Harvell-Kilgore Corp., 418 F.2d 1010, 1014 (5th Cir. 1969). *But see* Green v. ICI America, Inc., 362 F. Supp. 1263 (E.D. Tenn. 1973), in which a contractor producing dynamite was permitted to share in the government's sovereign immunity even though the government had agreed to reimburse the contractor for liability to third parties. The court in *Green* did find the government's high degree of control over the contractor to be persuasive.

[251] 243 F. Supp. at 827.

[252] 364 A.2d at 47.

In any event, plaintiffs may be expected to counter cost arguments by emphasizing the government's immunity, such as expounded by *Feres*,[253] is premised on the need for military discipline rather than cost containment. It also may be possible to avoid cost arguments by demonstrating litigation involving government contractors can have but little impact on military discipline.

(3) Government Fault.

The wide acceptance of strict liability should virtually eliminate the effectiveness of the third rationale for sovereign immunity involving the equity of holding the contractor entirely liable when the government at least partially lacked care. To the extent that the action sounds in strict liability, the issue of the relative lack of care between the contractor and the government is irrelevant.[254]

2. Public Policy.

Public policy defenses are based not on the government's ability to avoid liability but on its duty to take certain actions on behalf of the nation. In asserting a public policy defense, a contractor alleges a finding of its liability would impede the government in the discharge of such national functions as conducting foreign policy or providing for the common defense.

(a) Policies Asserted.

Public policy defenses may be expressed in many forms by defendant-contractors. They may be phrased in terms of the need to maintain the lead in weapons development, the inherent unsafety in the advanced design of weapons systems, the necessity of timely delivery to avoid obsolescence in the field, and the erosion of the defense base by permitting such suits. Ultimately, whatever argument is used, it rests on the premise that research and development in general and the military aquisition of it in particular are different from other procurement situations.

All of these rationales for the public policy defense were advanced by the defendant-contractors in *Montgomery v. Goodyear Tire and Rubber Co.*[255] *Montgomery* involved the crash of a Navy dirigible off the coast of New Jersey which killed the entire crew of Navy servicemen. The plaintiffs suit alleged the malfunction of an electronic

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[253]*Feres* however, did not mention discipline. *See* text accompanying notes 66-70 *supra*.

[254]*See* text accompanying notes 222-45 *supra*.

[255]231 F. Supp. 447 (S.D.N.Y. 1964), *aff'd*, 392 F.2d 777 (2d Cir. 1968), *cert. denied*, 393 U.S. 1058 (1969).

warning bell built by one defendant and installed by a second failed to warn the crew of the gas escaping from the dirigible.

The *Montgomery* defendants urged that this country's need to maintain the lead in weapons development justified sacrifices in safety during the research and development of new weapons systems. Likewise, the defendants stressed that the advanced design of most weapons systems is at the very frontier of science and engineering where safety considerations have not kept pace with the state of the art. The court expressed great sympathy for these arguments stating: "The Court is impressed by the sensitive questions of national defense raised here and the important role played by these advanced weapon systems in protecting the nation. We recognize that in some cases, certain safety factors must be disregarded in order to explore new possibilities in weaponry."[256]

Defendants also argued that the amount of time for production is necessarily short because of the need to deliver weapons and equipment to the field prior to obsolescence and this lack of time severely limits safety considerations. The court, however, was much less impressed by this line of reasoning. Although acknowledging that it may be true that all possible safety problems cannot be eliminated because of the speed with which weapons must be completed, the court refused to make any decision on this basis: "The speed with which an airship must be completed to prevent obsolescence is no license for defective work. Speculation over the adequacy of time consumed in the manufacture of this baloon...will accomplish nothing."[257]

Finally, the *Montgomery* defendants urged that allowing such lawsuits would work a hardship on the manufacturers and government personnel involved in designing, maintaining, and operating such systems. Implicit in this argument was the contention that liability of contractors would result in such harm to contractors that an erosion of the defense base would result. In other words, the companies on which the government had relied for its weapons and equipment would be bankrupted or at least dissuaded from entering into contracts with the government. Noting first that the government was not an ordinary consumer, the court said this did not disallow considerations of negligence and warranty. Thus, the court refused defendants motion for summary judgment. Whatever vitality the defense base argument might hold, it was not sufficient for the defendants in *Montgomery*.

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[256]231 F. Supp. at 450.
[257]*Id.*

It must be recognized that the public policy defense was avoided in *Montgomery* at least in part by the artful pleading of plaintiffs' attorneys. The case was pleaded on the basis of negligent construction of the safety devices actually placed on the dirigible rather than on the basis of a negligent failure to include certain safety devices. The court emphasized this distinction in its decision: "Under perilous circumstances, men are expected to go forward at all hazards despite the total absence of safety devices. . . (W)e are not confronted here with challenges so awesome."[258]

Consequently, attention must be given to the presence or absence of safety features in actions involving the public policy defense. Just as a physician who provides care to an accident victim may be held to a high duty of care despite the emergency of the situation, a government contractor does not necessarily avoid liability on public policy grounds for those features it has supplied. If the government has contracted for a system that includes certain safety mechanisms, the contractor will avoid liability by providing good mechanisms rather than by providing a public policy defense.

(b) Recent Applications.

Judicial belief in a need for a public policy defense in the right circumstances remains today. Recent decisions continue to cite the defense with approval even when an advanced weapons system is not the injury causing product. In *Casabianca v. Casabianca*,[259] for example, a child's hand was caught in a forty-year-old dough maker manufactured for the Army in World War II. Although ultimately decided on the basis of the government design defense, *Casabianca* emphasized the importance of deference to public policy for equipment produced in support of the military's efforts in time of war. In *Sannar v. Ford Motor Co.*,[260] also ultimately disposed under the government design defense, the court stressed its acceptance of the public policy defense in entering judgment for the manufacturer of an Army jeep: "The procurement of military equipment by the Government is made pursuant to its war powers and its inherent right and obligation to maintain an adequate defense posture. In carrying out its responsibilities the Government must be given wide latitude in its decision-making process."[261]

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[258] *Id.*

[259] 428 N.Y.S.2d 400 (Sup. Ct. Bronx County 1980).

[260] 144 N.J. Super. 1, 364 A.2d 43, *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (1977), *cert. denied*, 75 N.J. 616, 384 A.2d 846 (1978).

[261] 366 A.2d at 47.

Two possible conclusions may be drawn from these recent decisions. First, public policy remains viable at least to the extent its connection with the national defense is emphasized. Second, public policy has at least some utility when used in support of a government design defense.

3. Assumption of Risk.

Assumption of risk is an affirmative defense through which the defendant seeks to escape liability by shifting responsibility for the injury to the injured party. The basic concept is that it is inequitable to find a defendant liable if the plaintiff somehow voluntarily placed himself in a situation in which the injury was more than merely an unlikely possibility. Assumption of risk is a particularly powerful defense because it is even recognized as a defense to strict liability. The Restatement (Second) of Torts, in discussing strict liability, provides at Comment n to Section 402A:

> Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability.

At first impression, assumption of risk seems to be an unlikely basis for defense by a government contractor involved in a product liability litigation with a military plaintiff. After all, service members discharge their duties under compulsion of military orders. Civilians exposed to employment dangers are free to leave their worksites subject at most to loss of their jobs. Military members attempting the same remedy to avoid similar dangers expose themselves to prosecution under the Uniform Code of Military Justice.[262] Consequently, any defendant-contractor contemplating the assertion of the assumption of risk defense is faced with the immediate and initial hurdle of demonstrating voluntariness. Despite the obvious difficulty, a number of contractors have raised this defense.

In *Montgomery v. Goodyear Tire & Rubber Co.*,[263] the defendants asserted such a defense following a dirigible crash that killed the

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[262] *See* 10 U.S.C. §§ 885-887, 892, 894 (1976).

[263] 231 F. Supp. 447 (S.D.N.Y. 1964), *aff'd*, 392 F.2d 777 (2d Cir. 1968), *cert denied*, 393 U.S. 1058 (1969).

Navy crew. Evidently, the crash occurred after a seam had broken, permitting gas to escape and a warning bell system had failed to advise the crew of the leak. In their effort to demonstrate voluntariness, the defendants emphasized that, while all Navy personnel were not required to fly, all the victims had volunteered for flight duty and they had all received additional compensation in the form of flight pay. The court easily rejected this assumption of risk defense by stating the defense required two elements: an awareness of the danger and a voluntary choice to encounter the hazards of that danger. Awareness is vital the court emphasized because one cannot assume an unknown hazard.[264] Applying the law to the facts in *Montgomery*, the court noted that awareness encompassed knowledge at the time of volunteering of the limited safety features in the dirigible as well as knowledge of the possibility of a break in the seams. Since proof of this knowledge was lacking, defendants' motion for summary judgment was denied. Similarly, in *Berkebile v. Brantly Helicopter Corp.*,[265] a pilot killed in the crash of his helicopter was held to have assumed the risk only if he knew of the specific defect in the helicopter causing the crash and then voluntarily used the helicopter knowing of the danger posed by that defect.

In *O'Keefe v. Boeing Co.*,[266] the defendant presented a much stronger assumption of risk defense than the defendants in *Montgomery*. *O'Keefe* involved a bomber that crashed during a training mission, killing its Air Force crew. Rather than trying to establish assumption of risk on the facts that the crew volunteered for flight status and received flight pay, the defendants focused on the events surrounding the crash. The aircraft crashed after the pilot decided to enter an area of severe turbulence. While the crew was required to fly a training mission, there was no requirement for them to fly into the particular area of severe turbulence. In addition, the available evidence showed that the other members of the crew had failed to urge their pilot not to enter the area.

Addressing the question of the assumption of risk by the other members of the crew, the court wasted little time in finding that they had not assumed the risk by failing to question the decision of their commander. The crew, the court held, did nothing more than their duty. Even if the pilot had been negligent in entering the area of severe turbulence, his crew was not.

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[264] 231 F. Supp. at 451.
[265] 462 Pa. 83, 337 A.2d 893 (1975).
[266] 335 F. Supp. 1104 (S.D.N.Y. 1971).

Furthermore, the pilot did not assume the risk by entering the severe weather. The court applied the law of the state of Washington and acknowledged that assumption of risk is a valid defense in that jurisdiction. The court then quoted the Washington Supreme Court on the need for the encountering of the risk to be not only voluntary but unreasonable:

> The fact that the danger is patent does not automatically free the manufacturer from liability but does so only if the plaintiff voluntarily and *unreasonably* encounters it. Restatement (Second) of Torts, § 402A, comment n, at 356 (1965). It could never be said as a matter of law that [a person] whose job requires him to expose himself to a danger, voluntarily and unreasonably encounters the same.[267]

The pilot's duty was to fly his plane in a manner to permit the training of his crew. Under such circumstances it could not be said his decision to enter the severe turbulence was unreasonable.

It would appear then that the performance of one's duty, even if dangerous, is not unreasonable. If that is the case, it logically follows that assumption of risk can only occur under circumstances in which the military member disobeys his or her orders. Indeed, any other principle would be objectionable for its adverse impact on military efficiency and discipline because it would hinder soldiers who obeyed their orders and held those who did not. Consequently, assumption of risk as a defense may only be available to government contractors who can show an injury caused by a disobedience of orders.

4. Government Design.

The most unsettled area of the law involving the ability of government contractors to escape liability for third party injuries is the government design defense.[268] The defense is based on the premise that a contractor who complies with required specifications provided by the government ought to be insulated from liability for any harm resulting from defects in those specifications. The significance of this defense is not only that it would enable government contractors to dodge liability, but that it represents a serious challenge to the conceptual underpinnings of strict liability.

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[267] *Id.* at 1121 (quoting Brown v. Quick Mix Co., 75 Wash.2d 833, 836, 454 P.2d 205, 208 (1969) (emphasis in original)).

[268] Although some cases refer to this as the government contract defense, the name government design defense is a more accurate term and will be used herein.

(a) Origins of the Defense.

The seed of the defense may be found in the Supreme Court's decision in *Yearsley v. Ross Construction Co.*[269] In an action based upon the negligent erosion of soil by a government contractor, the Supreme Court noted the contractor did not seem to have committed a wrong because the contractor merely had performed the work as directed by the government. However, the Supreme Court emphasized the contractor acted within the authority granted by the government and ultimately disposed of the matter under the sovereign immunity defense.[270]

In *Littlehale v. E.I. du Pont de Nemours & Co.*,[271] the court considered the contractor's duty to warn users of military ordnance it produces. Under such circumstances, the court held the manufacturer has a duty to warn users only when the plans are so obviously, patently, or glaringly dangerous that an ordinary manufacturer would not follow them. The facts in *Littlehale* involved the contractor's production of blasting caps for the Army Department of Ordnance. Thirteen years after delivery, a blasting cap exploded, wounding a Navy seaman and a Navy civil servant. The injured parties brought their claims in both warranty and negligence, eventually alleging only negligent failure to warn rather than negligent manufacture. After first holding that no warning is required to be given to a purchaser well-aware of the inherent dangers and that any duty to warn a purchaser's employees lies with the purchaser rather than the manufacturer, the court held the Army Department of Ordnance was such an aware purchaser. The result was to relieve the contractor of any duty to warn.

Similarly, the *Littlehale* court discussed in a footnote the product liability of a manufacturer who makes his product according to specifications supplied by another. Succinctly stating the parameters of the government design defense, the court noted the possibility for very broad limits:

> [W]here a party contracts with the Government and the Government specifies the means by which the product is to

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[269]309 U.S. 18 (1940).

[270]*See also* Myers v. United States, 323 F.2d 580 (9th Cir. 1963); Dolphin Gardens v. United States, 248 F. Supp. 824 (D. Conn. 1965). *But see* Barr v. Brezina, 464 F.2d 1141 (10th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973), in which a contractor failed to escape liability for building an unsafe staircase according to government specifications even though the contractor warned the government it would be unsafe.

[271]268 F. Supp. 791 (S.D.N.Y. 1966), *aff'd*, 380 F.2d 274 (2d Cir. 1967).

> be manufactured and other details incident to the production, the manufacturer's acts in accordance with the plans are at the very least not measurable by the same tests applicable to a manufacturer having sole discretion over the method of manufacture, and at the most are insulated from any liability.[272]

(b) Relationship with Strict Liability.

(1) Demise of Government Design.

Neither *Yearsley* nor *Littlehale* was brought under a theory of strict liability. The advent of strict liability initially appeared to eliminate for causes of action in strict liability whatever effectiveness the government design defense possessed for actions sounding in negligence or breach of warranty. In the jurisdictions recognizing it, strict liability attaches regardless of whether or not the defendant exercised care. Furthermore, the basic reasons for imposing strict liability exist even when the government prepares the contract specifications.[273]

The Fifth Circuit recognized this distinction in *Challoner v. Day & Zimmerman*.[274] Defendant'contractors attempted to use a government design defense in an action in strict liability for soldiers killed and injured by ammunition malfunction during combat operations against the North Vietnamese in Cambodia. Because the action was brought under the theory of strict liability, the court rejected the possibility of a government design defense:

> Numerous cases are cited which have held that a contractor is not liable for injuries caused by the defective design furnished him by another unless the design is so glaringly or obviously dangerous that the contractor should have been alerted . . . The difficulty with this argument is that the cited cases which absolve defendants who follow defective designs of another were not decided under a strict liability theory . . . In this case it was not necessary to prove negligence. The theory alleged is strict liability. A strict liability case, unlike a negligence case, does not require that the defendant's act or omission be the cause of the defect. It is only necessary that the product be defective when it leaves the defendant's control. A specific example of this principle is found in Comment (f) to Restatement §

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[272] *Id.* at 804 n.17.
[273] *See* text accompanying notes 222-45 *supra*.
[274] 502 F.2d 867 (8th Cir. 1974).

402A which says that strict liability applies to "wholesalers, retailers, or distributors" who sell defective products, notwithstanding the fact that these parties will not normally be the ones who cause the existence of the defect.[275]

(2) Resurrection of Government Design.

Despite the logic and consistency of *Challoner*, the issue was far from settled. Only five years after *Challoner*, a district court judge announced by memorandum and order that the government design defense existed and would be applied in an action by American and Australian veterans exposed during the Vietnam War to chemical defoliants commonly referred to as "Agent Orange." Although he found that questions of fact existed and refused the defendant-contractors original motion for summary judgment, Judge George Pratt held in his *In re "Agent Orange" Product Liability Litigation*[276] memorandum opinion that the government design defense was necessary because tort liability principles properly seek to impose liability on the wrongdoers and the defendants claimed to have been compelled to produce Agent Orange.[277] Such a rationale does not address strict liability and the memorandum and order failed to even cite *Challoner*. While the judge spent several pages expounding the defendant's assertions regarding the need for the government design defense, the plaintiffs' arguments were summarized in one sentence as merely alleging defendants should not be permitted to "hide" behind government specifications to avoid liability.[278] Indeed, the most remarkable feature about the decision is its failure to even note the most fundamental issue involved: Whether it is even possible to raise the government design defense in a strict liability action.

(a) Policies Overriding Strict Liability.

Judge Pratt did order the parties to brief their positions as to the elements constituting the government design defense.[279] In his memorandum and order issued fourteen months later, he finally confronted the issue, but only in a footnote.[280] Apparently, it was only the action by one group of plaintiffs who submitted a separate memoran-

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[275]512 F.2d at 82.

[276]506 F. Supp. 762 (E.D.N.Y. 1980). *See also In re* "Agent Orange" Product Liability Litigation, 635 F.2d 987 (2d Cir. 1980), *cert. denied sub. nom.* Chapman v. Dow Chem. Co., 454 U.S. 1128 (1981).

[277]506 F. Supp. at 793-94.

[278]*Id.* at 795.

[279]Evidently, Judge Pratt was not interested in the question of whether the government design defense is possible in strict liability.

[280]*In re* "Agent Orange" Product Liability Litigation, 534 F. Supp. 1046 (E.D.N.Y. 1982).

dum arguing that the defense cannot exist in strict liability that prompted the judge to even address this threshold issue.[281]

While acknowledging that the considerations behind strict liability are different than those for negligence, the Judge simply stated the policies requiring the government design defense overrode the considerations behind strict liability. These policies are intended to permit the government to wage war and to do it with the support of military contractors. Furthermore, Judge Pratt noted that considerations of cost, time, and risk are uniquely questions for the military and should be exempt from review by civilian courts.[282]

(b) Deficiencies in the Policies.

The problem with this summary rejection of strict liability is that the cited policies rest on fallacious premises. Judge Pratt raised to preeminence the need to permit the government to wage war with the support of the suppliers of its weapons, yet the defendants in *Agent Orange* alleged that they had been compelled to manufacture the chemical through the government's use of the mandatory provisions of the Defense Production Act[283] and various economic and informal pressures.[284] The flaw thus lies in the inconsistency between the facts as alleged by defendants and the purpose for the policies overriding strict liability. If indeed the defendants were compelled in the manner alleged, there is no need for concern over whether the government can obtain the support of suppliers of its weapons. All that will be necessary in the future will be for the government to apply similar compulsion. Such compulsion may be applied and the weapons thus obtained regardless of whether or not injured soldiers have a remedy in strict liability.

Likewise, it is not apparent that the military will be precluded from waging war in a manner it deems advisable without a government design defense available to contractors. It simply does not follow that providing a tort remedy against contractors will result in something approaching injunctive action against the government. There are many reasons for this.

First, the government has whatever power of compulsion to which the Agent Orange contractors succumbed. Second, there is no immediacy in tort remedies. Just as the Vietnam War was concluded

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[281] *Id.* at 1054 n.1.
[282] *Id.*
[283] 50 U.S.C. App. §§ 2061-2073 (1976).
[284] 506 F. Supp. at 795.

before the first Agent Orange action was brought, it is likely future wars will be fought long before there is any resolution of tort matters arising from the equipment and weapons used in such a war. Third, the military bears a responsibility for its troops that in large part is self-imposed. The most basic tenet of leadership taught in military academies and schools is loyalty to one's subordinates. Similarly, the January 1983 public statement by the Air Force Chief of Staff that, had he been asked by the President, he would have traded some weapons programs for an October pay increase indicates the military's awareness of matters other than hardware.[285] In short, it was presumptuous for Judge Pratt to speak for the military and conclude that a tort remedy for its troops against contractors was undesired. Fourth, the debilitating effect of such a legal principle on morale can only limit, rather than enhance, military options. Persons never exposed to a military environment might deprecate the importance of morale, but it is unlikely that anyone who has served will. A knowledge that the courts provide greater protection for the draft resister spray painting the Pentagon should his paint can explode than for the airman spraying gene-altering defoliant under enemy fire should not be expected to build esprit de corps.

According to Judge Pratt's footnote, considerations of cost, production time, and risks belong to the military and not the courts.[286] Outside the footnote, he indicates that courts should not require suppliers of ordnance to question the military's needs or specifications for weapons during wartime.[287] The best response to these positions simply is to ask "Why?". By contracting, the government implicity admits that the contractor in some way can perform the task better than if it were done in-house. It then appears illogical to presume that the government knows better or even that it is in the better position to find defects. There is no good reason for not requiring or at least encouraging the contractor's suggestions. Indeed, the military's value engineering programs seek to do just that.[288]

Furthermore, even if the policy reasons were both correct and sufficiently important to override strict liability, they are inapplicable to the victims of Agent Orange. "Courts should not require suppliers of *ordnance* to question the military's needs or specifications for *weapons* during wartime", Judge Pratt propounds.[289] Even in his

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[285] N.Y. Times, Jan 14, 1983, § 1 at 1.

[286] 534 F. Supp. at 1054 n.1.

[287] *Id.* at 1054.

[288] *See, e.g.*, Defense Acquisition Reg. §§ 1-1700 through 1-1707 (1 July 1976) [hereinafter cited as DAR].

[289] 534 F. Supp. at 1054 (emphasis added).

footnote, he speaks of "the policies which require a government contract defense, particularly in the context of manufacturing *weapons*" and "[t]he purpose of a government contract defense is to permit the government to wage war . . . with the support of suppliers of military weapons."[290] Indeed, in his 1980 order, Judge Pratt stated about Agent Orange: "Where, as here, manufacturers claim to have been compelled by federal law to produce *weapons* without ability to negotiate. . . ."[291] The problem, of course, is that Agent Orange was neither a weapon nor ordnance. Agent Orange was simply a defoliant used to defoliate jungles. Unlike napalm, it was not directed against enemy soldiers. This distinction also seems to have escaped Judge Pratt, but acknowledgement of it would preserve strict liability for the Agent Orange veterans even under the policies he advanced. That this is an important distinction rather than one without difference is realized by considering the manner in which soldiers handle their equipment as opposed to their weapons.

In short, if there are good policy reasons for permitting the government design defense to override strict liability, they have not been enunciated in *Agent Orange*. Indeed, by consigning this most essential issue to a footnote, it has hardly been considered.

(c) Expansion of the Policies.

At least two federal circuits have since agreed that the government design defense is applicable to claims based on strict liability. In *Brown v. Caterpillar Tractor Co.*,[292] an injured Army reservist argued that the defense is inconsistent with strict liability. Applying Pennsylvania law, the Third Circuit cited a 1970 Pennsylvania case which limited a contract specification defense in claims arising from ultra-hazardous activities as a reaffirmation of the existence of the government design defense. The Third Circuit noted that, while the Pennsylvania courts had not specifically addressed the issue, a number of other courts such as that in *Agent Orange* had determined that the defense applies to strict liability. Finally, the *Brown* court noted that there were many pieces of proposed product liability legislation, most of which incorporated the defense. The court merely cited the proposed Uniform Product Liability Law, however, and ignored the lack of effectivity of proposed but unpassed legislative proposals.

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[290] *Id.*
[291] 506 F. Supp. at 794.
[292] 696 F.2d 246 (3d Cir. 1982).

Nonetheless, the *Brown* decision did indicate that application of *Agent Orange* to all claims might be too broad. While agreeing that, under the facts in the case, the government design defense also applied to a breach of warranty claim, the court held that such would not have been the case if the goods furnished to the government were themselves defective. The court said that a contractor "is not so shielded when he has performed negligently or in a willfully tortious manner."[293] In other words, the breach of a pertinent warranty by a defendant-contractor could defeat the defense.

Showing much less concern for both military plaintiffs and the principle of strict liability, the Ninth Circuit in *McKay v. Rockwell International Corp.*[294] expanded the government design defense beyond that pronounced by Judge Pratt. Building on *Feres* and *Stencel*,[295] the court developed a defense applicable to strict liability that would be almost factually insurmountable. Since *Feres* said that the government was not liable to its injured service members and since *Stencel* said that the government was not liable to indemnify contractors for damages they had paid, the court also found contractors not liable since they would pass the costs of damages to the government. The court further noted that its desire not to involve itself in military matters, the exigencies of national defense that require technology to its limits, and the incentives of such a defense for contractors to work closely with military authorities all supported the need for such a defense.[296]

Whatever hope there still might be for stemming the rush to destroy the availability of strict liability for military members is best expressed in *Jenkins v. Whittaker Corp.*[297] In an action in strict liability for the death of a soldier killed at the Army's Pohakuloa Training Range in Hawaii when an atomic simulator unexpectedly exploded, Judge Samuel P. King cited *Challoner* approvingly while distinguishing *Agent Orange* on its particular facts. Applying Hawaiian law, Judge King agreed with plaintiff's contention that strict liability under Hawaiian law had survived the onslaught against strict liability. Granting plaintiff's motion to limit argu-

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[293]*Id.* at 253.

[294]*See* 704 F.2d 444 (9th Cir. 1983).

[295]*See* text accompanying notes 1-116 *supra*.

[296]*See also* Hargrove v. International Harvester Co., No. 82-2015 (4th Cir., May 24, 1983), in which the defendant-contractor attempted to convince the Fourth Circuit that there are no exceptions to the government design defense if inherently dangerous products are involved. Finding an Army loading vehicle not to be inherently dangerous, the Fourth Circuit refused to consider the argument.

[297]551 F. Supp. 110 (D. Hawaii 1982).

ment, Judge King ordered the defendant not to argue to the jury that it could not be liable because it had followed government specifications.

The appearance of *Jenkins* is a breath of fresh air which may hinder somewhat the attempt to smother strict liability for service members, but it is unfortunate to have arisen within the Ninth Circuit. Whether the decision will be appealed to that circuit, based on its recent holding in *Rockwell*, remains to be seen. Evidently, the best hope for other military plaintiffs would be for the plaintiffs in *Jenkins* to lose at the jury level and preserve the precedent.

(c) Unresolved Issues in Government Design.

Even if it is admitted that the defense of government design exists, many questions remain about the extent of the defense as expounded by Judge Pratt and as interpreted by later courts. In the words of Judge Pratt, a defendant-contractor is entitled to dismissal of all claims against it if the defendant-contractor proves:

> 1. That the government established the specifications for Agent Orange;
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> 2. That the Agent Orange manufactured by the defendant met the government's specification in all material respects; and
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> 3. That the government knew as much or more than the defendant about the hazards to people that accompanied use of Agent Orange.[298]

Under the *Rockwell* analysis, the government design defense applies when the government is immune under *Feres*, the government established or approved reasonably precise specifications the government established or approved reasonably precise specifications, the equipment conformed to those specifications, and the contractor warned the government about patent errors in the governments specifications or about dangers in the use of the equipment known to the contractor but not to the government.[299]

(1) Degree of Compulsion.

One issue left unresolved by *Agent Orange* is the degree of compulsion necessary to apply the government design defense. Stated another way, the question may be framed as attempting to determine

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[298]534 F. Supp. at 1055.
[299]704 F.2d at 449-50.

the degree of freedom of negotiation and performance sufficient to eliminate the defense. The *Agent Orange* defendants initially based their defense on the alleged compulsory nature of the government's contracts.[300] Pouncing on this argument, plaintiffs urged the court that any role by defendants in the preparation of the specifications must result in the inapplicability of the defense. Rejecting plaintiffs' argument, Judge Pratt noted that while evidence that defendants played some role in the development of the specifications would affect the establishment of the relative degree of knowledge between the government and the defendants, it would not preclude the defense.[301]

The Third Circuit agreed in *Brown* that compulsion was not a prerequisite to assertion of the government design defense under the applicable Pennsylvania law. Nonetheless, its reluctance to make this holding is demonstrated by its wish for better law to apply:

> If we were writing on a clean slate, or were ourselves fashioning the law of Pennsylvania, we might well be persuaded that a contractor must prove some degree of compulsion in order to successfully raise the government contract defense. We are, however, constrained by existing Pennsylvania law.[302]

The United States District Court for the Northern District of California, on the other hand, found the degree of compulsion to have been a very significant factor in its decision *In re Related Asbestos Cases*.[303] Defendant-contractors had provided asbestos to the Navy and were sued for the harm caused to third parties by asbestos. The defendants moved for summary judgment based on the government design defense, but the court denied the motion. The court emphasized that it had based its denial in part on the appearance of facts that the government strictures placed on defendants varied during the performance of their contracts.[304] Consequently, trial on the issue of the exact degree of those strictures was necessary.[305]

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[300]506 F. Supp. at 762.
[301]534 F. Supp. at 1056.
[302]696 F.2d at 254.
[303]543 F. Supp. 1142 (N.D. Cal. 1982).
[304]*Id.* at 1152.
[305]*See also* Johnson v. United States, No. 81-1060 (D. Kan., July 18, 1983), which held that there was no reason to apply the government design defense absent a showing that the contractor had been compelled to provide a particular product.

(2) Type of Specifications.

Consideration also must be made of the type of specifications. Inquiry is necessary into whether they are performance specifications under which the contractor is merely provided performance requirements that the product must meet but is otherwise left free to design the product. If it is the contractor's responsibility to meet particular performance standards, but the contractor is free to choose the method by which those standards will be met, the contractor should be held accountable if its method proves harmful to third parties. In *Jenkins*, for instance, the material issues of fact with regard to the contractor's responsibility for the design of the device injuring a soldier compelled the court to deny the contractor's motion for summary judgment.

The importance of such a distinction was recognized by Judge Pratt in *Agent Orange*. While rejecting any requirement that contractor-defendants must prove that they had neither direct nor indirect responsibility for formulating the specifications, Judge Pratt found it an important factor in determining the breadth of the government design defense: "If it should appear that the contract set forth merely a "performance specification", as opposed to a specified product, then the government contract defense would be far more restricted than as described. . . ."[306]

The Third Circuit in *Brown* would go even further with the distinction, possibly extending it to all negotiated contracts. Pointing out the large number of government contracts that are negotiated rather than formally advertised, the Third Circuit concluded these were not contracts entered into on a "take it or leave it basis." In addition, even though the government undoubtedly enjoyed the greater bargaining power, there was certainly opportunity for input by the contractor.[307] As a result, a contractor has the ability to influence specifications in a large number of contracting situations. At some point, then, the contractor's influence should be sufficient to hold it responsible for the harm caused by those specifications.

(3) Compliance with Specifications.

The issue of whether the contractor's product met the government specifications in all material respects seems straightforward enough, but questions can arise over the definition of "material." *Koutsoubos v. Boeing Vertol*[308] focused on the definition of materiality

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[306]534 F. Supp. at 1056.
[307]696 F.2d at 254.
[308]553 F. Supp. 340 (E.D. Pa. 1982).

in the crash of a Navy helicopter that killed its pilot at sea. The court determined materiality not only by a comparison of the government's specifications with the product supplied, but also considered which specifications the plaintiff alleged were defective.[309] While the helicopter design was alleged by the plaintiff to include defective safety features, the court stressed that the Navy chose those design features. Those features included the ability of the helicopter to float, the presence of six emergency exits, interior lighting, and testing and inspection by the Navy prior to acceptance. Inspection by the Navy revealed that specifications for these design features had been met. Under these circumstances, the court found the defendant-contractor protected from liability by the government design defense.[310]

On the other hand, the court in *Asbestos* found that the defendant-contractors sometimes filled their Navy orders with the same products used to fill their nonmilitary orders. Although such asbestos complied with the Navy specifications, it could not be said it was manufactured according to the Navy specifications because it was made for all users. As a result of this factor, as well as the varying degree of government compulsion, the court refused to grant a motion for summary judgment based on the government design defense.[311]

Similarly, the court in *Johnson v. United States*[312] held the government design defense inapplicable when all the contractor supplied the government was an adaptation of an item readily available in private commerce. Under the circumstances, the court determined there was no policy reason for the government design defense since there was no risk that either contractors or the courts would second-guess the design of military items.

(4) Weapons v. Equipment.

As indicated above, Judge Pratt based his policy rationale on the need for the military to obtain the ordnance and weapons it wanted, but he failed to observe that Agent Orange was neither.[313] Judge King in *Jenkins*, however, was aware of this important distinction and based his holding in part on it. Noting that the instrument which killed a soldier was a simulator and not a weapon, he also emphasized it existed only for demonstration purposes. Since the defective pro-

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[309]*Id.* at 343.
[310]*Id.* at 343-44.
[311]543 F. Supp. at 1152.
[312]No. 81-1060 (D. Kan., July 18, 1983).
[313]534 F. Supp. at 1054.

duct was not a weapon Judge King saw no reason to apply the government design defense and refused to do so.[314]

In *Tefft v. A.C.&S. Inc.*,[315] however, the government design defense was held applicable to asbestos, a product that was not a weapon. Exactly the opposite conclusion to *Tefft* was reached in another asbestos case, *Chapin v. Johns-Manville Corp.*[316]

(5) Peacetime v. War.

Likewise, the issue of whether the defense is available in peacetime as well as war must be considered. While *Rockwell* and *Brown* did not address the issue, the language of *Agent Orange* implies that Judge Pratt would limit the defense to wartime situations. For example, he states: "Courts should not require suppliers of ordnance to question the military's needs or specifications for weapons during *wartime.*"[317]

Those cases which have confronted the issue either emphasized the wartime situation involved in the acquisition or specifically held the defense only applicable in wartime situations. In *Casabianca v. Casabianca*,[318] the court emphasized that a "supplier to the military in time of war has a right to rely upon specifications" and refused to further consider whether the defense could be used in a peacetime acquisition.[319] *Jenkins*, on the other hand, left no doubt about its position that war was a condition precedent to the refuge of the government design defense:

> The [Agent Orange] ruling relied heavily upon the rationale that the law should not "require suppliers of ordnance to question the military's needs or specifications for weapons during wartime"... *Agent Orange*, therefore, should be limited to cases involving the manufacture of "weapons during wartime".... [The atomic simulator] was used for demonstration purposes. Furthermore, it was not designed under the urgency of wartime. Accordingly, *Agent Orange* is inapposite to the case at bar.[320]

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[314]551 F. Supp. at 114.
[315]No. C80-924M (W.D. Wash., Sept. 15, 1982).
[316]No. S79-0272(N) (S.D. Miss., Nov. 2, 1981).
[317]534 F. Supp. at 1054.
[318]428 N.Y.S.2d 400 (Sup. Ct. Bronx County 1980).
[319]*Id.* at 402.
[320]551 F. Supp. at 114.

(6) Relative Knowledge of Hazards.

The defendant's degree of knowledge as compared with the degree of the government's knowledge of the potential hazards of the product is one of the principal elements to meet in establishing the government design defense. In the words of Judge Pratt:

> Perhaps the central question for...trial is whether the government knew as much as the defendants did about the hazardous aspects of this product. If the government knew as much as the defendants and, knowing of the hazards, decided to use "Agent Orange" as a weapon of war, defendants would be protected from liability.[321]

The reason for such an element apparently is that, had the government been as aware as the defendant of the hazard-causing deficiencies in the specifications, "it might have altered the government's decisions as to whether and how to use" the product.[322] Judge Pratt later expanded this concept in 1983 by emphasizing that it was not a question of determining what the government would have done but, rather, what it might have done. According to Judge Pratt, the entire government design defense is unavailable if, had the information been available to the government, it "might have affected the Government's decision making."[323]

The burden, of course, rests with the defendant-contractors to establish that the government's knowledge was equal to or greater than theirs.[324] While the contractor's recommendation or advice to the government about the design may not be sufficient by itself to preclude the government design defense, it is relevant in establishing the relative degree of knowledge between the government and a defendant-contractor.[325]

The principle in operation is seen by Judge Pratt's disposition in 1983 of summary judgment motions made by seven of the nine *Agent Orange* defendants.[326] Finding that the government knew by 1963 of significant though uncertain health risks associated with Agent Orange, Judge Pratt dismissed the claims against four defendants who did not have knowledge of health risks superior to the government.[327] Dow Chemical, however, knew of a link between the dioxin

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[321]534 F. Supp. at 1057.
[322]*Id.*
[323]565 F. Supp. 1263, 1270-71 (E.D.N.Y. 1983).
[324]Koutsoubos v. Boeing Vertol, 553 F. Supp. 340 (E.D. Pa. 1982).
[325]534 F. Supp. at 1056.
[326]*See* 565 F. Supp. at 1270-71.
[327]Thompson Chemical, Hercules, Riverdale Chemical, and Hoffman-Taff were the four companies securing dismissal.

found in Agent Orange and health problems in the 1950s. It also knew of a serious chloracne outbreak in 1964 in circumstances involving high concentrations of dioxin. Although Dow took steps to reduce the dioxin content in its Agent Orange to one part per million, it failed to advise the government of its knowledge.[328] Had the government been aware of these facts, it might not have purchased or used Agent Orange in the manner it did. As a result, Dow's motion for summary judgment was denied.[329]

Likewise, the summary judgment motions of T.H. Agriculture & Nutrition and Uniroyal were denied. The motion of T.H. Agriculture was denied because it had disclosed at the time of its original contract that it had factored into the price the costs of treating its workers for chloracne. Uniroyal failed to obtain summary judgment because of a question of fact about whether it received a 1965 Dow report on the dangers of dioxin before it entered its contract in 1966.[330]

While the dispositions of the summary judgment motions help explain the parameters of the knowledge principle, several questions remain unanswered. What affect, for example, does the contractor's reasonable but mistaken belief that the government knows of the risks have on the principle? What effect does the government's negligent failure to obtain the information from another source have on the principle. Finally, although Judge Pratt's 1982 decision rejects the contention that what the defendant should have known, as well as the state of the art, are irrelevant,[331] the rejection is made without discussion. Is it not possible then that another court will find what a defendant should have known or the state of the art does affect the principle? Evidently, the answers to these and other questions must await future litigation.

(7) Duty to Warn of Known Hazards.

A corollary to the relative knowledge between the government and contractor is the duty of the contractor to warn the government of the hazards:

> A supplier should not be insulated from liability for damages that would never have occurred if the military had been apprised of hazards known to the supplier. A supp-

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[328]Judge Pratt did note that, if one part per million were safe, Dow would have been selling a safe product for which it would not be liable and for which it would have told the government everything that it had needed to know.

[329]*See* 565 F. Supp. at 1270-71.

[330]*Id.*

[331]534 F. Supp. at 1046.

> lier, therefore, has a duty to inform the military of known risks attendant to a particular weapon that it supplies, so as to provide the military with at least an opportunity fairly to balance the weapon's risks and benefits.[332]

The consequence of such a failure to warn is severe:

> It is only if defendants concealed or failed to disclose to the government information about hazards of which the government was ignorant that defendants fail to gain the protection of the government contract defense in the context of these actions.[333]

Phrased another way, if the defendant-contractor did not but could have raised the government's knowledge to its own level, the defendant-contractor does not deserve the defense.[334]

Nonetheless, the duty to warn must be distinguished from any duty to investigate. Even if further testing easily would have revealed the harmful defect, the duty to warn does not impose upon the contractor any duty of testing not included in the specifications or contract.[335]

IV. INSURANCE

A. PROBLEMS

Contractors obtain third party liability insurance to protect their final interests from adverse judgments and to meet the requirements of their contracts. Contractual requirements to obtain insurance are of two types: those which mandate a minimum amount without qualification[336] and those which mandate a specific amount to qualify for indemnification.[337] Unfortunately, both voluntarily-desired and contractually-required insurance are sometimes unavailable or available only through the payment of exceedingly high premiums.

1. Noninsurability.

Third party liability insurance desired by or required of a contractor may be unavailable in total or in part. Such insurance is unavaila-

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[332]*Id.* at 1055.

[333]*Id.* at 1057.

[334]*See also* Johnson v. United States, No. 81-1060 (D. Kan., July 18, 1983), which found a duty to warn the user rather than the government by placing a warning label on the product when the government's specifications do not forbid it, the potential harm is deadly, the danger is not obvious, and the expense of warning is slight.

[335]534 F. Supp. at 1055.

[336]*See, e.g.*, DAR §§ 10-405(a), 10-501.

[337]*See* text accompanying notes 396-589 *infra*.

ble in part when insurers impose monetary limits, increase deductibles, or restrict coverage in certain areas. When all insurers impose similar limitations, the contractor is uninsurable.

The Federal Interagency Task Force on Product Liability concluded that there was no general problem on noninsurability in the field of product liability.[338] The Task Force did find specific problems of noninsurability in total for companies in some high risk product lines. These specific problems of noninsurability in total were caused by the failure of the companies to make a thorough search of all sources of insurance, by companies with prior judgments against them for product liability, and by premiums so great as to render insurance effectively unavailable.[339]

A much more widespread problem is partial noninsurability based on limits, deductibles, and restrictions.[340] Despite the general inflationary spiral, monetary limits have not risen to keep pace.[341] Conversely, the costs of defending suits are more frequently being included within the monetary limits.[342] Deductibles, likewise, are remaining fairly constant in amount, but are being applied much more frequently to policies.[343] Coverage restrictions are increasing, however, and excluding many new products.[344]

Of greater concern to contractors has been the ever-increasing size of jury verdicts for injuries. As the monetary limits of insurance policies remains constant and begin to include costs of defending lawsuits, the rise in jury verdicts results in greater total or partial noninsurability.

2. Excessive Costs.

While monetary limits in third party product liability insurance have remained stable, the same cannot be said for premiums. The dramatic growth of insurance rates is the most distinguishing change in the insurance industry. From this, it may be concluded there is no effective control over premiums.[345]

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[338]Dep't. of Commerce, Final Report of the Interagency Task Force on Product Liability, at VI-2 (1978).
[339]*Id.* at VI-3.
[340]*Id.* at VI-8-10.
[341]*Id.* at VI-8.
[342]*Id.* at VI-9.
[343]*Id.* at VI-11.
[344]*Id. at VI-9.*
[345]*Id.* at VI-21-24.

The premium explosion can best be understood by a few recent examples. The annual insurance premium for one Space Shuttle contractor rose from $230,000 to $2,900,000 in one year, a more than ten-fold increase.[346] Another contractor was charged a premium of $1,000,000 to cover potential liabilities arising from a single launch of the Space Shuttle.[347] Even the Department of Defense has acknowledged that some of its contractors involved in high risk research cannot obtain insurance at any reasonable price.[348]

A number of serious difficulties have been created by the rise in premiums. In particular, the following findings have been made by the Model Uniform Product Liability Act:[349]

> (A) Sharply rising product liability insurance premiums have created serious problems in commerce resulting in: (1) increased prices of consumer and industrial products; (2) disincentives for innovation and for the development of high-risk but potentially beneficial products; (3) an increase in the number of product sellers attempting to do business without product liability insurance coverage, thus jeopardizing both their continued existence and the availability of compensation to injured persons; . . . .
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> (B) One cause of these problems is that product liability law is fraught with uncertainty and sometimes reflects an imbalanced consideration of the interests it affects. The rules vary from jurisdiction to jurisdiction and are subject to rapid and substantial change. These facts militate against predictability of litigation outcome.[350]

In addition, to the extent that the government reimburses premiums, significant inflation in government contracts is realized. To the extent that the government does not reimburse premiums, contractors are deterred from entering or remaining in the competition for contracts, and the nation's research and development base is eroded.

B. SOLUTIONS

1. Self-Insurance.

One very basic solution to the problems associated with insurance is simply for the contractor to assume risk and establish a self-

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[346]39 BNA Fed. Contracts Rep. 795 (Apr. 11, 1983).
[347]39 BNA Fed. Contracts Rep. 184 (Jan. 24, 1983).
[348]38 BNA Fed. Contracts Rep. 1008 (Dec. 13, 1982).
[349]44 Fed. Reg. 62,714 (1979).
[350]Model Uniform Product Liability Act, § 101.

insurance program. Self-insurance means the assumption or retention of loss, whether voluntary or involuntary, by the contractor. Self-insurance includes the deductible portion of purchased insurance.[351]

It is Department of Defense policy that the government will act as a self-insurer against its own losses.[352] Likewise, the contractor is permitted to act as a self-insurer, subject to certain limitations.[353] Self-insurance for catastrophic risks, for example, will not be recognized.[354] Self-insurance to protect a contractor against the costs of correcting its own defects in materials or workmanship is not permitted.[355] Self-insurance may be recognized as a cost,[356] but prior approval of a contracting officer for a self-insurance program is necessary when it is likely that at least half of the costs of the self-insurance will be allocable to negotiated contracts and the estimated costs are at least $200,000.[357]

Self-insurance plays an important role in the government acquisition process in a number of areas. Under one statute,[358] for example, the decision to indemnify contractors requires consideration of the adequacy of a number of factors including self-insurance.[359] Likewise, under the Swine Flu Act,[360] the manufacturers had to provide a total of ten million dollars in self-insurance.[361]

Self-insurance has the obvious benefit of avoiding the problems of noninsurability and excessive costs. The detriment, of course, is that the contractor exposes itself to potentially enormous liability.

2. Reimbursement of Insurance Costs.

Insofar as the government covers the costs of premiums, the problem of excessive costs of insurance is not a concern for the contractor.[362] One logical solution for a contractor facing such an insurance problem, therefore, is to seek a cost reimbursement contract from the government.

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[351] DAR 10-301.3.
[352] *See, e.g.*, DAR § 1-330.
[353] 4 C.F.R. § 416 (1983).
[354] DAR 10-303(b).
[355] *Id.*
[356] DAR § 15-205.16.
[357] DAR § 10-303(a).
[358] *See* text accompanying notes 509-30 *infra*.
[359] Exec. Order No. 10789, § 1A(a) (implementing Pub. L. No. 85-804).
[360] *See* text accompanying notes 531-37 *infra*.
[361] *The Swine Flu Program: An Unprecedented Venture in Preventive Medicine*, H.R. Doc. No. 77-115, 95th Cong., 1st Sess. 19-20 (1977) [hereinafter cited as House Report].
[362] Of course, it would be a major concern for the government.

As a general rule, costs of insurance are allowable under a cost reimbursement contract.[363] Such reimbursement is limited to costs for insurance which is either required or approved by the contracting officer and which is maintained pursuant to the contract.[364] Costs are not allowable unless the type and extent of coverage are in accordance with sound business practice and the premiums are reasonable.[365] Approval for reimbursement, however, is different from approval of the contractor's insurance program.[366]

Federal law specifically prohobits the Department of Defense from paying certain insurance costs:

> None of the funds appropriated to the Department of Defense is available for obligation to reimburse a contractor for the cost of commercial insurance that protects against the costs of the contractor for correction of the contractor's own defects in materials or workmanship.[367]

This legislation was prompted by a threatened $100,000,000 insurance claim from General Dynamics. The original legislation did permit reimbursement for insurance of defects in workmanship or materials if such insurance was normally maintained by the contractor in connection with the general conduct of its business.[368] Later legislation removed the exception for insurance normally maintained.[369] The legislation has been implemented by the Department of Defense.[370] Despite the continuing applicability of the legislation and its Department of Defense implementation, Congress has again included the specific prohibition in the most appropriation act for the Department of Defense.[371]

Costs of self-insurance also are allowable.[372] Computation is by the projected average loss method which permits recovery of average rather than actual losses.[373] Even a debit from a contractor's reserves for self-insurance may be allowable if it represents an average projected loss.[374]

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[363]DAR § 15-205.16.
[364]DAR § 15-205.16(a)(1).
[365]DAR § 15-205.16(a)(2)(a).
[366]*See* DAR § 10-302(a).
[367]10 U.S.C. § 2399 (1976).
[368]Pub. L. No. 97-12, ch. III, 95 Stat. 14, June 5, 1981.
[369]Pub. L. No. 97-144, § 770, 95 Stat. 1565, Dec. 29, 1981.
[370]DAR § 15-205.16(a)(3).
[371]Pub L. No. 97-377, § 766, 96 Stat. 1861, Dec. 21, 1982.
[372]4 C.F.R. § 416 (1983).
[373]*Id.*
[374]*Id.* at § 416.50(a)(2).

One particularly interesting example of the allowability of the costs of insurance involved the Swine Flu Act.[375] The program participants maintained $10,000,000 in self-insurance and paid premiums of $8,650,000 for an additional $220,000,000 in insurance. Both the self-insurance and the insurance premiums were considered costs of production of the Swine Flu vaccine, so the government funded the entire $18,650,000.[376]

3. Product Liability Risk Retention Act of 1981.

The most promising opportunity for insurance relief of government contractors is the Product Liability Risk Retention Act of 1981.[377] The Act permits a much greater involvement by government contractors in the financing of their liability for product failures. The purpose of the Act, as indicated by its legislative history, could hardly be different if the contractors had been asked to prepare it themselves:

> [The Act] is designed to address one of the principal causes of the product liability problem; questionable insurer ratemaking and reserving practices. The Act will reduce the problem of the rising cost of product liability insurance by permitting product manufacturers to purchase insurance on a group basis at more favorable rates or to self-insure through insurance cooperatives called "risk retention groups".[378]

The principal feature of the Product Liability Risk Retention Act is that it creates a single, national, simplified insurance law for the risks that many government contractors now face. The Act preempts state insurance laws to the extent that they apply to product and completed operations liability insurance.[379]

The Act provides for the creation of purchasing groups and risk retention groups. The risk retention group need only qualify in one state or the District of Columbia, Bermuda, or the Cayman Islands. Once established, it will be free to form captive insurance companies in all of the jurisdictions with only a negligible amount of state control.[380] Such risk retention groups are expected to provide insurance at lower premiums and with fewer coverage restrictions, lower deductibles, and higher monetary limits.

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[375] *See* text accompanying notes 531-37 *infra*.
[376] *See* House Report, *supra* note 370.
[377] 15 U.S.C. §§ 3901-3904 (Supp. V 1981).
[378] H.R. Rep. 97-190, 97th Cong., 1st Sess. 4 (1981).
[379] 15 U.S.C. at §§ 3902(a), 3903(a).
[380] *Id.* at 3902.

The purchasing group, on the other hand, will authorize group purchase of liability insurance with anticipated savings.[381] The purchasing group will deal with recognized commercial insurance companies, but will avoid state laws limiting or regulating the formation of group insurance plans. Smaller contractors are more likely to favor group purchasing plans while larger contractors probably will prefer to form their own insurance companies.

4. Other Remedies.

In addition to the possible solutions already discussed, there are at least three other alternatives.

A contractor may seek a fixed price contract and attempt to include a contingency for liability. To the extent competitors do not include such contingencies or only include lesser ones, the contractor becomes noncompetitive. In addition, a requirement for pricing data would eliminate a large contingency.[382]

Another device infrequently used is backdated insurance. Unlike traditional insurance that offers coverage for a prospective liability, backdated insurance provides coverage retroactively to administer and settle a claim relating to known liability. A limiting factor concerning backdated insurance is the reluctance of the Department of Defense to recognize it as an allowable cost.[383]

Finally, contractors may place some reliance in third party liability clauses such as the "Insurance-Liability to Third Persons" clause.[384] Despite its title, such a clause is basically a means of providing indemnity rather than insurance.[385] A major complicating factor is the General Accounting Office's objection to the use of such clauses as violations of the various funding and appropriations statutes.[386]

V. INDEMNITY AND CONTRIBUTION

A. BASIC CONCEPTS

1. Distinctions between Indemnity and Contribution

Contribution is a common law concept based in tort that requires each tortfeasor to pay a share of the damages. Contribution is not

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[381] *Id.* at 3903.
[382] *See* DAR § 3-807.
[383] DAR Case No. 81-120.
[384] DAR § 7-203.22.
[385] *See* text accompanying notes 497-98 *infra*.
[386] *Id.*

allowed unless the contributing defendant is liable in tort to the injured party.[387] Approximately half of the American jurisdictions recognize the concept of contribution.[388] Of these, American jurisdictions, twenty have enacted the Uniform Contribution Among Tortfeasors Act.[389]

The right to contribution exists absent any contractual provision requiring it.[390] As such, it is founded upon principles of equity. As an equitable doctrine, it is not available to persons committing intentional torts.[391]

In those jurisdictions recognizing contribution, each tortfeasor is usually required to pay an equal share of the damages.[392] A minority of the jurisdictions, however, apportion liability on the degree of the comparative fault among the tortfeasors.[393]

Indemnity is a common law concept which may be based on either tort or contract. Like contribution, indemnity may be allowed when all defendants are at fault.[394] Unlike contribution, indemnity may be allowed against a defendant not at fault, such as the employer of an independent contractor.[395]

While contribution merely shifts a portion of the liability from one defendant to another, indemnification shifts the entire liability from one defendant to another.[396] The liability may be shifted to the party most responsible for the harm,[397] or to the party owing the greater duty to the person harmed.[398] In any event, the party seeking contri-

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[387]W. Prosser, The Law of Torts § 50 (4th ed. 1971).

[388]18 Am. Jur. 2d *Contributions* §§ 1-115 (1965).

[389]*See* Alaska Stat. §§ 09.16.010 to 09.16.060 (1979); Ark. Stat. §§ 34-1001 to 34-1009 (1983 Cum. Supp.); Colo. Rev. Stat. 13-50.5-101 to 13-50.5-106 (1980 Cum. Supp.); Dela. Code tit. 10, §§ 6301-6308 (1982 Cum Supp.); Fla. Stat. Ann. § 768.31 (1982 Supp.); Hawaii Rev. Stat. §§ 663-11 to 633-17 (1982 Supp); Md. Code, art. 50, §§ 16-24 (1983 Cum Supp.); Mass. Gen. Laws, ch. 231B, §§ 1-4 (1983-84 Supp.); Miss. Code, § 85-5-5 (Supp. 1983-84); N.M. Stat. Ann. §§ 41-3-1 to 41-3-8 (1983); N.C. Gen. Stat. §§ 1B-1 to 1B-6 (1981 Cum Supp.); N.D. Cent. Code 32-38-01 to 32-38-04 (1983 Supp); Ohio Rev. Code, §§ 2307.31 to 2307.32 (1982 Supp.); Pa Stat., tit. 42, §§ 8321-8327 (1983-84 Supp.); R.I. Gen. Laws, §§ 10-6-1 to 10-6-11 (1983 Cum. Supp.); S.D. Comp. Laws, §§ 15-8-11 to 15-8-22 (1982 Supp.); Tenn. Code. Ann., §§ 29-11-101 to 29-11-106 (1983 Supp.) Wyo. Stat. §§ 1-1-110 to 1-1-113 (1983-84 Supp.).

[390]United States v. Yellow Cab Co., 340 U.S. 543 (1950).

[391]Turner v. Kirkwood, 49 F.2d 590 (10th Cir. 1931), *cert. denied* 284 U.S. 635 (1932).

[392]Uniform Contribution Among Tortfeasors Act (U.L.A.) § 1(b).

[393]*See* Prosser, *supra* note 396.

[394]*See* Allied Mutual Cas. Corp. v. General Motors Corp., 279 F.2d 455 (10th Cir. 1960).

[395]George A. Fuller Co. v. Otis Elevator Co., 245 U.S. 489 (1918).

[396]Molinari, *Tort Indemnity in California*, 8 Santa Clara L. Rev. 159 (1968).

[397]*Id.*

[398]United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964).

bution or indemnification will prefer indemnification because of its greater degree of relief. For this reason, indemnification is a much more important right than contribution.

2. Application of Indemnity and Contribution to the United States.

(a) Contribution.

To the extent the United States has waived its sovereign immunity,[399] it is subject to contribution the same as any other tortfeasor.[400] Because contribution generally rests upon joint liability, however, the United States usually can avoid contribution when it is not liable.[401]

Nonetheless, at least two exceptions permitting contractor recovery of contribution may be available even when the government is not liable. The first involves claims in admiralty and the second involves the erosion of the requirement for joint liability.

In *Weyerhaeuser Steamship Co. v. United States*,[402] a government employee was injured in a collision between a government dredge and another ship. Both vessels were operated in a negligent manner. The employee received a $16,000 settlement from the shipowner who then sued the United States for contribution. Under admiralty law, an equal division of damages is required when both vessels are negligent.[403] The United States, however, contended there could be no contribution because a provision in the Federal Employees' Compensation Act[404] limited the government's liability to only compensation under that Act.[405] Bowing to the force of precedent,[406] the Supreme Court emphasized the pervasiveness of admiralty rules:

> In the present case there was no contractual relationship between the United States and the petitioner governing their correlative rights and duties. There is involved here, instead, a rule of admiralty law which, for more than 100 years, has governed with at least equal clarity the correla-

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[399]*See* text accompanying notes 1-116 *supra*.

[400]*See* text accompanying note 4 & note 4 *supra*.

[401]Since the United States can avoid liability for injuries to its military members, government contractors whose products injure military members cannot obtain contribution from the United States. *See* text accompanying notes 65-102 *supra*.

[402]372 U.S. 597 (1963).

[403]The North Star, 106 U.S. 17 (1882). *See* 46 U.S.C. §§ 761-768 (1976) for the applicability of such principles in cases of death.

[404]5 U.S.C. § 8116(c) (1976).

[405]The Supreme Court's later decision in Lockheed Aircraft Corp. v. United States, 74 L.Ed.2d 911 (1983), held otherwise.

[406]Also note the constitutional underpinnings of admiralty at U.S. Const. art. III, sec. 2.

> tive rights and duties of two shipowners whose vessels have been involved in a collision in which both were at fault....[W]e hold that the scope of the divided damages rule in mutual fault collisions is unaffected by a statute enacted to limit liability of one of the shipowners to unrelated third parties.[407]

An even broader exception, though not widely adopted, would require contribution without consideration of a defendant's ability to avoid liability for the injury. In other words, the focus would be upon joint negligence rather than joint liability. Such a result was found in both *Hart v. Simons*[408] and *Travelers Insurance Co. v. United States*.[409] In each case, a government employee was injured using contractor equipment, the employee recovered from the contractor, and the contractor obtained contribution from the United States despite the court's agreement the United States was not liable to its employee. The rationale in both cases was that the governing principle for contribution should be joint negligence not joint liability. The court in *Travelers Insurance* succinctly stated its rationale: "The Government owed a duty to its employee and the additional fact that there is no liability should not preclude an action like the one before the court [for contribution]."[410]

It would seem logical to apply the rationale of *Travelers Insurance* to indemnification efforts based on injuries to military members, especially since the government's ability to avoid such liability to military members is not based on statute.[411] Nevertheless, in *Fry v. International Controls, Inc.*,[412] the same court that decided *Travelers Insurance* refused to extend its precedent to an attempt to obtain indemnification for an injury to a service member.

(b) Tort Indemnity.

Just as for contribution, to the extent the United States has waived its sovereign immunity, it is subject to indemnity the same as any other tortfeasor.[413] Whereas the United States avoids contribution by showing that it was not liable to the injured person, it can avoid tort indemnity merely by showing that it was less liable than the party seeking indemnification.[414]

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[407]372 U.S. at 603-04.
[408]223 F. Supp. 109 (E.D. Pa. 1963).
[409]331 F. Supp. 189 (E.D. Pa. 1971).
[410]*Id.* at 192.
[411]*See* text accompanying notes 65-102 *supra*.
[412]Civ. No. 69-298 (E.D. Pa., Aug. 31, 1971).
[413]Hawkinson v. Pennsylvania R.R., 280 F.2d 249 (3d Cir. 1960).
[414]*See* text accompanying note 407 *supra*.

Nonetheless, the admiralty exception also may operate to require the United States to indemnify another even when the government can show that it was less liable. For example, in *Wallenius Bremen G.m.b.H. v. United States*,[415] a government inspector was injured in a fall down an improperly maintained ladder on a German ship. After the plaintiff settled his libel in admiralty for $110,000, the defendant sought indemnification from the United States on the grounds that the government negligently permitted a physically unfit inspector to board the ship. Although the government alleged that the exclusive remedy against it was under the Federal Employees' Compensation Act,[416] the unimpressed court stated:

> [W]e are unable to see why in addition to breach of duty there must be indemnitor's *liability* to the injured party. If the purpose of indemnity is to relieve the relatively innocent wrongdoer and shift the burden to one whose conduct is more blameworthy, the fact that the latter has a personal defense if sued by the injured person would seem to be irrelevant.[417]

(c) Express Contract Indemnity.

In a number of instances, the government will expressly agree to indemnify its contractors for injuries to third parties.[418] The usual method of doing this is by the insertion of a particular indemnification clause into the contract.[419] Under such an arrangement, normal methods of contract interpretation are involved. The major interpretation questions focus on what actions of the parties preclude indemnification.

The primary interpretation question is whether indemnification extends to situations in which the injury is the result of the indemnitee's own negligence. The general rule is that a party does not indemnify against another's negligence unless the intention to do so is expressed in clear and unequivocal terms.[420] Nevertheless, some courts will provide relief from the general rule based on the respective bargaining power of the parties.[421]

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[415]409 F.2d 994 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970).
[416]*See* note 414 & accompanying text *supra*.
[417]409 F.2d at 998.
[418]*See* text accompanying notes 391-95 *supra*.
[419]*See e.g.*, DAR §§ 7-203.22, 7-403.56.
[420]United States v. Seckinger, 397 U.S. 203, 211, (1970).
[421]*See, e.g.*, Kansas City Power & Light Co. v. United Telephone Co. of Kansas City, 458 F.2d 177 (10th Cir. 1972).

Another interpretation question is whether the indemnitee's willful misconduct or bad faith defeats its right to indemnification. Such a question usually arises in situations where the indemnitee's negligence does not preclude recovery. As stated in *Appeal of McDonald-Douglas Corp.*,[422] an attempt to obtain indemnification under a specific clause requiring indemnification for the contractor's negligence but not its willful misconduct:

> [W]illful misconduct has been used by courts...to describe a greatly aggravated form of negligence.... While the court does not necessarily find that the person held liable intended that the victim suffer death or injury, it must find that the actor know, or should have been deemed to have known from the facts in his possession, that the injury would probably result, and that such a risk of harm was the product of a lack of due care under all the circumstances considerably in excess of that which would support a finding of negligence. Similarly, in failing to prevent or reduce the probability of harm, the actor must evidence a knowing disregard for risks far in excess of what would be reasonable under a negligence standard. From this knowing disregard, an element of intent is imputed in the meaning of "willful misconduct"....
> We therefore find that in demarcating "willful misconduct" as an exception to the general rule of reimbursement, the clause contemplates the kind of qualitative distinction described above, the distinction between lack of due care, including aggravated forms of negligence, and a knowing disregard for greatly unreasonable risks.

Likewise, in *Appeal of Fairchild Hiller Corp.*,[423] the use of flammable solvents to clean aircraft parts and of improper lighting capable of causing fire did not amount to willful misconduct or bad faith in an aircraft burning incident.

Of course, it must be remembered that the interpretation of any express contract provision or indemnity does not always resolve the matter. Independent considerations of contribution and tort indemnity are still necessary. In *Green Construction Co. v. Williams Form Engineering Corp.*,[424] a claim for contribution was permitted even though the relationship between the government and its contractor was governed by contract law because the government was also found to owe a duty of care to its contractor apart from the contract.

[422]NASA BCA No. 865-28, 68-1 BCA para. 7021 (1968).
[423]ASBCA No. 14387, 72-1 BCA para. 9202 (1971).
[424]No. G75-248 (W.D. Mich., Sept. 10, 1980).

(d) Implied Contract Indemnity.

Despite the lack of an express indemnity provision, the United States may be found subject to an implied contractual obligation to indemnify. In *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*,[425] a contractor breached its contractual obligation to a shipowner to store cargo properly and safely. An employee injured by the cargo sued the shipowner and recovered $75,000. The shipowner, in turn, sued the contractor for indemnification, notwithstanding the absence of an express indemnity provision. Nonetheless, the Supreme Court held that the contractor was obliged to indemnify the shipowner and found that this obligation was based on the contract. Likening the warranty of workmanlike service to a manufacturer's warranty of soundness of the manufactured product, the Supreme Court stressed that the shipowner's actions was not changed from one for breach of contract to one based on tort because recovery depended on the standard of the contractor's performance.[426]

Attempts to extend the *Ryan* principle beyond the scope of admiralty have met with mixed results. A number of decisions have applied *Ryan* outside of admiralty cases,[427] but the Sixth,[428] the Fifth,[429] and the Second Circuits[430] have refused to do so.

Since the liability for indemnity is based on breach of warranty, a cause of action in contract rather than tort, the logical question is whether the indemnitee's conduct has any relevance at all. The Supreme Court in *Weyerhaeuser Steamship Co. v. Nacirema Co.*[431] stressed that tort discussions based on responsibility for harm or duty must not be considered. Nonetheless, the Supreme Court did leave open the door for some consideration of the indemnitee's conduct: "If in that regard respondent rendered a substandard performance which led to foreseeable liability of petitioner, the latter was entitled to indemnity *absent conduct on its part sufficient to preclude recovery.*"[432] One such consideration may be the indemnitee's knowledge. In *Barr v. Brezina Construction Co,*[433] for instance, the indem-

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[425]350 U.S. 124 (1956).

[426]*Id.* at 134.

[427]*See e.g.*, Fisher v. United States, 299 F. Supp. 1 (E.D. Pa. 1969); Moroni v. Intrusion—Prepaki, Inc., 165 N.E.2d 346 (Ill. 1960).

[428]Liberty Mut. Ins. Co., 472 F.2d 69 (6th Cir. 1972).

[429]Hobart v. Sohio Petroleum Co., 445 F.2d 435 (5th Cir.), *cert. denied*, 404 U.S. 942 (1971).

[430]Schwartz v. Compagne General Transatlantique, 405 F.2d 270 (2d Cir. 1968).

[431]355 U.S. 563 (1958).

[432]*Id.* at 567 (emphasis added).

[433]464 F.2d 1141 (10th Cir. 1972).

nitee knew that certain construction plans were faulty. Following an injury due to such faulty plans, the defendant-contractors sought indemnification from the government based on a breach of an implied warranty of fitness by the government. Because of the defendant-contractors' knowledge of the defects, however, the court refused to require indemnification.

3. Pleading Indemnity and Contribution.

(a) Contribution and Tort Indemnity.

As contribution and tort indemnity are both based in tort, a contractor seeking them must plead its case under the Federal Tort Claims Act,[434] the government's primary waiver of its sovereign immunity for tort. The contractor may seek indemnification in federal district court through impleader, cross-claim, or separate action. Impleader and cross-claim, however, are only available to a contractor if the suit is pending against the contractor in a federal court. This is because the government's waiver of immunity under the Federal Tort Claims Act is limited to actions filed in federal district courts.[435]

Although the contractor may only seek contribution or tort indemnification in a federal action, the contractor is required to plead the law of the jurisdiction in which the wrongful or negligent act or omission had occurred.[436] To the extent that a particular jurisdiction does not recognize contribution or tort indemnity, the contractor is without such a remedy.[437]

Actions in admiralty for contribution and tort indemnification are available under the Suits in Admiralty Act.[438] Contractors in admiralty will usually bring their actions under both the Federal Tort Claims Act and the Suits in Admiralty Act.[439]

Sometimes, the contractor may gain its right to contribution or tort indemnity from the types of pleadings of the United States. This may occur when the government, not content with having avoided the contractor's action for contribution or tort indemnification, asserts an affirmative claim in the same case. In *Nikiforow v. Ritten-*

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[434]28 U.S.C. §§ 2671-2687 (1976).
[435]*See* text accompanying note 24 *supra*.
[436]28 U.S.C. § 1346(b) (1976).
[437]*See* text accompanying notes 449-51 *infra*.
[438]46 U.S.C. §§ 741-748 (1976).
[439]*See* Wallenius Bremen G.m.b.H. v. United States, 409 F.2d 994 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970).

house,[440] a Coast Guardsman injured while towing a private boat brought suit against the boat's owner. The owner impleaded the United States, but the federal district court dismissed the owner's claim for contribution and tort indemnity. Since the government had expended several thousands of dollars in medical care for the Coast Guardsman, it then intervened as a party-plaintiff seeking these costs from the boat owner under the Medical Care Recovery Act.[441] Unfortunately for the government, the court found that the voluntary entry of the government into the suit exposed it to liability for all purposes. As a result, the court, in a later opinion, required the government to indemnify the boat owner for almost $80,000.[442]

(b) Express and Implied Contract Indemnity.

Since express and implied contract indemnity are based in contract rather than tort, they are not brought under the Federal Tort Claims Act. Contractors seeking such contractual indemnification, therefore, must plead their cases under the Tucker Act,[443] which permits suits against the United States on contract claims.

As in cases seeking contribution or tort indemnification, therefore, the contractor may seek indemnification through a separate action although it must be filed in the U.S. Claims Court. Unlike cases seeking contribution or tort indemnity, the contractor seeking contractual indemnity relies on federal contract law rather than on state law.[444]

Furthermore, a contractor seeking contractual indemnification has an alternate forum available. Under the Contract Disputes Act of 1978,[445] the contractor may proceed under the disputes clause[446] in its contract and bring an action before a board of contract appeals. Should the contractor be unsuccessful in this forum, it may appeal to the U.S. Claims Court.[447]

B. JUDICIAL LIMITS

Since the products from and the research under a government contract are most frequently used by government personnel, it is not

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[440]277 F. Supp. 608 (E.D. Pa. 1967).
[441]42 U.S.C. §§ 2651-2653 (1976).
[442]Nikiforow v. Ritterhouse, 319 F. Supp. 397 (E.D. Pa. 1970).
[443]28 U.S.C. § 1346(a)(2) (1976).
[444]*See* United States v. Seckinger, 397 U.S. 203 (1970). *But cf.* Jones v. United States, 304 F. Supp. 94, 99 n.19 (S.D.N.Y. 1969).
[445]Pub. L. No. 95-563 (codified in part at 41 U.S.C. §§ 601-613 (Supp. III 1979).
[446]*See, e.g.*, DAR § 7-103.12.
[447]41 U.S.C. § 607(g) (1976).

very surprising that most injured plaintiffs are government personnel. Contractors have attempted with varying degrees of success to obtain government indemnity or contribution for damages paid for such injuries. Courts have raised significant hurdles to such recovery, although the contractor's chances for indemnity or contribution are somewhat better if the injured party is a civil servant rather than a military member.

1. Military Personnel.

In 1973, Air Force Captain John Donham was force to eject when his F-100 aircraft failed in midair. Despite Captain Donham's compliance with all egress procedures, his parachute unit malfunctioned, resulting in a permanently crippling injury. The parachute unit had been supplied by Stencel Aero Engineering Corporation under a subcontract with North American Rockwell. Captain Donham brought actions against Stencel, eventually settling for $207,500.

Stencel brought a cross-claim against the government seeking tort indemnity under the Federal Tort Claims Act,[448] but the Eighth Circuit granted the government's motion to dismiss in *Stencel Aero Engineering Corp. v. United States.*[449] Appealing to the Supreme Court, Stencel emphasized that it had become aware of a defect in the parachute pack design and had recommended a change, but that the Air Force had insisted upon a different design change.[450] Chief Justice Burger, speaking for the majority, found these facts unpersuasive in light of *Feres*[451] and held Stencel solely liable for the defect without benefit of indemnity.[452] Under the *Feres* Doctrine, the government's upper limit of liability for a service-connected injury was determined by the Veterans Benefits Act.[453]

Stencel has generally been considered as a rule precluding government indemnification of contractors, but it should be noted Stencel was only a subcontractor. Indeed, the Supreme Court even emphasized in a footnote that there was no contractual relationship between Stencel and the government.[454] The issue before the Supreme Court then was not whether a *prime* contractor may seek indemnity.

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[448]28 U.S.C. §§ 2671-2687 (1976).

[449]536 F.2d 765 (8th Cir. 1976).

[450]This appears to be an attempt to use the government design defense not as a shield against the injured plaintiff but as a sword against the government.

[451]*See* text accompanying notes 1-116 *supra*.

[452]431 U.S. 666 (1977).

[453]*Id.* at 673.

[454]*Id.* at 667 n.2.

Nonetheless, such a distinction did not concern the Fourth Circuit in *Henry v. Bell Textron, Inc.*[455] This case is notable not only because it was a contractor rather than a subcontractor which was denied government indemnity but because the extreme facts in it demonstrate a refusal to allow indemnity in any circumstances. *Henry* involved the deaths of two Virginia Army National Guard members in the crash of a Bell UH1H helicopter. The facts could hardly have been more favorable to Bell. The helicopter had been damaged by enemy fire in Vietnam, virtually every relevant part had been replaced at least twice since manufacture, and the Army's accident report found the government more responsible than Bell for the crash. The facts were for naught, however, as the government escaped liability for indemnity. Relying on *Stencel*, the court stated: "Bell Textron is placed in a very difficult position by the expanding doctrines of products liability and the relatively inflexible doctrines of sovereign immunity and Eleventh Amendment immunity, but unfortunately for it, the law is clearly against it."[456]

Pursuant to the Contract Disputes Act,[457] every government contract contains a disputes clause which requires the contractor's continued performance even during a dispute, such as might concern whether a design change is necessary.[458] Failure to perform is considered a breach. Once a contractor discloses a defect but is directed by the government to perform in the original manner, it faces an unenviable choice. If it performs as directed, it may be liable for subsequent third party injuries without hope for indemnification or contribution. If it attempts to avoid liability through design change, it will be in breach of its contract and susceptible to the whole range of government remedies for breach. In short, the contractor's options seem limited to breach or liability.

If the contractor could not obtain indemnification under the extreme facts of *Henry*, it is hard to imagine any situation in which indemnity for an injured military member would be available. At least to the extent reliance is placed on the Federal Tort Claims Act, as is done in actions for tort indemnity or contribution, the contractor's lack of success is predicted.[459]

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[455]577 F.2d 1163 (4th Cir. 1978).

[456]*Id.* at 1164.

[457]41 U.S.C. §§ 601-613 (Supp. III 1979).

[458]41 U.S.C. § 605(b) (1976).

[459]A different result may at least be possible when the action is based on contract rather than tort.

2. Federal Civilian Personnel.

Until recently, a contractor's ability to obtain contribution or indemnification from the government for injuries to the government's civilian personnel was virtually as limited as if the injured parties were military personnel. While the limitations for military personnel was based directly on the Supreme Court's precedent in *Feres*, the limitation for civilian personnel was based on judicial interpretation of statute. The statute, the Federal Employees' Compensation Act (FECA),[460] was held to bar indemnity actions against the United States.[461] The reasoning was that such actions were barred because contractors seeking indemnity were outside the FECA's exclusive liability language:

> The liability of the United States...under [FECA] with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States...to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States...because of the injury or death....[462]

Even under such precedent, at least one exception for admiralty was permitted. In *Weyerhaueser Steamship Co. v. United States*,[463] indemnification by the United States was required for an injured civilian employee based on the divided damages concept of admiralty. The right in admiralty was found more important than the limitation under the FECA.

The general precedent[464] was followed by the District of Columbia Circuit in *Thomas v. Lockheed Aircraft Corp.*,[465] an action by the estate of a civilian employee killed in the crash of the C-5A evacuating children shortly before the Communist victory in Vietnam. Nevertheless, the Supreme Court reversed in *Lockheed Aircraft Corp. v. United States*[466] and required the government to indemnify the manufacturer of the airplane. Finding that the FECA provision was intended only to govern the rights of employees and those claim-

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[460]5 U.S.C. §§ 8101-8149 (1976).

[461]*See, e.g.*, Kudelka v. American Hoist & Derrick Co., 541 F.2d 651 (7th Cir. 1976); Galimi v. Jetco, Inc., 541 F.2d 949 (2d Cir. 1975); Newport Air Park, Inc. v. United States, 419 F.2d 342 (1st Cir. 1969).

[462]5 U.S.C. § 8116(c) (1976).

[463]372 U.S. 597 (1963).

[464]The precedent was not unanimous. *See* Wallenius Bremen G.m.b.H. v. United States, 409 F.2d 994 (4th Cir. 1969), *cert. denied*, 398 U.S. 958 (1970).

[465]665 F.2d 1330 (D.C. Cir. 1981).

[466]74 L.Ed.2d 911 (1983).

ing on their behalf, the majority embraced the rationale of *Weyerhaeuser*.

In dissent, Justice Rehnquist chided the majority for ignoring *Stencel* and applying in general the ancient maritime principle of *Weyerhaeuser*. Citing legislative history, he demonstrated that the principal purpose of the FECA provision in question was to limit the amount that the government would have to pay on account of injuries to its employees. Nonetheless, a clear majority of the Court decided otherwise. It is likely that a significant avenue of relief has been opened for contractors liable to injured government civilian employees.

The breadth of *Lockheed* may be limited by two factors. First, the decision does not create a federal indemnification rule. The laws of the various jurisdictions on the right to contribution and tort indemnification are still applicable.[467] If no such right exists in a particular state, the relief of *Lockheed* is irrelevant. Second and possibly more important, it is doubtful that *Lockheed* will be extended to indemnify contractors whose liability is founded on strict liability rather than negligence. Under *Nelms v. Laird*,[468] it appears that suits cannot be maintained against the government under the Federal Tort Claims Act absent a showing of some fault. It seems logical to afford the government the same protection in actions seeking indemnity.

Finally, a most anomalous result of *Lockheed* must not be overlooked. Since the FECA enables the government to avoid liability to its employees,[469] but since *Lockheed* may require the back-door liability of indemnification, it would be to the government's advantage to assist the contractor in its defense of the claim by the government's own employees. Indeed, the government may want to demonstrate its own negligence as a means to defeat the claim of its employees against the contractor. The government would stand to lose nothing by such a demonstration of its own negligence, since that would create no greater right in its injured employees. The government could gain the ultimate protection against indemnification, however, by a finding that the contractor is not liable to the employees.

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[467] 28 U.S.C. § 1346(b) (1976).
[468] 406 U.S. 797 (1972).
[469] *See* text accompanying notes 1-116 *supra*.

C. STATUTORY LIMITS

The judicial limits discussed in the previous section usually are raised in situations in which the government seeks to avoid indemnity and contribution. Even more frustrating to government contractors are those situations in which an agency is willing to indemnify but is prohibited from doing so by various statutes.

The two most common statutory limitations on indemnity are the Anti-Deficiency Act[470] and the Adequacy of Appropriations Act.[471] Both statutes forbid government agencies from obligating funds in advance of or in excess of current appropriations unless authorized by law.[472]

Specifically, the Court of Claims[473] held in *California-Pacific Utilities Co. v. United States*[474] that the Anti-Deficiency Act forbids indemnification agreements between agencies and contractors unless there is an appropriation available to pay any liability. Nonetheless, both the civilian and the military agencies continued to use a standard clause, "Insurance-Liability to Third Persons",[475] that neither limited the duration of the coverage nor the amount of the government's liability. Finally, in 1982, the Comptroller General held that such clauses violate both the Anti-Deficiency Act and the Adequacy of Appropriations Act.[476] Unless otherwise authorized by law, the Comptroller General ruled that an indemnity provision in a contract that subjects the United States to an indefinite and uncertain liability contravenes those Acts.

Nevertheless, the Comptroller General has recognized that not every indemnification clause is prohibited; an indemnification clause authorized by law is permitted.[477] When the contractor is a public utility, indemnification is permitted,[478] although not if the utility lacks a monopoly.[479] Finally, indemnification is permitted if the clause limits the government's liability to appropriations available at the time a contract is entered into and explicitly provides that

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[470]31 U.S.C. § 665 (1976).
[471]41 U.S.C. § 11 (1976).
[472]*See* text accompanying notes 499-508 *infra* for examples of such authorizations.
[473]Now the Court of Appeals for the Federal Circuit.
[474]194 Ct. Cl. 708 (1971).
[475]Federal Procurement Reg. § 1-7.204.5 (1 May 1964); DAR § 7-203; Federal Procurement Reg. § 1-7.404.9 (1 May 1964); DAR § 7-402.26.
[476]*Assumption by Government of Contractor Liability to Third Persons*, B-201072, 82-1 CPD 406 (May 3, 1982).
[477]*Id.*
[478]59 Comp. Gen. 705 (1980).
[479]Comp. Gen. Dec. B-197583 (Jan. 31, 1981) (unpub.).

nothing in it may be construed as indicating that Congress will appropriate the additional funds.[480]

The general response in the agencies to the Comptroller General's opinion has been to supplement, rather than eliminate, the indemnification clauses. In the Navy, for example, the following language is now added to the indemnification clause found at DAR 7-203.22:

> The obligation of the Government to reimburse the contractor for liabilities to third persons as set forth in paragraph (c) (ii) of the clause entitled "Insurance-Liability to Third Persons" [1966 DEC], shall be limited to the amount of appropriations legally available for payment for the loss at the time of the loss. Nothing contained in this clause may be construed to imply that Congress will appropriate funds sufficient to cover the difference between available appropriations and the Contractor's liabilities.[481]

Citing a number of previous decisions alleged to be to the contrary, the Public Contract Law Section of the American Bar Association requested that the General Accounting Office reconsider its 1982 decision. The GAO agreed to do so,[482] however, in a 1983 decision, the result was the same. The Comptroller General affirmed its 1982 decision dismissing all cases cited by the Public Contract Law Section as situations in which the maximum liability had been determined and adequate funds could be obligated or administratively reserved to cover it.[483] Referring to several specific statutes authorizing indemnification,[484] the Comptroller General emphasizes that such statutory exceptions are the product of Congress, not the Executive Branch. Thus, indemnification clauses are permissible only when specifically authorized by statute or when liability is fixed and funding available or reserved.[485]

Several other statutory prohibitions besides the Anti-Deficiency Act and the Adequacy of Appropriations Act also exist. The most common are the appropriations acts themselves, which restrict fund

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[480] *See Assumption by Government*, *supra* note 485.

[481] Navy Policy Representative, Defense Acquisition Regulatory Council, memorandum, 13 August 1982.

[482] The General Accounting Office's willingness to reconsider its earlier decision is extraordinary because the Public Contract Law Section was not a party to any dispute.

[483] *Assumption by Government of Contractor Liability to Third Persons-Reconsideration*, B-201072, 83-1 CPD 501 (May 12, 1983).

[484] The Comptroller General referred to Pub. L. No. 85-804, nuclear energy, and swine flu. *See* text accompanying notes 510-38 *infra*.

[485] *See Assumption by Government-Reconsideration*, *supra* note 492.

availability to limited periods of time.[486] Since many funds are so limited, they would seem to be unavailable years later when a contractor is found liable.[487]

Another important prohibition is found in the operation of the Federal Tort Claims Act.[488] That Act is a waiver of some of the government's immunity from suit, but it does not waive immunity for punitive damages or interest prior to judgment.[489] Contractor claims for indemnification or contribution based on the Federal Tort Claims Act could not encompass successfully amounts assessed for punitive damages prior to judgment.

D. STATUTORY AUTHORIZATIONS

If indemnification clauses are permissible if there is statutory authority for them,[490] the pertinent authorization statutes should be considered next. For government contractors, there are two general indemnity statutes and several covering special risk situations.

1. 10 U.S.C. Section 2354.

The first general statute authorizing contractor indemnity is section 2354 of Title 10, U.S. Code. Although the language of the statute provides that it is available for "research and development,"[491] the legislative history indicates that it is available only for the experimental portion of research and development contracts.[492] In any event, it is not available for production contracts.

The authority of section 2354 originally was limited to the military departments, but now the Secretary of Health and Human Services may approve the inclusion of indemnity clauses under this authority for research contracts let by the Public Health Service.[493] Department of Defense clauses using this authority[494] are available to indemnify only for losses in the direct performance of the contract that are not compensated by insurance or otherwise and that result from risks the contract defines as "unusually hazardous".[495] The government escapes liability if insurance was available and was

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[486]*See, e.g.*, Pub L. No. 97-377, 96 Stat. 1830 (1982).

[487]One possible argument against this limitation is that the liability to indemnify actually arose at the time the contract was entered. *See* 59 Comp. Gen. 518 (1980).

[488]*See* text accompanying notes 1-116 *supra*.

[489]28 U.S.C. § 2674 (1976).

[490]*See* p. 106. text accompanying notes 486-89 *supra*.

[491]10 U.S.C. § 2354(a) (1976).

[492]*See, e.g.*, S. Rep. No. 1397, 80th Cong., 2d Sess. (1948).

[493]42 U.S.C. § 241(a)(7) (1976).

[494]DAR § 7-303.61; DAR § 7-403.56.

[495]DAR § 10-701(a).

required or approved by the contracting officer.[496] Likewise, the government escapes liability if the risk causing the harm has not been inserted into the contract as "unusually hazardous."[497] This may be the most significant limiting factor because of the reluctance of the military departments and the Department of Health and Human Services to characterize their contracts as "unusually hazardous". To the extent that this characterization is not made, indemnity is not appropriate under section 2354.[498]

Authority to indemnify under section 2354 has been delegated to a number of positions below secretarial level. For example, the Air Force has delegated this authority as low as to the Director and Deputy Director of Contracting and Manufacturing at the Ballistic Missile Office, a component within Air Force Systems Command.[499]

2. Public Law 85-804.

Public Law 85-804,[500] the second general statute authorizing contractor indemnity, provides a much broader authority to indemnify than section 2354. The authority of Public Law 85-804 is neither restricted to the Departments of Defense and Health and Human Services, nor is it limited to research and development contracts.

Public Law 85-804 finds its roots in the first War Powers Act[501] enacted shortly after the Japanese attack on Pearl Harbor. That Act authorized the President through the Executive Branch agencies to: "[E]nter into contracts and into amendments or modifications of contracts. . . without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war."[502] Almost immediately after enactment, the Attorney General advised the Secretary of War that the Act permitted the indemnification of contractors suffering losses at the hands of the enemy.[503]

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[496]*See, e.g.*, DAR § 7-303.61(g). *See also* text accompanying notes 345-95 *supra*.

[497]*See* 10 U.S.C. § 2354(a)(1) (1976); DAR § 10-701(b).

[498]It should be noted that a contract containing an indemnification clause under 10 U.S.C. § 2354 is not exclusive of other indemnifications. An indemnification clause pursuant to other statutory authority also may be included in such a contract. *But see* DAR § 10-702(a), which provides clauses indemnifying under Pub. L. No. 85-804 are to be used in contracts other than those for which indemnification under 10 U.S.C. § 2354 is available.

[499]U.S. Dep't of Air Force, DAR Supp. 10-701 (as amended by AF Acquisition Circular 83-10, 1 August 1983).

[500]50 U.S.C. §§ 1431-1435 (1976).

[501]55 Stat. 838 (1942).

[502]*Id.*

[503]40 Op. Atty. Gen. 225 (1941).

Passed in 1958 as the successor to the first War Powers Act, Public Law 85-804 provides:

> The President may authorize any department or agency of the Government which exercises functions in connection with the national defense . . . to enter into contracts or into amendments or modifications . . . without regard to other provisions of law . . . whenever he deems that such action would facilitate the national defense.[504]

Unlike section 2354, Public Law 85-804 does not mention indemnification. The legislative history leaves little doubt, however, that indemnity authority is provided:

> The need for indemnity clauses in most cases arise from the advent of nuclear power and the use of highly volatile fuels in the missile program. The magnitude of the risks involved under procurement contracts in these areas have rendered commercial insurance either unavailable or limited in coverage. At the present time, military departments have specific authority to indemnify contractors who are engaged in hazardous research and development, but this authority does not extend to production contracts [10 U.S.C. § 2354]. Nevertheless, production of which may include a substantial element of risk, giving rise to the possibility of an enormous amount of claims. It is therefore, the position of the military departments that to the extent commercial insurance is unavailable, the risk of loss in such a case should be borne by the United States.[505]

As implemented by executive orders,[506] indemnification agreements are permitted only in situations involving either "unusually hazardous" or "nuclear" risks. An additional requirement is that commercial insurance not be reasonably available. The risk which is indemnified, however, is not limited to those in research and development contracts. Furthermore, the legislative history indicates the product need not be "unusually hazardous" or "nuclear" as long as the risk so qualifies.[507] For instance, the Air Force has indemnified under Public Law 85-804 for risks resulting from or in connection

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[504]50 U.S.C. § 1431, (1976).

[505]S. Rep. No. 2281, 85th Cong., 2d Sess. (1958).

[506]Pub. L. No. 85-804, 72 Stat. 972 (1958) (currently codified at 50 U.S.C. §§ 1431-1435 (1976)), as implemented by Exec. Order No. 10789, 23 Fed. Reg. 8897 (1958); as amended by Exec. Order No. 11051, 27 Fed. Reg. 9683 (1962); Exec. Order No. 11382, 32 Fed. Reg. 16247 (1967); Exec. Order No. 11610, 36 Fed. Reg. 13755 (1971); Exec. Order No. 12148, 44 Fed. Reg. 43239 (1979)).

[507]H.R. Rep. No. 2232, 85th Cong., 2d Sess. (1958).

with burning propellants, using energy sources, and launching missiles.[508]

The authority of Public Law 85-804 is limited to actions that "would facilitate the national defense,"[509] but the executive order permits eleven civilian agencies to exercise the authority.[510] The secretary of each military department, as well as the heads of the eleven named civilian agencies, may exercise the authority.

Due to the requirement to facilitate the national defense, the most frequent use of the indemnification authority under Public Law 85-804 has been made by the military departments.[511] Nevertheless, two civilian agencies have recently undertaken major uses of the authority in Public Law 85-804 to indemnify their contractors.

As approved by the Secretary of Transportation,[512] the Federal Aviation Authority has been authorized to indemnify its Air Traffic Computer Replacement Program contractors. The hardware and software to be obtained will increase the automation of the air traffic control system. A malfunction in such a system could result in a major aircraft accident with astronomical damages. Under the indemnification scheme, computer contractors will be required to carry insurance in the amount of $500 million, but losses in excess of that amount will be indemnified.[513]

A possible difficulty with this indemnification is that computer hardware and software do not by their nature lead to unusually hazardous or nuclear risks, which are the prerequisites for indemnification under the executive order.[514] While there is legislative history indicating that it is the risk rather than the product which must be unusually hazardous[515] and while the executive order does focus on risks rather than products, this indemnification is unique because it bases the concept of "unusually hazardous" on the potential amount

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[508]Sealy H. Cavin, Jr., Acquisition Law Seminar, Office of the General Counsel, Department of the Air Force, Jan. 26, 1983.

[509]50 U.S.C. § 1431 (1976).

[510]The Departments of Treasury, Interior, Agriculture, Commerce, and Transportation, the Nuclear Regulatory Commission, General Services Administration, National Aeronautics and Space Administration, Tennessee Valley Authority, Government Printing Office, and Federal Emergency Management Agency may exercise this authority.

[511]Procedures are found at DAR § 17-303.2. In accordance with DAR § 10-702, an indemnification clause found at either DAR § 7-303.62 or DAR § 7-403.57 is usually inserted into the contract.

[512]46 Fed. Reg. 62596, Dec. 24, 1981, as amended by 47 Fed. Reg. 1229, Jan. 11, 1982.

[513]*Id.*

[514]*See* note 515 *supra*.

[515]*See* note 516 *supra*.

of loss rather than on the increased likelihood of such a risk occurring.

Similarly, the Administrator of the National Aeronautics and Space Administration (NASA) has authorized the indemnification of its contractors in the Space Shuttle program.[516] Although NASA was authorized to indemnify under separate statutory authority[517] and had indemnified the *users* of the Space Shuttle, it had been NASA's firm policy not to indemnify its *contractors* under Public Law 85-804.[518] Such policy now has been radically altered.

The NASA indemnification is limited to losses resulting from or arising from the use of a contractor's products or a contractor's services in NASA Space Shuttle activities. Only those contractors approved by the NASA Administrator and who maintain insurance in the amounts specified by the Administrator are eligible for indemnification. The indemnification may even be applied prospectively to to contractors under existing contracts without further consideration. The indemnification, however, is not available for losses caused by the willful misconduct or lack of good faith on the part of any of the contractor's directors or officers or any principal officials.[519]

Significantly, the NASA Administrator has defined unusually hazardous risks solely in terms of potential liability:

> These risks are considered unusually hazardous risks solely in the sense that if, in the unlikely event, the [Space Shuttle] its cargo or other elements or services used in NASA's space activities malfunctioned causing an accident, the potential liabilities could be in excess of the insurance coverage that a NASA prime contractor would reasonably be expected to purchase and maintain, considering the availability, cost and terms and conditions of such insurance. In no other sense are the [Space Shuttle] its cargo or other elements or services used in NASA's space activities unusually hazardous.[520]

While it should not be difficult to demonstrate that space flight may cause many more hazardous risks of the kind envisioned by Public

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[516]NASA Procurement Notice 83-3, Indemnification of NASA Contractors Involved in Space Activities.

[517]42 U.S.C. § 2458b (1976).

[518]NASA Procurement Reg. § 10.350 (now contrained in NASA Procurement Notice 83-3, Guideline I).

[519]*See* NASA Procurement Notice 83-3, note 525 *supra*.

[520]NASA, Memorandum Decision under Public Law 85-804, Jan. 19, 1983 *reprinted at* 39 BNA Fed. Contracts Rep. 216-17 (Jan. 24, 1983).

Law 85-804 and the executive order than may computer hardware and software, the rejection of such a basis for indemnity further erodes whatever vitality the "unusually hazardous" standard may have.[521]

3. Special Risk Statutes.

While section 2354 of Title 10, U.S. Code, and Public Law 85-804 have the general applicability previously discussed, there are a number of statutes of interest to government contractors which authorize indemnity in limited situations. As might be expected, many of these statutes are for the benefit of research and development contractors.

(a) Swine Flu Immunization Act.

A drug manufacturer had been held strictly liable for the sale of polio vaccine in *Davis v. Wyeth Laboratories, Inc.*[522] and *Reyes v. Wyeth Laboratories, Inc.*[523] With this adverse precedent in mind, drug manufacturers refused to provide swine flu vaccine to the government without indemnification for third party liability. Prompted by the fear of an epidemic without such vaccine, Congress enacted the Swine Flu Immunization Act of 1976.[524]

The Swine Flu Act was not an indemnification in the traditional sense because the United States did not agree to pay drug manufacturers for the amounts for which they were determined liable. Rather, third party suit against the drug manufacturer was barred. A challenge to this bar was rebuffed in *Wolfe v. Merrill National Laboratories.*[525]

Recognizing the unfairness of barring all suits by injured plaintiffs, Congress provided the remedy of suit against the United States. Such remedy was exclusive and was based on the Federal Tort Claims Act.[526] Liability was based on the law of the jurisdiction where the act or omission occurred, but the discretionary function exception to the Federal Tort Claims Act[527] was removed as a defense. Suit was permitted against the United States by a federal employee in *Wallace v. United States*[528] despite the fact that the

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[521]*See* text accompanying notes 564-77 *infra.*
[522]399 F.2d 121 (9th Cir. 1968).
[523]498 F.2d 1264 (5th Cir. 1974).
[524]Pub. L. No. 94-380, 90 Stat. 1113 (1976) (previously codified at 42 U.S.C. § 247b(j)-(l) (1970); repealed by Pub. L. No. 95-626 (1978)).
[525]433 F. Supp. 231 (D. Tenn. 1977).
[526]*See* text accompanying notes 13-64 *supra.*
[527]28 U.S.C. § 2680 (1976).
[528]669 F.2d 947 (4th Cir. 1982).

employee had received his vaccine at his place of employment and despite the exclusivity provisions of the Federal Employees' Compensation Act.[529]

Most significantly, the United States received the right to recover from a negligent manufacturer or other program participant for damages and litigation costs that the government incurred due to the manufacturer's or participant's negligence. The practical effect of the Swine Flu Act was to protect the manufacturers and other participants from liability for breach of warranty and strict liability but not for negligence.

(b) Price-Anderson Act.

The Price-Anderson Act was passed in 1957 to protect and indemnify licensees involved in the development of atomic energy.[530] Indemnification was only one part of a four-part plan to provide protection. Under the first part of the plan, licensees are required to maintain $160 million of private insurance.[531] The second part of the plan provided an insurance pool by requiring each licensee to pay a "deferred premium" of between two and five million dollars in the event of an accident involving any licensee.[532] The third part provided a recovery ceiling of $560 million beyond which liability does not extend for any single nuclear incident.[533] Finally, to the extent that liability for a single nuclear incident exceeds the required insurance and the deferred premium pool before it reaches the ceiling, the United States will indemnify the excess amount.[534]

The Price-Anderson Act limitations are significant because nuclear incidents can be very costly even when no deaths or injuries are involved. The losses, for example, for just evacuation expenses and lost wages during the incident at Three Mile Island have been estimated at $18 million.[535]

Two important features about the Price-Anderson Act should be noted. Unlike section 2354 and Public Law 85-804, the decision to provide indemnity coverage is not discretionary. In addition, Con-

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[529] 5 U.S.C. § 8116(c) (1976).

[530] 42 U.S.C. § 2210 (1976).

[531] 10 C.F.R. § 140.11(a)(4) (1983).

[532] 42 U.S.C. § 2210(b) (1976). This section was not in the Act as originally enacted, but was included by Pub. L. No. 94-197, 89 Stat. 1111 (1975).

[533] 42 U.S.C. § 2210(e) (1976). This provision withstood a constitutional attack in Duke Power Co. v. Carolina Envt'l Study Group, 438 U.S. 59 (1978).

[534] 42 U.S.C. § 2210(c) (1976).

[535] Note, *Abolishing the "Extraordinary Nuclear Occurrence" Threshold of the Price-Anderson Act*, 14 Mich. J. L. Reform 609, 618 (1981).

gress has indicated that it would act as "necessary and appropriate to protect the public from the consequences of a disaster" if the total liability in a nuclear incident exceeds the $560 million ceiling.[536]

(c) Veterans Omnibus Health Care Act.

Under the Veterans Omnibus Health Care Act,[537] the Veterans Administration is authorized to indemnify contractors engaged in research involving prosthetic devices for veterans. The indemnification is only available for unusually hazardous risks. Research contractors are required to carry insurance and the maximum amount of indemnification is limited to funds obligated for the contract or available for research and development or appropriated for indemnification.

(d) Private Bills.

One route many contractors, especially those providing research and development, may overlook is the possibility of a private indemnification bill passed by Congress. This is the route which had been attempted by Stencel Aero Engineering Corporation[538] following the Supreme Court's denial of their claim for indemnity from the United States.[539] Such an action is especially inviting in a fact situation as favorable to the contractor as was Stencel's.[540]

(e) Other Indemnification Statutes.

Of some interest to government contractors are a number of little known indemnification statutes which may impact on the structure of future indemnification statutes. Contractors rebuilding the Northeast rail corridor have received the special protection of indemnification.[541] Congress has specifically authorized the National Aeronautics and Space Administration to indemnify Space Shuttle users, as opposed to contractors.[542] The Secretary of State has been authorized to indemnify contractors when necessary to protect the foreign policy interests of the United States.[543] Similar to the Swine Flu Immunization Act is the Teton Dam Act, which authorizes victims of a collapsed dam to file administrative claims with the

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[536] 42 U.S.C. § 2210(e) (1976).

[537] 38 U.S.C. § 4101(c)(3)(A) (1976).

[538] *See* H.R. 2514 (introduced in 1981 by Congressman Hendon of North Carolina to indemnify Stencel for third party settlement costs).

[539] 431 U.S. 667 (1977).

[540] *See* text accompanying notes 457-63 *supra*.

[541] Pub. L. No. 97-369, tit. I. § 101, 96 Stat. 1773 (1982).

[542] 42 U.S.C. 2458b (1976).

[543] 22 U.S.C. § 2393 (1976) (as implemented by Exec. Order 11223, 30 Fed. Reg. 6635 (1965)).

Department of the Interior.[544] It is unlike the Swine Flu Immunization Act in that the remedy is not exclusive and the relief is provided after rather than before the incident.

(f) Proposed Statutory Indemnification.

The reluctance of Congress to indemnify government contractors was demonstrated by its failure to pass a number of recent bills that had proposed indemnification of general application. In 1979, a bill was introduced which would have required indemnification of suppliers when government employees are injured due to faulty government specifications.[545] In 1982, "The Government Contractors' Product Liability Act" was introduced. This bill would have indemnified suppliers of a product or service to the government in all cases except those involving the contractor's primary and active or willful negligence.[546] Neither bill emerged from committee.

E. POLICY ISSUES

That a number of indemnification statutes have been proposed in the last few years[547] renders it likely that more will be introduced. Such proposals may be in many different forms, so consideration of various policy issues is necessary.

1. Why Indemnify at All?

The first, and possibly the most important, issue is whether any indemnification at all is necessary or even desirable. At least four separate arguments for indemnity may be advanced based on harm to the contractor, the government, and the injured third parties. First, without indemnification, it is argued that contractors will suffer ruinous liability. Second, it is suggested that severe harm will befall the government either because vital sources of research and development will no longer be available or because they will refuse to contract with the government because of fear of liability-induced bankruptcy. Third, injured third parties will have no effective means to recover since their judgments will have driven the defendant-contractors into bankruptcy. Fourth, the lack of a requirement for the government to indemnify, coupled with the great immunity from direct suit it enjoys, is a disincentive for the government to practice safety, thereby resulting in future injuries to third parties.

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[544]Pub. L. No. 94-400, 90 Stat. 1211 (1976).
[545]H.R. 5351 (introduced by Rep. Lamar Gudger).
[546]H.R. 1504 (introduced by Rep. Charles Grassley).
[547]*See, e.g.*, notes 554 & 555 *supra*.

The American Bar Association, prompted by its Public Contract Law Section, also has joined the movement. That the American Bar Association's House of Delegates voted at the 1983 midyear meeting to oppose any federal legislation governing product liability claims did not prevent it from voting at the same meeting in favor of indemnification of government contractors.[548]

Sometimes, individual agencies promote the effort towards indemnification because of the perception that their own interests will be advanced through the indemnification of their contractors. Fearing that its activities in space would be curtailed without indemnification because of the enormous increase in insurance premiums would deter its contractors from further dealing with the agency, the National Aeronautics and Space Administration has begun to ally itself with the supporters of indemnification.[549] Indeed, the NASA General Counsel has stated that some Air Force contractors who have been indemnified for Air Force projects on the Space Shuttle have refused to perform work for NASA without indemnification.[550]

Nonetheless, both the Departments of Defense and Justice stand in general opposition to any significant legislative effort at indemnification. Defense opposes such legislation because it would decrease the incentive that contractors now have to develop safe products and because it would erode the government's immunity from suit by essentially permitting suit through its contractors.[551] Likewise, Justice also opposes indemnification legislation because it would reduce a contractor's incentive to produce the best and safest products and because it would result in a drain on the Treasury without the normal restraints. In addition, Justice believes the great competition to obtain government contracts shows there is no need for such legislation. Finally, Justice objects to such legislation since it would provide government contractors, virtually all commercial corporations, special rights and remedies not available to others.[552]

In any event, such positions overlook the most serious deficiency with indemnification: that it does not concern itself with third parties who are injured. To the extent any indemnification scheme fails to protect the public, it will be subject to criticism.[553]

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[548]39 BNA Fed. Contracts Rep. 344 (Feb. 14, 1983).
[549]*See* NASA Procuremen: Notice 83-3, *supra* note 525.
[550]39 BNA Fed. Contracts Rep. 795 (Apr. 11, 1983).
[551]24 Fed. Pub. Govt. Contractor 440 (Dec. 27, 1982).
[552]38 BNA Fed. Contracts Rep. 600-01 (Oct. 11, 1982).
[553]*See* text accompanying notes 585-87 *infra*.

2. What Is the Proper Extent of Indemnity?

If the initial question of whether indemnity is necessary is answered in the affirmative, the inquiry reasonably turns to the appropriate breadth and depth of indemnity.

(a) Should It Be General in Nature or Should It Be Limited to Specific Programs?

Phrased in another way, this question could ask whether the statutory scheme should be similar to section 2354 of Title 10, U.S. Code, and Public Law 85-804 (general applicability) or similar to Swine Flu and Teton Dam (specific programs). Before a Senate Judiciary panel, American Bar Association representatives recently testified that a statute of general applicability, rather than one limited to particular agency activities, was necessary.[554] A statute of general applicability does not necessarily mean a statute of generous remedies; the two statutes of general applicability certainly have not depleted the Treasury. Congress can still restrict excessive payments by mandating limits on the risks covered or the threshold and ceiling amounts. To the extent a statute of general applicability authorizes rather than directs indemnification, it provides the Executive Branch with the flexibility needed to respond to novel situations as they arise rather than to await statutory permission.

(b) What Risks Should It Cover?

Even a statute of general applicability can be limited to particular risks. The American Bar Association has urged Congress to adopt legislation that would provide indemnification for catastrophic accidents and cases in which the contractor complied with the government's design.[555] The Justice Department, however, has disputed the contention that the government is more responsible than its contractors for injuries from products built according to government specifications. In this view, the government lacks the in-house capacity to design and control the manufacture of sophisticated products; rather, it is the contractor who is the more sophisticated.[556] The Justice Department appears to favor a liability test based on the greater knowledge.[557]

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[554] 38 BNA Fed. Contracts Rep. 1009 (Dec. 13, 1982).

[555] *Id.*

[556] *See* 38 BNA Fed. Contracts Rep. 600-01 (Oct. 11, 1982).

[557] Compare this with the *Agent Orange* government design test discussed in text accompanying notes 285-91 *supra*.

There is a certain appeal in the Justice position that, whatever risks are covered, they should not include government design. Coverage for catastrophic accidents is more acceptable, although it still suffers from placing the focus on protection of the contractor rather than on the protection of potential third party victims.

(c) What Threshold and Ceiling Amounts Should Apply?

The threshold represents the amount below which indemnity is not available. The Federal Aviation Administration uses a $500 million threshold for its Air Traffic Computer Replacement Program,[558] while the National Aeronautics and Space Administration uses a sliding threshold at no uniformly-fixed level for all of the contractors in the Space Shuttle program.[559] Any threshold should be based on the availability of insurance.[560] A negotiable threshold could cause great disparity that would depend solely on the bargaining strength of each contractor. A fixed limit is preferable, provided that it can be readjusted for all contractors upon changes in the availability of insurance. Since the Federal Aviation Administration threshold can be reset for all contractors by the action of the Secretary of Transportation, it appears to be a better model.

A ceiling, on the other hand, represents the amount above which indemnity is not available. The Price-Anderson Act, for example, establishes a $560 million ceiling.[561] Ceilings are absolutely necessary to protect the government's financial responsibility. A catastrophic accident in a situation with no ceiling could be almost as disastrous for the government as for the injured parties. Even with a ceiling, Congress is free to provide additional relief by legislation. The exact amount of the ceiling, however, depends on circumstances such as the availability of insurance. Once the government determines the maximum amount that it can expend, it should determine the ceiling as the sum of that amount and the amount of insurance reasonably available and required to be maintained.[562]

3. Should the Standard Be "Unusually Hazardous"?

Traditionally, the most common standard for providing indemnity protection is that of "unusually hazardous."[563] Indeed, the legislative report for section 2354 of Title 10, U.S. Code, considered indemnifi-

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[558] *See* text accompanying notes 515-22 *supra*.
[559] *See* text accompanying notes 525-28 *supra*.
[560] *See* text accompanying notes 345-95 *supra*.
[561] 42 U.S.C. § 2210(e) (1976).
[562] *See* text accompanying notes 578-84 infra.
[563] *See* text accompanying notes 499-530 *supra*.

cation necessary because research and development programs involved "extremely hazardous new developments."[564] The executive order implementing Public Law 85-804, however, opens the standard slightly by including "nuclear" as well as "unusually hazardous" as a standard.[565]

Many efforts have been made to avoid the restrictions posed by limiting indemnification to an "unusually hazardous" standard. A 1982 Office of Federal Procurement Policy Task Force report recommended amending the executive order under Public Law 85-804 to authorize indemnity for contract work that is unusually hazardous or nuclear in nature or gives rise to the possibility of catastrophic losses.[566] The National Aeronautics and Space Administration has proposed changing the executive order to include "catastrophic accident" or "space activity."[567]

The Federal Aviation Administration and the National Aeronautics and Space Administration have eroded the concept of "unusually hazardous" in their recent indemnity authorizations by defining it in terms of the large amount of potential liability rather than in terms of an increased likelihood of harm.[568]

From a practical standpoint, it makes little sense to indemnify only for what is predicted will be unusually hazardous. The third party wants damages while the defendant-contractor wants indemnification and neither cares if something is characterized as unusually hazardous as long as they receive damages and indemnification. Consequently, further erosion of the unusually hazardous standard is not only predictable but logical.

4. What Is the Proper Role of Insurance?

The Swine Flu Act was passed because the various contractors and other participants could not obtain insurance.[569] In most other statutory indemnification situations, insurance is available in at least some amount and is usually required.[570] One statutory indemnification goes so far as to set up its own insurance program.[571]

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[564]H.R. Rep. No. 548, 82d Cong., 1st Sess. (1951).

[565]*See* text accompanying note 515 *supra*.

[566]Report of the OFPP Interagency Task Force on Indemnification, Part I, Indemnification of Government Contractors Against Third Party Liability Claims, 28 Jan. 1982.

[567]Laurence S. Fedak, Acquisition Law Seminar, Office of the General Counsel, Department of the Air Force, 26 Jan. 1983.

[568]*See* pp. 111-12, text accompanying notes 523-30 *supra*.

[569]*See* pp. 112-13, text accompanying notes 531-38 *supra*.

[570]*See, e.g.*, Veterans Omnibus Health Care Act, 38 U.S.C. 4101 (1976).

[571]Price-Anderson Act, 42 U.S.C. § 2210 (1976).

One of the reasons for the passage of Public Law 85-804 was the concern of Congress about the *unavailability* of private insurance for contractors.[572] Nonetheless, the executive order implementing Public Law 85-804 merely requires the appropriate official to take into account the availability, cost, and terms of insurance.[573]

The National Aeronautics and Space Administration, for instance, believes that indemnity is appropriate because it replaces the exorbitant cost of liability insurance.[574] While the Department of Defense position is that the government must not become a general insurer, it agrees that there is a need for limited indemnity when insurance at a reasonable price is not available.[575] In short, indemnity appears appropriate when the possible damages are beyond the coverage of reasonably available insurance.

The amount of insurance required by a contractor will be a function of the amount available at a reasonable cost and the amount the government requires. Because possible liability for negligence will prompt better performance, the government should not indemnify for negligence at least to the extent that insurance for negligence is reasonably available. To protect the interests of third parties who may be injured, the government should ensure that proceeds are available to pay damages by requiring the contractor to carry insurance for negligence, at least insofar as it is reasonably available.

5. Should the Remedy Focus on the Third Party Victim Rather Than the Contractor?

The primary defect of NASA's Space Shuttle indemnity plan may be understood by considering the result if the Space Shuttle disintegrated and crashed into Seattle and Vancouver. Under the Multilateral Convention on International Liability for Damage Caused by Space Objects,[576] the United States has agreed to pay the losses of all foreign citizens of such a crash. The Treaty does not require similar payments by the United States to American citizens. Through reliance on the discretionary function exception to the Federal Tort Claims Act[577] and other immunity defense, the United States could escape liability to its own citizens injured by the crash. To the extent that the contractor hides behind a government design[578] or any other defense, American citizens would be left without a remedy.

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[572] *See* text accompanying note 516 *supra*.
[573] Exec. Order No. 10789, § IA(a).
[574] 39 BNA Fed. Contracts Rep. 184 (Jan. 24, 1983).
[575] 39 BNA Fed. Contracts Rep. 1008 (Dec. 13, 1982).
[576] 24 U.S.T. 2309, Mar. 29, 1972.
[577] *See* text accompanying notes 37-48 *supra*.
[578] *See* text accompanying notes 117-344 *supra*.

The solution is to focus on the victim's remedy rather than the contractor's right to indemnification. In this regard, the Swine Flu Act[579] would serve as a useful model. The contractor, furthermore, could share in the benefit of the remedy to the degree a compensated victim could not or would not press a claim against the contractor.

6. What Is the Government's Proper Role?

(a) Should the Government Replace the Contractor as Defendant?

If the Swine Flu Act is a logical basis for focusing on the injured party's remedy rather than on the contractor's right to indemnification, the example of the Act should be followed and the United States should substitute itself as defendant. This may be accomplished in one of two ways. Entirely new legislation could be passed or the Federal Tort Claims Act could be amended to permit actions grounded on a basis other than negligence, such as in strict liability or breach of warranty. To the extent that this policy is adopted, the entire question of why the government should indemnify any contractor becomes irrelevant.

(b) Should the Government Also Be a Plaintiff?

By permitting the government a cause of action against the contractor for negligence to recover the government's costs and damages paid on the third party's claim, as is the case with the Swine Flu Act, there will be no lessening of the contractor's concern for good performance. The incentive to avoid negligence will remain even though there will be no need for contractors to place contingencies in their contracts to cover strict liability or to refrain from entering a government contract.

(c) Should the Government Establish an Administrative Remedy and Make It a Prerequisite for Litigation?

In many cases, administrative remedies are less expensive and quicker than legal remedies. Since the focus should be placed on the injured third party, an administrative remedy is appropriate. In addition, it would also save the government time and money if a number of cases could be resolved without litigation. For this reason, the administrative remedy should be a prerequisite to litigation. In this regard, a significant difference with the Swine Flu Act is noted. That Act had no provision for an administrative remedy.

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[579] *See* text accompanying notes 531-38 *supra*.

The Federal Tort Claims Act already has an extensive administrative remedy procedure. Possibly the simplest solution is to amend the Federal Tort Claims Act to permit the bringing of the envisioned claims under it.[580]

(d) Should the Third Party's Remedy against the United States Be Exclusive?

Exclusivity would protect contractors from all of the harms that prompt them to seek indemnification, but it would not result in any reduction in the damages recoverable by the injured third party. Again, the Swine Flu Act should serve as the model and the remedy against the government should be exclusive.

VI. CONCLUSION

Since the government acts in the public interest while government contractors act in their own self-interest, it is not particularly anomalous to hold government contractors accountable for third-party injuries when the government remains immune from suit.

In recent years, the primary means for determining the liability of government contractors has been strictly liability. Despite its swift development in the past twenty years, strict liability is now being threatened by one judge's footnote in a memorandum opinion. Unfortunately for American veterans and service members, the *Agent Orange* decision may prove more harmful to them than the chemical itself.

In any event, emphasis on the relief of government contractors tends to ignore what should be the more important concern of relief for third-party victims. The interests of government contractors and their victims are not mutually exclusive, however. A remedy along the lines of the Swine Flu Act offers the advantage of providing damages to third-party victims as well as protection for government contractors.

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[580] Another example of an administrative remedy may be found in the Teton Dam Act, Pub. L. No. 94-400, 90 Stat. 1211 (1976).

NEW LAWS AND INSIGHTS ENCIRCLE THE POSSE COMITATUS ACT

by Colonel Paul Jackson Rice*

In 1981, Congress passed an act entitled, "Military Cooperation with Civilian Law Enforcement Officials." Through this new law, Congress attempted to clarify and modify the Posse Comitatus Act. It clarified the law in the areas of providing criminal information, military equipment and facilities, military personnel to train civilian law enforcement personnel, and expert military advisors to the civilian law enforcement community. Congress modified the Posse Comitatus Act so that military personnel may operate military equipment in assisting civilian law enforcement personnel. This assistance is quite limited. Under implementing Department of Defense guidance, the Navy and Marine Corps may exercise aggressive assistance to civilian law enforcement officials. Certain issues, such as the military undercover agent and the joint military-civilian patrol, were not affected by the 1981 legislation. They remain sensitive areas in the day to day interface between military and civilian police. Reimbursement to the Department of Defense for services provided remains a key issue in implementing the 1981 Act.

I. INTRODUCTION

Dear Congressman:

I'm sure somebody has already thought of this, but it sounds so good to me that I think it should be mentioned again. I'm talking about how to keep the Mexicans from sneaking into the United States.

Why don't we use the Army? They aren't doing anything else and it would be good practice for them. All we need to do is put them along the border. They already have the necessary equipment.

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*Staff Judge Advocate, V Corps, Frankfurt, Federal Republic of Germany. LL.M., Northwestern University; A.B., J.D., University of Missouri. Author of *Court-Martial Jurisdiction—The Service Connection Standard in Confusion*, 61 J. Crim. L., Criminology & Police Science 339 (1970); O'Callahan v. Parker: *Court-Martial Jurisdiction, "Service Connection," Confusion, and the Serviceman*, 51 Mil. L. Rev. 41 (1971). Member of the bars of the states of Illinois and Missouri and to the federal bar for the Northern District of Illinois. This article is derived from a paper submitted in partial satisfaction of course requirements at the U.S. Army War College, Carlisle Barracks, Pennsylvania.

We could also use the Navy to help fight the dope smugglers I keep hearing about. If we sank a couple of their boats, it might make them think twice!

Your faithful constituent,[1]

The views expressed in the above letter recently were supported in part in a congressional hearing. A Florida congressman addressed the concept of using military support to counter drug smuggling. He stated that, in peacetime, boredom and lack of mission have been historical problems for the military, and involvement in the drug war would be extremely beneficial.[2]

These statements reflect the frustration, misunderstanding, and confusion about the role of the armed forces of the United States in this society. This fact is not difficult to understand; the historical relationship between the military and those in authority has never been well understood by a vast majority of the populace. When that lack of understanding is coupled with serious current problems, such as unrestrained drug traffic and an illegal immigration flood, then a loud cry should be expected.

The burden of answering the faithful constituent most likely will be given to the Army.[3] The response will cite the Posse Comitatus Act[4] and explain how the Act prohibits the Army from enforcing the law:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than 10 years or both.[5]

After the constituent receives the response, he or she will be wiser but no less frustrated. Congress recently reexamined the Posse

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[1]The letter is similar to many forwarded to the Pentagon for an appropriate response.

[2]Comments by Congressman Charles E. Bennett, on 26 February 1983, during a hearing of the Government Information, Justice and Agriculture Subcommittee of the Committee on Government Operations.

[3]A tremendous amount of correspondence from constituents is forwarded to federal agencies for direct reply, with an information copy provided to the congressman. Draft letters are also prepared for the congressman's signature. The Office of the Chief, Legislative Liaison, Department of the Army, acts as the point of contact for Army assistance.

[4]18 U.S.C. § 1385 (1976).

[5]*Id.*

Comitatus Act and the issue of military support to civilian law enforcement officials. Their subsequent legislative action does not go far enough to alleviate the frustrations of the faithful constituent. Congress enacted section 905 to Public Law 97-86, entitled "Military Cooperation with Civilian Law Enforcement Officials."[6] The new Act clarifies and ever-so-mildly expands the authority of the military.

This seems to be an excellent time to examine the new Act authorizing military cooperation and to reexamine the Posse Comitatus Act in view of the new Act. There is a need to understand this area of the law, to determine in which direction it is heading and to conclude whether the direction is beneficial.

II. BACKGROUND

The Posse Comitatus Act was originally enacted in 1878.[7] It is generally accepted that the catalyst for the passage of the Act was the excessive use of and resulting abuses by the Army in the southern states while enforcing the reconstruction laws.[8] The legislative history of the Posse Comitatus Act has been fully developed in previous articles.[9] Hence, it will not be restated here. This article will only address legislative history as it pertains to and illuminates specific issues.

When a federal criminal law, such as the Posse Comitatus Act, has existed for over a century and there has never been a prosecution under it, one might ask whether the law is viable. In fact, in 1948, when a defense counsel attempted to use the Posse Comitatus Act to challenge the jurisdiction of the court over his client, the judge complimented the counsel for "turning up of this obscure and all-but-forgotten statute . . . ."[10]

While the Act was never a vision of clarity, its reputation for obscurity was probably due to the fact that, in broad terms, it had accomplished its mission. After the passage of the Act, it was understood that federal troops were not available to supplement civilian law enforcement officials.[11] Hence, the issue seldom arose.

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[6]10 U.S.C. §§ 371-378 (Supp. V 1981).

[7]Act of June 18, 1878, § 15, 20 Stat. 152 (codified in 18 U.S.C. § 1385).

[8]*See* Furman, *Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act*, 7 Mil. L. Rev. 85, 92-96 (1960) [hereinafter cited as Furman].

[9]*See* Furman, *supra* note 8, at 95-97; Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 Mil. L. Rev. 83, 86-92 (1975) [hereinafter cited as Meeks].

[10]Chandler v. United States, 171 F.2d 921, 936 (1st Cir. 1948).

[11]16 Op. Atty. Gen. 162 (1878).

On occasion, the Posse Comitatus Act has been misused by members of the Army to avoid providing assistance to civilian communities. As most civilians are unfamiliar with the Act, it was easy for the Army to say that the Act prohibits the requested assistance. For example, a church in a neighboring community would like an engineer battalion from the post to enlarge and grade their parking lot. There are a numerous good reasons why the Army should not be constructing a church parking lot.[12] In the past, however, post representatives have told the church officials that providing assistance would violate the Posse Comitatus Act. The post officials were saying that they would really like to help, but if they did, it would be a crime. Such misuse of the Act only contributed to the confusion surrounding it.

Notoriety for the Act came in 1973-75. During that period, in Quantico, Virginia, marines, acting as undercover agents, were instrumental as witnesses in convicting civilians of the illegal sale of firearms.[13] The possibility of using the exclusionary rule to deter Posse Comitatus Act violations was addressed.[14] Also, a 1973 incident in the Village of Wounded Knee on the Pine Ridge Indian Reservation in South Dakota caused reverberations. Individuals who had caused civil disorder at Wounded Knee were prosecuted, *inter alia*, for interfering with law enforcement officers lawfully engaged in their duties. Two court decisions held that possible violations of the Posse Comitatus Act precluded the federal officers from being lawfully engaged in their duties.[15] The rationale of these decisions made clear that the misunderstanding of the Act was not limited to church parking lots.[16]

In 1981, Congress also recognized the Posse Comitatus Act to be ambiguous.[17] They believed that some commanders were denying the civilian community "aid, even when such assistance would in fact be legally proper."[18] Their concern was magnified because of the

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[12]Department of Defense activities are not permitted to provide assistance which selectively benefits a particular organization. Religious organizations are specifically mentioned. Department of Defense Dir. 5410.18, para.V.B.2. (3 July 1974). DOD activities are also prohibited from providing services when such service would compete with local civilian commercial activities. *Id.* at para.V.B.10. (3 July 1974).

[13]United States v. Walden, 490 F.2d 372 (4th Cir.), *cert. denied*, 416 U.S. 983 (1974).

[14]490 F.2d at 373, 377.

[15]United States v. Banks, 383 F. Supp. 368 (D.S.D. 1974); United States v. Jaramillo, 380 F. Supp. 1375 (D. Neb. 1974), *appeal dismissed*, 510 F.2d 808 (8th Cir. 1975).

[16]These cases will be examined subsequently, but treating loans of property and advice of observers as possible violations shows the depth of the problem.

[17]H.R. Rep. No. 97-71, Pt. 2, 97th Cong., 1st Sess., *reprinted in* [1981] U.S. Code Cong. & Ad. News 1785 [hereinafter cited as H.R. Rep. No. 97-71].

[18]*Id.* at 3.

drug smuggling problem and their desire to use every means available to combat it.[19] Their solution, "Military Cooperation with Civilian Law Enforcement Officials," which is codified in Title 10, United States Code, sections 371 through 378, will be carefully evaluated in the pages to follow.

III. PURPOSE

Prior to the new Act,[20] the Posse Comitatus Act was vague and ambiguous. Now, after the new Act, certain portions of the Posse Comitatus Act have been clarified; however, other portions are still confusing. The new Act has also raised issues which did not previously exist. The purpose of this article is to provide a working understanding of the new Act. While the areas clarified will be addressed, effort will also be made to identify areas still in doubt in order to provide guidance.

There are also areas of the Posse Comitatus Act which were untouched by the new Act and need to be examined. This examination may provide some insight as to the direction the law is moving and whether the distinct lines between the military and civilian authority are becoming blurred.

IV. CLARIFICATIONS

SECTION 371

The first three sections of the new Act were an attempt to codify existing law and practice.[21] The "Wounded Knee" cases had been so unsettling that there was a need for Congress to clarify existing law.

In section 371,[22] entitled "Use of information collected during military operations," the military is authorized to provide to federal, state, and local law enforcement officials information collected during routine military operations when the information is relevant to a violation of federal or state law. This is a classic case of stating the obvious.[23] At Fort Riley, Kansas in 1978,[24] conclusive evidence

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[19] *Id.*

[20] 10 U.S.C. §§ 371-378 (Supp. V 1981).

[21] H.R. Rep. No. 97-71, at 8-10.

[22] 10 U.S.C. § 371 (Supp. V 1981) states:

> The Secretary of Defense may, in accordance with other applicable law, provide to Federal State, or local civilian law enforcement officials any information collected during the normal course of military operations that may be relevant to a violation of any Federal or State law within the jurisdiction of such officials.

[23] This issue was never in doubt.

[24] The author was the Staff Judge Advocate, 1st Infantry Division (Mech.) and Fort Riley, at the time of the incident.

existed that an Army service member and his wife were selling marijuana out of the vegetable bin in their refrigerator. At the time the military police apprehended the soldier, they notified the Federal Bureau of Investigation as to the activities of the wife. She was subsequently prosecuted by the U.S. Attorney. This situation occurred prior to the new Act, but it is difficult to believe that anyone would have believed that the Posse Comitatus Act would have precluded the notification of the FBI.[25]

Military police are constantly gathering information concerning drug activities on and around a military installation. During these efforts, a military informant or apprehended military dealer may provide the name of a civilian as the source of the drugs. It seems clear that, both before and after the new Act, military authorities were authorized to lawfully notify civilian police of the civilian source. The issue which will be examined later is the limit on how much further the military police may go.[26]

At the time of the passage of the new Act, Congress had its thoughts on the drug smuggling problem. The House Committee on the Judiciary saw no reason why military missions could not be compatible with the needs of civilian law enforcement officials. "For example, the scheduling of routine training missions can easily accommodate the need for improved intelligence information concerning drug trafficking in the Caribbean."[27] The Secretary of Defense, in promulgating regulations for section 371, addressed the concern of Congress.[28] He advised that, under guidance established by the military secretaries, training and operations could take into account civilian law enforcement needs, but only if the collection of information was an "incidental aspect of training performed for a military purpose."[29]

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[25]Of course, the incident occured on the installation. When the incident occurs off-post, the military must be able to satisfy the court that they were performing official military duties.

[26]The military police would argue that all dealers in the chain are affecting morale and discipline on the post and that they should be able to follow their leads as far as they take them.

[27]H.R. Rep. No. 97-71, at 8.

[28]Department of Defense Dir. 5525.5, Encl. 2, para. A.5. (22 Mar. 1982) [hereinafter cited as DOD Dir. 5525.5].

[29]*Id.* As of this writing, the military secretaries had not yet submitted guidance.

Clearly, the primary purpose of the mission cannot be that of aiding civilian law enforcement officials. However, if certain military surveillance equipment has to be tested and the location of the testing is immaterial, then coordination with local officials would seem to be in order. If, however, the best location for civilian surveillance is 100 miles farther than is necessary for the military testing, the issue is in doubt.

Section 371 would not affect the outcome in *Wrynn v. United States*.[30] In that case, two prisoners escaped from the Suffolk County Penal Farm in Yaphank, New York. The sheriff requested assistance from the Suffolk County Air Force Base. A helicopter and two air force pilots were provided to assist in the search of wooded areas. Late in the day, the pilot attempted to land the helicopter on a highway which was believed to have been blocked off from traffic. However, the movement of a vehicle at a critical moment caused the helicopter to swerve and hit a 20-foot sapling, throwing wood in all directions. Wrynn, a 17 year old boy was hit in the leg. He sued the United States under the Federal Tort Claims Act.[31] The court concluded that the use of helicopter and pilots to search for an escaped prisoner constituted use of the Air Force to execute the law, which violated the Posse Comitatus Act. Further, action under the Federal Torts Claim Act would not lie, because the pilots were not agents of the government acting within the scope of their employment.[32]

An argument can be made that, if it were not for the confusion created by some of the "Wounded Knee" opinions, there would have been no need for the first three sections of the new Act. For example, in *United States v. Banks*,[33] one of the factors the court considered in concluding that the government could not meet its burden of proving the lawfulness of the activity of its officers was that Nebraska National Guardsmen had flown reconnaissance flights over Wounded Knee.[34] The court, without addressing the issue, concluded that national guardsmen were part of the Army for purposes of the Posse Comitatus Act. The critical issue should have been whether the guardsmen were in a state militia status or whether they had been federalized.[35] If the Nebraska guardsmen were federalized—that

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[30]200 F. Supp. 457 (E.D.N.Y. 1961).
[31]28 U.S.C. § 2674 (1976).
[32]200 F. Supp. at 465.
[33]383 F. Supp. 368 (D.S.D. 1974).
[34]*Id.* at 376.
[35]The Posse Comitatus Act only applies to the National Guard when performing federal service. DAJA-AL 1980/2685, 16 Sept. 1980. *See* Furman, *supra* note 8, at 101.

might explain why they were in South Dakota, then the court's view on Posse Comitatus probably was correct.[36]

In a sister case, *United States v. Jaramillo*,[37] dealing with the same reconnaissance flight, the court again concluded that National Guard personnel were part of the Army for purposes of the act.[38] In a rather novel approach, the court in *Jaramillo*, looked at the activity on the part of the Army to determine whether it had been useful to the civilian law enforcement officers. It then concluded "[b]eyond a reasonable doubt the aerial reconnaissance was of no usefulness to the law enforcement officers."[39] As the court could not conclude the same for other Army assistance, it decided the defendants should be "acquitted." This usefulness test applied the element of success or failure to the activity of the military. If that test had been applied to the unsuccessful search for the escaped prisoner in *Wrynn*,[40] the result would have been different; the prisoner had not been found, therefore, the Act had not been violated.

United States v. Red Feather,[41] provided a more enlightened approach to the "Wounded Knee' situation. The court carefully examined the legislative history of the Act and concluded that its purpose was to eliminate the direct active use of federal troops by civilian law enforcement officers. The court stated: "the act was intended to stop army troops, whether one or many, from answering the call of any marshal . . . to perform direct law enforcement duties to aid in execution of the law."[42] The court's distinction between active and passive participation on the part of the military is one which pervades the new Act. Once the court had made the distinction between active and passive roles, it had little difficulty in concluding there was no Posse Comitatus violation.

Section 371 of the new Act would not have affected the status of the "Wounded Knee" reconnaissance flight. Section 371 authorizes the providing of information "during the normal course of military operations." The Nebraska National Guard flight would not have qualified under this test.

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[36]In Meeks, *supra* note 9, the author related that interviews with members of the National Guard Bureau, who requested anonymity, indicated that the Nebraska personnel had been ordered to federal service.

[37]380 F. Supp. 1375 (D. Neb. 1974), *appeal dismissed*, 510 F.2d 808 (8th Cir. 1975).

[38]380 F. Supp. at 1380.

[39]*Id.* at 1381.

[40]200 F. Supp. 457 (E.D.N.Y. 1961).

[41]392 F. Supp. 916 (D.S.D. 1975), *aff'd sub nom.* United States v. Casper, 541 F.2d 1275 (8th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977).

[42]*Id.* at 922.

Since the mid-1970s, the military has had strict rules governing the acquiring, reporting, processing, or storing of information on persons or organizations who are not affiliated with the Department of Defense.[43] However, these rules do not preclude the reporting of law enforcement violations by civilians who are smuggling drugs. Both the Department of Defense directive[44] and the Army regulation[45] specifically authorize the reporting of crimes and the keeping of a record of the report.

Section 371 includes the language that "in accordance with other applicable law" such information may be provided. The House Report[46] indicates that the language was included to insure the continued application of the Privacy Act.[47] One of the purposes of the Privacy Act is to safeguard individuals against certain governmental invasions into their personal privacy and unwarranted disclosures of personal information. However, the exceptions to the Privacy Act are so broad that the Act will not restrict disclosure of information under section 371. The Privacy Act permits release of information to outside agencies and activities provided that the release is consistent with the reasons for which the information was gathered and the outside activity is listed in the Federal Register as a routine user of the information.[48] The Army has blanketed the law enforcement area by publishing in its privacy regulation a routine use of general applicability.[49] This permits the release from any file which indicates a criminal, civil, or regulatory violation to the appropriate federal, state, local, or even foreign agency with the responsibility to investigate. Hence, the Privacy Act is applicable, but not of significance.

B. SECTION 372

Of those things which are clear and certain, it seems that it has been easier to define what is not a violation of the Posse Comitatus Act, rather than what is. Thus, prior to the "Wounded Knee" cases, everyone seemed satisfied that loaning military equipment to civilian law officers did not violate the act.[50] Only one of the "Wounded Knee" cases raised a cloud over furnishing military equipment. In

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[43]Department of Defense Directive 5200.27 (7 Jan. 1980); Army Regulation 380-13 (30 Sep 1974).

[44]DOD Dir. 5200.27, para F.1. (7 Jan 1980).

[45]AR 380-13, para 10a (30 Sept. 1974).

[46]H.R. Rep. No. 97-71, *supra* note 17, at 8.

[47]5 U.S.C. § 552a (1976).

[48]*Id.* at §§ 552a(a)(7), (b)(3).

[49]U.S. Dep't of Army, Reg. No. 340-21, Office Management—The Army Privacy Program, para. 3-1c(1) (27 August 1975) (C.2, 15 June 1979).

[50]*See* Furman, *supra* note 8, at 123; JAGA 1968/3586, 26 Mar. 1968.

United States v. Banks,[51] the court concluded that the government could not establish that its law enforcement officers were lawfully engaged in their activities, a necessary element. In support of this thesis, the court highlightened that "large amounts of military equipment, including ammunition, weapons, flares, armored personnel carriers and clothing, were loaned or sold"[52] to the Justice Department by the Department of Defense "in connection with the Wounded Knee operations."[53] The court gave the sale and loaning of equipment some weight, but, because of its conglomerate approach of stacking all rationale on the same pile, it is difficult to assess its value. The court concluded that based upon all factors, "there is insufficient evidence of the lawfulness of the government activity at Wounded Knee...."[54]

Unexpected decisions cause ripples in the steady flow of jurisprudence. Consequently, the notoriety of the *Banks* case should not be surprising. It also caused hesitancy on the part of the Department of Defense in supporting local emergencies.[55] This resulted in the Office of the Legal Counsel of the Department of Justice specifically addressing the issue in an opinion which concluded by stating:

> It is therefore evident that the Congress, the courts, and the Department of Defense itself have recognized that the Posse Comitatus Act is no bar to the loan of supplies or equipment from the military services to local law enforcement agencies in situations where personnel of the armed forces would not be used to enforce the law.[56]

Section 372 of Title 10, United States Code[57] tracks well with what the Justice and Department of Defense had believed to be the existing law. While the law may not have changed, the enactment by Congress of express statutory authorization has given publicity to

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[51]383 F. Supp. 368 (D.S.D. 1974).

[52]*Id.* at 375.

[53]*Id.*

[54]*Id.* at 376.

[55]During the Hanafi Muslem hostage situation in Washington, D.C., the Justice Department had requested grenades in case the gunmen begin to kill their hostages. There was a delay in responding to the request.

[56]Memorandum for the Attorney General, dated 17 Mar. 1977, subject: Loan of Military Equipment for Local Law Enforcement Purposes During Emergencies.

[57]10 U.S.C. § 372 (Supp. V 1981) states:

> The Secretary of Defense may, in accordance with other applicable law, make available any equipment, base facility, or research facility of the Army, Navy, Air Force, or Marine Corps to any Federal, State, or local civilian law enforcement official for law enforcement purposes.

the fact. This has already caused an increase in requests for the use of military property.

Congress, in section 376 of the new Act,[58] provided a justification for the military services not to provide the requested equipment or facility. It states that assistance may not be provided if the assistance will adversely affect military preparedness. Section 376 is significant in evaluating what assistance may be provided under sections 371 through 374. The new Act directs the Secretary of Defense to issue necessary regulations to insure no adverse effect on military preparedness. However Department of Defense Directive 5525.5 adds very little to the formula.[59] It directs the heads of the Department of Defense components to insure that the decision authority is kept at a level where the decision can properly be assessed. The Directive also instructs the Joint Chiefs of Staff to assist in developing guidance for use in evaluating the impact.

It appears that adverse effect will not be measured by how the individual request will affect military preparedness, but rather by the cumulative effect of requests coming from different areas of the country. Thus, the approval authority must be kept at a high level to properly evaluate the impact. The Assistant Secretary of Defense for Manpower, Reserve Affairs, and Logistics must approve request for "arms, ammunition, tank-automotive equipment, vessels and aircraft...."[60] Requests for loan of equipment for more than sixty days must be approved by the head of the DOD component.[61] While the Army has not yet published its implementing guidance, it has established a quarterly consolidated report[62] so it may assess impact and costs of the assistance.

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[58] *Id.* at § 376 states:

> Assistance (including the provision of any equipment or facility or the assignment of any personnel) may not be provided to any civilian law enforcement official under this chapter if the provision of such assistance will adversely affect the military preparedness of the United States. The Secretary of Defense shall issue such regulations as may be necessary to insure that the provision of any such assistance does not adversely affect the military preparedness of the United States.

[59] *See* DOD Dir. 5525.5, paras. E.1.f., E.2.c.(3), E.5.a.; Encl. 2, para. B; Encl. 3, para. C; Encl. 4, para. D; and Encl. 5, para. C.

[60] *Id.* at Encl. 3, para. D.3.c.

[61] *Id.* at Encl. 3, para. D.3.d.

[62] HQDA MSG DTG 251745Z Apr 83, Subject: Cooperation with Civilian Law Enforcement Officials (DAMO-ODS).

C. SECTION 373

> *Training and advising civilian law enforcement officials.* The Secretary of Defense may assign members of the Army, Navy, Air Force and Marine Corps to train Federal, State, and local civilian law enforcement officials in the operation and maintenance of equipment made available under Section 372 of this title and to provide expert advice relevant to the purpose of this chapter.[63]

The legislative history of section 373 states an intention to clarify existing practice,[64] but a careful reading indicates that the authorization is quite limited. For example, the only training authorized under the new Act pertains to the operation and maintenance of equipment provided under section 372. This would exclude, *inter alia*, all training on methods and techniques of handling police duties, such as crowd and riot control. It is not unusual for federal law enforcement officers to attend the Military Police School at Fort McCellan, Alabama. While there will always be those who complain about this type of linkage[65] between the civilian and military, it is difficult to conceive that such training would be interpreted as "execution of the law" so as to constitute a violation of the Posse Comitatus Act.

The limited nature of the training authorization in section 373 should not be of great concern. Congress made clear its intent not to limit the authority of the Government in section 378:

> *Nonpreemption of other law.* Nothing in this chapter shall be constructed to limit the authority of the executive branch in the use of military personnel or equipment for civilian law enforcement purposes beyond that provided by law prior to the enactment of this chapter.[66]

Hence, training which was lawfully provided prior to the new Act, but is not addressed in the new Act's authorization of training, would still be lawful. The problem arises when the DOD Directive implementing the new Act only permits training as set out in section 373.[67] While the authority to train beyond the scope of the new Act still exists, it is becoming more difficult to find.[68]

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[63]10 U.S.C. § 373 (Supp. V 1981).
[64]H.R. Rep. No. 97-71, at 10.
[65]*See* Meeks, *supra* note 9, at n.204.
[66]10 U.S.C. § 378 (Supp. V 1981).
[67]DOD. Dir. 5525.5, Encl. 4, para. A.4.
[68]Department of Defense Dir. 3025.12, para. X.C. (19 Aug. 1971).

One of the key considerations in determining the legality of providing training should be its location. If the military police are providing training on riot control in a city caught in the midst of an upheaval, it will most likely result in a Posse Comitatus Act violation. However, the providing of training on a military post in a classroom would not seem to violate the Act. The government may decide as a matter of policy not to permit civilian law enforcement officials to attend military police classes, but that is something different from the activity being a crime. It seems that Congress was attempting to further such a policy when the Committee on the Judiciary stated in its report that "[t]his section would not authorize use of a Green Beret training course for urban SWAT teams."[69] As the section is very restrictive in what it authorizes, the Committee's statement is correct. The real issue is whether, after examining section 378 and what constituted lawful activities prior to the new Act, the use of the Green Beret training course would be permissible. It is submitted that this was not the type of activity intended to be prohibited by the Posse Comitatus Act.

The new Act is specific in clarifying the authority to provide expert advice. In the "Wounded Knee" cases decided prior to the new Act, the advice provided by then-Colonel Voley Warner was a key factor in deciding those cases against the government. While Colonel Warner was there as a military observer to appraise the situation, he did advise the FBI and U.S. marshals. He suggested rules of engagement, such as avoiding gun fire and shooting to wound rather than to kill. Further, he urged federal officials to negotiate and supported their request for the use of unarmed armored personnel carriers. Both *Banks* and *Jaramillo*[70] decided that the activity of Colonel Warner went too far; however, neither court concluded that he was in charge or in a position of authority over civilians.[71]

In *United States v. Red Feather*,[72] the court carefully examined the legislative history of the Act and decided that Congress intended to prohibit the *direct active* use of any military troop unit of any size. The advice of Colonel Warner was not of the type of direct active

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[69]H.R. Rep. No. 97-71, at 10 n.2.

[70]United States v. Banks, 383 F. Supp. 368 (D.S.D. 1974); United States v. Jaramillo, 380 F. Supp. 1375 (D. Neb. 1974), *appeal dismissed*, 510 F.2d 808 (8th Cir. 1975).

[71]It is difficult to state exactly what the courts found, as neither was willing to find that Colonel Warner or any other federal official had violated the Posse Comitatus Act. They did not believe they had to reach that issue to dispose of the case and so they did not.

[72]392 F. Supp. 916 (D.S.D. 1975), *aff'd sub nom.* United States v. Casper, 541 F.2d 1275 (8th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977).

participation to be constrained. In *United States v. McArthur*,[73] the court stated:

> 'execute' implies an authoritarian act. I conclude that the feared use which is prohibited by the posse comitatus statute is that which is regulatory, proscriptive or compulsory in nature and causes the citizens to be presently or prospectively subjected to regulations, proscriptions or compulsions imposed by military authority.[74]

The court had no difficulty in deciding that the actions of Colonel Warner were proper. It went on to observe that, if law enforcement authorities may borrow military equipment, then they ought to be able to borrow expert advice.[75]

It is interesting to observe that the active/passive distinction articulated in *Red Feather* and modified in *McArthur* is alive and well in the new Act. *Red Feather* stated that the Posse Comitatus Act prohibits direct law enforcement, such as arrest, seizure of evidence, search of a person, investigation of a crime, interviewing of a witness, and pursuit of an escaped civilian witness. This concept is expressed in section 375 of the new Act.[76]

The new Act appears to have resolved the issue of the military providing expert advice. While the activity was probably always lawful, it is now specifically authorized. The only factual issue to be resolved in the future is whether the military advisor has asserted such authority so as to place himself in charge.

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[73]419 F. Supp. 186 (D.N.D. 1976).

[74]The results in *McArthur* are sound, but the statement about borrowing expert advice is somewhat troublesome. Why not borrow undercover agents or investigators?

[75]10 U.S.C. § 375 (Supp. V 1981) states:

> The Secretary of Defense shall issue such regulations as may be necessary to insure that the provision of any assistance (including the provision of any equipment or facility or the assignment of any personnel) to any civilian law enforcement official under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in an interdiction of a vessel or aircraft, a search and seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.

The *McArthur* approach was adopted by DOD Dir. 5525.5, encl. 4.

V. THE MODIFICATION

A. ASSISTANCE BY DEPARTMENT OF DEFENSE PERSONNEL

As stated earlier, sections 371, 372, and 373 of the new Act were intended as a clarification of existing law. Section 374[77] of the new Act is a definite change in the law. It permits the use of military personnel to assist civilian law enforcement authorities under limited circumstances.

Military personnel may only be assigned to operate and maintain or assist in operating and maintaining equipment which was provided under section 372 of the new Act. Only the heads of the agencies

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[77] *Id.* at § 374 states:

> (a) Subject to subsection (b), the Secretary of Defense, upon request from the head of an agency with jurisdiction to enforce—
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> (1) the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);
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> (2) any of sections 274 through 278 of the Immigration and Nationality Act (8 U.S.C. 1324-1328); or
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> (3) a law relating to the arrival of departure of merchandise (as defined in section 401 of the Tariff Act of 1930 (19 U.S.C. 1401)) into or out of the customs territory of the United States (as defined in general headnote 2 of Tariff Schedules of the United States (19 U.S.C. 1202)) or any other territory or possession of the United States, may assign personnel of the Department of Defense to operate and maintain or assist in operating and maintaining equipment made available under section 372 of this title with respect to any criminal violation of any such provision of law.
>
> (b) Except as provided in subsection (c), equipment made available under section 372 of this title may be operated by or with the assistance of personnel assigned under subsection (a) only to the extent the equipment is used for monitoring and communicating the movement of air and sea traffic.
>
> (c)(1) In an emergency circumstance, equipment operated by or with the assistance of personnel assigned under subsection (a) may be used outside the land area of the United States (or any territory or possession of the United States) as a base of operations by Federal law enforcement officials to facilitate the enforcement of a law listed in subjection (a) and to transport such law enforcement officials in connection with such operations, if—
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> (A) equipment operated by or with the assistance of personnel assigned under subsection (a) is not used to interdict or to interrupt the passage of vessels or aircraft; and
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> (B) the Secretary of Defense and the Attorney General jointly determine that an emergency circumstance exists.
>
> (2) For purposes of this subsection, an emergency circumstance may be determined to exist only when—
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> (A) the size or scope of the suspected criminal activity in a given situation poses a serious threat to the interests of the United States; and
>
> (B) enforcement of a law listed in subsection (a) would be seriously impaired if the assistance described in this subsection were not provided.

responsible for enforcing federal drug laws, immigration laws, and customs laws may request military personnel. Then, except in cases of "emergency circumstances," the military operations and those assisting in operating may only use the equipment for "monitoring and communicating the movement of air and sea traffic."[78] While not mentioned in the statute, the legislative history[79] states that the providing of military personnel should "be limited to situations where the training of civilian personnel would be unfeasible or impractical from a cost or time perspective." The DOD Directive concurs.[80]

An example of the type of assistance which may be provided under section 374 would be pilots and radar specialists for the Navy E2-C aircraft which has the capability to detect low-flying aircraft. It would be impractical from a time and cost perspective to train civilian law enforcement officers to fly the aircraft and operate the sophisticated intelligence equipment. This aircraft is ideal for monitoring air traffic.

B. MAINTENANCE SUBJECT TO POSSE COMITATUS ACT

While is it probably as difficult to maintain the aircraft and its technical equipment as it is to operate them, it is doubtful that maintenance of equipment by military personnel ever violated the Posse Comitatus Act. If that is true, and this article will provide support for that position, then it is unfortunate that section 374 included a provision authorizing personnel to maintain equipment.

Only the "Wounded Knee" cases addressed the issue of whether the performance of maintenance on loaned military equipment by military personnel violated the Posse Comitatus Act. The cases are predictable with *Banks* and *Jaramillo* finding fault with military participation; *Red Feather* and *McArthur* did not believe military maintenance was of the type of direct assistance which violated the Act.[81] It is submitted that maintaining military equipment is not the type of activity which coerces or threatens to coerce civilians. Main-

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[78]*Id.* at § 374(b).

[79]H.R. Rep. No. 97-311, 97th Cong., 1st Sess., *reprinted in* [1981] U.S. Code Cong. & Ad. News 1860, 1861 [hereinafter cited as H.R. Rep. No. 97-311].

[80]DOD. Dir. 5525.5, Encl. 4, para. A.6.b.

[81]None of the courts addressed whether a national guardsman in state status was subject to the Posse Comitatus Act. While it is irrelevant to the main issue, these cases could have been disposed of on the National Guard issue. National guardsmen in state status are not subject to the Act. *See* Furman, *supra* note 8, at 101; DAJA-AL 1980/2685, 15 Sept. 1980.

tenance is not the type of activity which causes citizens to be presently or prospectively subjected to regulations, proscriptions or compulsions imposed by military authority.

It may be argued that the presence of military personnel which maintaining equipment provides the capability to regulate, proscribe, and compel civilians. However, the same appearance is created by the very presence of military personnel providing the equipment in the first instance. All authorities seem to agree that the military may provide equipment. Assume that the Army has provided the FBI with a helicopter and it crashes. It seems clear that the Army may provide a well-maintained replacement for the destroyed helicopter. Further assume that a loaned helicopter loses one of its skids. Again, it seems clear that the Army may replace the defective helicopter with a well-maintained one. These replacements which are being loaned to the FBI are being maintained by Army personnel. But the argument goes that, if military personnel replace the skid on the limping helicopter, such activity violates the Posse Comitatus Act. A distinction which says a replacement may be provided for a helicopter in need of repair, but that the helicopter may not be repaired, is without merit. It is submitted that there is no real distinction between loaning equipment and maintaining it.[82]

If maintenance of equipment does not violate the Posse Comitatus Act, then the nonpreemption language in section 378 continues that status. Unfortunately, Department of Defense Directive 5525.5 now requires all the prerequisites set out in section 374 be met before maintenance personnel may be provided.

C. EMERGENCY CIRCUMSTANCES

Barring emergency circumstances, military personnel operating the provided equipment were limited to "monitoring and communicating the movement of air and sea traffic."[83] At the time of enactment, Congress was certain that there may be times when there would be a need for the military to do more. Consequently, they provided an emergency exception. The statute sets out that an emergency circumstance exists only when "the size or scope of the suspected criminal activity in a given situation poses a serious threat to

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[82]In JAGA 1968/3586, 26 Mar. 1968, The Judge Advocate General advised that there was no legal objection to loaning unarmed helicopters to a National Guard unit for civil disturbance operations, but that pilots and maintenance personnel may not be provided. JAGA 1957/1209, 18 Jan. 1957, was cited as authority for that opinion, but JAGA 1957/1209 dealt only with pilots.

[83]10 U.S.C. § 374(b) (Supp. V 1981).

the interests of the United States"[84] and federal drug, custom, or immigration law enforcement "would be seriously impaired if the assistance described in this subsection were not provided."[85] The existence of an emergency circumstance must be determined jointly by the Secretary of Defense and the Attorney General.[86] While Congress understood that both of these agency heads have broad delegation authority, it expected and intended that the determination be made by appropriate high level officials.[87]

After examining the impressive requirements necessary for an emergency circumstance, the resultant military participation seems extremely modest. Under emergency circumstances, the equipment operated by military personnel may be used outside the land area of the United States, its territories, and possessions "as a base of operations by Federal law enforcement officials"[88] to enforce drug, customs, and immigration laws. The equipment may also "transport such law enforcement officials in connection with such operations,...."[89] However, the Act prohibits the military-operated equipment from being "used to interdict or to interrupt the passage of vessels or aircraft;...."[90] The Conference Report noted that the House bill had contained authority under certain limited circumstances for military personnel to assist in arrests and seizures, but that no federal law enforcement agency had expressed desire for that type of support.[91] However, nothing in the new Act would limit "the inherent authority of military personnel to defend themselves or to protect Federal property."[92]

D. NAVY AND MARINE CORPS EXCEPTION

As noted above, the additional assistance which may be provided under emergency circumstances, will not be of great assistance to civilian law enforcement personnel. The authority to use a Navy vessel as a base of operation and to transport officials, while, at the same time, prohibiting the vessel from interdicting or interrupting the passage of the smuggling vessel, exceedingly frustrates the operation.

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[84] *Id.* at § 374(c)(2)(A).
[85] *Id.* at § 374 (c)(2)(B).
[86] *Id.* at § 374(c)(1)(B).
[87] H.R. Rep. No. 97-311, at 121.
[88] 10 U.S.C. § 374(c)(1)(A) (Supp. V 1981).
[89] *Id.*
[90] *Id.* at § 374(c)(1)(A) (Supp. V 1981).
[91] H.R. Rep. No. 97-311, at 121.
[92] *Id.*

With this in mind, the Department of Defense developed an innovative approach so that the Navy and Marine Corps may interdict, search, seize, and arrest.[93] The Navy and Marine Corps are not included in the Posse Comitatus Act. Only as a matter of policy has the law been applied to these military services.[94] Section 375[95] of the new Act directs the Secretary of Defense to issue regulations to insure that military assistance provided does not interdict a vessel, search, seize, or arrest. However, that section only applies to activities authorized under the new Act and only if such activity was not otherwise authorized by law. As the Navy and Marine Corps had neither been subject to the original nor the new Act, restraints applicable only to the new Act do not affect them. This position is reinforced by section 378,[96] which emphasizes that nothing in the new Act was intended to limit executive authority in existence before its enactment.

The Department of Defense Directive requires the prior approval of the Secretary of Defense before the Navy or Marine Corps may participate in "interdiction of a vessel or aircraft, a search or seizure, an arrest or other activity that is likely to subject civilians to the exercise of military power that is regulatory, proscriptive or compulsory in nature."[97] It seems strange to see the above language in a DOD Directive implementing the new Act. The test to be applied for use of the Navy and Marine Corps is the same as must be found for an emergency circumstance under the new Act.[98]

VI. AREAS NOT COVERED BY THE NEW ACT

As mentioned earlier, Congress passed the new Act with the intent to provide additional military assistance to certain federal agencies and provide clarification as to the types of assistance which could be

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[93]DOD Dir. 5525.5, Encl. 4, para. C.2.

[94]SECNAVINST 5820.7 (15 May 1974).

[95]*See* note 76 *supra*.

[96]*See* text accompanying note 66 *supra*.

[97]DOD Dir. 5525.5, Encl. 4, para. C.2. This language should sound familiar, because it was used in United States v. McArthur, 419 F. Supp. 186 (D.N.D. 1976), to describe the type of conduct which violates the Posse Comitatus Act.

[98]DOD Dir. 5525.5, Encl. 4, para. C.2:

> Such approval may be granted only when the head of a civilian agency concerned verifies that: a. The size or scope of the suspected criminal activity poses a serious threat to the interests of the United States, and the enforcement of the law within the jurisdiction of the civilian agency would be seriously impaired if the assistance were not provided because civilian assets are not available to perform the mission; or b. Civilian law enforcement assets are not available to perform the mission and temporary assistance is required on an emergency basis to prevent loss of life or wanton destruction of property.

provided. There were, however, certain areas concerning military assistance to civilians authorities which were not addressed. It seems appropriate to address these areas in light of recent case law and the intent of Congress in passing the new Act.

A. UNDERCOVER AGENTS

Does a military undercover agent subject civilians to the exercise of military power that is regulatory, proscriptive, or compulsory in nature? If the agent arrests, or searches, or performs any of those traditional functions of authority, the answer is easy. But even in those cases where the agent does nothing more than make a purchase from a civilian suspect, there may be a violation of the Posse Comitatus Act.[99] The military has stated that, unless it is otherwise authorized, military personnel will not be used as informants or undercover agents.[100] The issue then becomes when is the activity otherwise authorized?

Actions of the military are legitimate when their primary purpose is that of furthering a military function of the United States "regardless of the incidental benefits to civilian authorities."[101] This has long been accepted as the "military purpose doctrine."[102] The issue then becomes whether the primary purpose of the undercover agent is the furthering of some military purpose. An examination of the cases in the area will provide a starting point.

It was not until the courts seriously addressed the exclusionary rule that civilian law enforcement officers became concerned about their working relationship with the military side. In *United States v. Walden*,[103] the United States Court of Appeals for the Fourth Circuit sent out the warning. William and Ruby Walden were illegally selling firearms to inelligible purchasers in violation of federal law.[104] An underage purchaser would customarily bring along a third party who would sign the necessary documents. The Waldens would then prepare a transfer receipt to the ineligible purchaser.

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[99]Even in a case where the Army was merely requested to store explosive devices until trial, it was decided that such action would violate the Posse Comitatus Act. Army custodians would be required to testify at trial to prove chain of custody. JAGA 1970/3513, 18 Feb. 1970.

[100]DOD Dir. 5525.5, Encl. 4, para. A.3.d.

[101]*Id.* at Encl. 4, para. A.2.a.

[102]*See* Furman, *supra* note 8, at 112-26; Meeks, *supra* note 9, at 124-26. In JAGA 1956/8555, 26 Nov. 1956, The Judge Advocate General stated: "The phrase 'to execute the law' would seem to import an active use of the Army for that purpose and would not appear to include incidental assistance to civilian law enforcement agencies which may result from an otherwise authorized use of the Army."

[103]490 F.2d 372 (4th Cir.), *cert. denied*, 416 U.S. 983 (1974).

[104]18 U.S.C. §§ 922(b)(1), 922(b)(3), 924(a) (1970).

Special investigators of the Treasury Department utilized Marines to make the unlawful purchases. The defendants, at trial, attempted to suppress the testimony of the Marines, claiming that the Marines violated military regulations and the Posse Comitatus Act. They were unsuccessful and convicted. On appeal, the United States Court of Appeals held that the Marine Corps undercover agents had violated Navy regulations, which as a matter of policy had applied the Posse Comitatus Act to the Navy and Marine Corps.[105] The court believed that the actions of the undercover agents violated the spirit of the Act, but the court was not willing to apply the exclusionary rule. The court was impressed that the government agents had acted innocently: "[T]here is totally lacking any evidence that there was a conscious, deliberate or willful intent on the part of the Marines or the Treasury Department's Special Investigators to violate the Instruction or the spirit of the Posse Comitatus Act."[106]

The court upheld the conviction because of the lack of bad faith and the vagueness of prior law. The court's position that it was not necessary *at this time* to apply an exclusionary rule sent up the warning flag. If the court considered the government's argument that the activities of the Marines were related to the maintenance, order and security of the base, it had rejected it.[107] However, the sale of the weapons occurred immediately off the base in the town of Quantico. If the base authorities were aware of this fact and that the illegally sold weapons were being purchased by Marines and being brought on the base, then what may they do to insure order and discipline? Clearly, they can notify local authorities. But would the purchase in question by an undercover Marine be for the primary purpose of furthering a military function? Order, discipline, and security of a base is a military function.

In *United States v. Wolffs*,[108] a soldier had been acting as an informant for the local police. He was to attempt to purchase drugs from Wolffs. The soldier was also keeping a military Criminal Investigation Detachment (CID) agent informed as to his activities. The CID agent became the undercover buyer for the first off-post transaction. Two CID agents were undercover buyers for the second sale and they made the arrest. The Fifth Circuit acknowledged that the Posse Comitatus issue was difficult and complex, but they decided that it need not be answered. They held that, even assuming a violation of the Act, application of the exclusionary rule was not warranted.

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[105]SECNAVINST 5400.12 (17 January 1969).
[106]490 F.2d at 376.
[107]*See* Meeks, *supra* note 9, at 176, n.176.
[108]594 F.2d 77 (5th Cir. 1979).

Following *Walden*, they concluded that if they are "confronted in the future with widespread and repeated violations of the Posse Comitatus Act, an exclusionary rule can be fashioned at that time."[109]

Four cases have arisen in the Lawton-Fort Sill, Oklahoma area. The first three were decided in 1972-73. In *Hubert v. State*,[110] members of the Fort Sill CID office apprehended a soldier for drug offenses. The soldier took the CID to the off-post quarters of his supplier. The CID purchased marijuana and turned it over to the Lawton police. The Lawton police used the CID agents to set up a controlled buy. After this second buy, the contraband was turned over to the Lawton police who arrested the accused. *Hildebrandt v. State*,[111] and *Lee v. State*,[112] were similar, but unrelated cases. In all three cases, the defendants argued that the testimony of the CID agents was incompetent because of the Posse Comitatus Act. All three convictions were upheld. The court was satisfied that the CID had a right to investigate soldiers involved with drugs and to determine their source of supply. In the *Hubert* case, the soldier had led the CID to a "location outside the scope of their military jurisdiction at which time the agents assumed no greater authority than that of a private citizen."[113]

While there is validity in the "private citizen" argument, it loses much of its credibility when the individuals are military police performing their trained profession. Further, it is difficult to determine what authority any citizen would have to make the first uncontrolled purchase in the *Hubert* case. If they were not acting under some official authority, then the unauthorized purchase from Hubert would seem to be a criminal act. A more persuasive argument is that the CID agents were performing an official military function of ascertaining the source of drug traffic coming on to Fort Sill. The method used was to insure a high degree of certainty. As long as the CID can demonstrate a military connection apart from a mere assertion of authority over civilians, most courts appear satisfied.

The most recent Oklahoma case did not meet the above test. In *Taylor v. State*[114] Mainard, an agent of the Fort Sill drug suppression team was led to an off-post drug source by two soldiers under

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[109] *Id.* at 85.
[110] 504 P.2d 1245 (Okla. Crim. App. 1972).
[111] 507 P.2d 1323 (Okla. Crim. App. 1973).
[112] 513 P.2d 125 (Okla. Crim. App. 1973).
[113] 504 P.2d at 1247.
[114] 645 P.2d 522 (Okla. Crim. App. 1982).

investigation. After coordinating with the Lawton police, Mainard was provided with money and wired with a radio transmitter. Immediately after the sale, the local police arrested the defendant. However, Mainard also participated in the arrest. He brandished his weapon during the arrest and actively assisted in the search of the defendant's house. He also personally delivered the drugs to Oklahoma State Bureau of Investigation. The court stated that they would not apply the exclusionary rule to the Posse Comitatus Act. They were unwilling to give the act such elevated treatment. However, they did feel compelled to examine illegal conduct by law enforcement personnel to see if it "rises to an intolerable level as to necessitate the exclusion of the evidence resulting from the tainted arrest."[115] The court concluded that Mainard's actions reached an intolerable level. It is interesting to note that, had Mainard stepped back at the time of the arrest and not participated, the court would have probably upheld the conviction.

If the person under investigation is a military member, it would seem that the military would have sufficient interest in the case so that there would be no problem. But, in 1969, the Supreme Court decided *O'Callahan v. Parker*,[116] which greatly limited court-martial jurisdiction. Unless the crime was in some way "service connected," there was no military jurisdiction.[117] The wake of that decision left military investigators confused and perplexed as to the limits of their authority. Finally, in 1980, the Court of Military Appeals expanded court-martial jurisdiction to include almost every involvement if service personnel with commerce in drugs in *United States v. Trottier*.[118] This decision gave more legitimacy to military police investigations off the installation. While the *Trottier* decision only applied to drug offenses, it should be kept in mind that the military has administrative authority to take action concerning many off-post incidents not involving drugs. Consequently, the authority of the military police investigator goes beyond the boundaries of the installation. In state criminal prosecutions where the defendants were members of the military, the courts had little difficulty in disposing of Posse Comitatus Act complaints.[119]

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[115] *Id.* at 524.

[116] 395 U.S. 258 (1969).

[117] Rice, *O'Callahan v. Parker: Court-Martial Jurisdiction, "Service Connection," Confusion, and the Serviceman*, 51 Mil. L. Rev. 41 (1971).

[118] United States v. Trottier, 9 M.J. 337 (C.M.A. 1980).

[119] State v. Trueblood, 265 S.E. 2d 662 (N.C. App. 1980); Burns v. State, 473 S.W. 2d 19 (Tex. Crim. App. 1971).

People v. Burden[120] is an excellent example where an airman is treated as any other citizen for purposes of the Posse Comitatus Act. Airman Hall, in the presence of Air Force special agents, was confronted by Michigan state police with criminal charges involving drug activity. The state police advised Hall that, if he would cooperate as an undercover agent, charges would be dropped. The Air Force would also give him special consideration and reassign him. Hall agreed and went off-base to the trailer of Burden where he purchased lysergic acid diethylamide and phencycladine. The trial court suppressed the evidence obtained through Hall because of his military status. The Michigan Court of Appeals affirmed the trial court decision.[121] The Court of Appeals rejected the language in *McArthur* stating that the Posse Comitatus Act does not require that the military subject civilians to regulations, proscriptions or compulsions: "Although it is clear that the subjugation of civilians to military power would violate the act, so does use of military personnel as undercover agents for civilian authority."[122] The Court of Appeals felt compelled to apply an exclusionary rule because its investigation had failed to uncover a prosecution under the Posse Comitatus Act. "Thus the only real sanction remaining to dissuade persons who violated its provisions is the sanction of the exclusionary rule."[123]

The Supreme Court of Michigan reversed. The court concluded that the legislative history of the Act clearly understood that there would be times when a soldier would be no more than any other citizen and should be so treated under the Act. During the legislative debate, Senator Windom asked Senator Merriman if a soldier could assist Merriman if he were being murderously attacked.

> If a soldier sees a man assaulting me with a view to take my life, he is not going to stand by and see him do it, he comes to my relief not as a soldier, but as a human being, a man with a soul in his body, and as a citizen.... The soldier standing by would have interposed if he had been a man, but not as a soldier. He could not have gone down in pursuance of an order from a colonel or a captain, but he would have done it as a man.[124]

The court concluded this was an excellent example of the military

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[120]411 Mich. 56, 303 N.W.2d 444 (1981).
[121]People v. Burden, 94 Mich. App. 209, 288 N.W.2d 392 (1979).
[122]*Id.* at 394.
[123]*Id.* at 395.
[124]7 Cong. Rec. 4245 (1878).

member acting undercover who is to be treated as any other citizen:

> In cooperating and assisting the civilian police agency, Hall was not acting as a member of the military. He was acting only as a civilian. His military status was merely incidental to and not essential to his involvement with the civilian authorities. He was not in uniform. He was not acting under military orders. He did not exercise either explicity or implicity any military authority.[125]

While *Burden's* analysis of the airman as a citizen seems quite correct, it will not be much help to the military police investigator who is a full-time crime fighter. The investigator's military status is not just incidental to his or her off-post undercover work. Further, the investigator's actions are authorized by military superiors. As stated earlier, the investigator should insure that he or she is pursuing a legitimate military function. If an action takes the investigator off-post, he or she should be as unobtrusive as possible. The investigator should never be in a position to assert authority over civilians. It should be noted, however, that the locating of civilians who are dealing in drugs *on the installation* clearly has an effect upon law, order, discipline, morale, and security and should permit the exercise of military authority.

B. JOINT MILITARY-CIVILIAN PATROLS

Many military installations are located adjacent to towns with a smaller population than the installation. These small towns increase in population on weekends, when the troops are seeking entertainment. The police force of these towns is usually larger than other towns of equal size. Even then, the police force may be undermanned for the weekend activities. One solution to the problem is for the military police to assist in law enforcement activities. While military police authority is limited to military personnel who violate military law, including reckless and drunken driving, disorderly conduct, and other types of conduct prejudice to the good order and discipline of the armed forces, it is not unusual to see a military police patrol cruising the entertainment district of a neighboring town.

As early as 1922, The Judge Advocate General of the Army frowned on such activity, believing that it would undoubtedly result in confusion and harmful results if practiced.[126] In 1952, The Judge Advocate General determined that the purpose of a joint military-

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[125]303 N.W.2d at 446-47.
[126]JAG 253.5, 14 June 1922.

civilian patrol was to allow "military personnel to assist civilian police in enforcing the laws,"[127] thus violating the Posse Comitatus Act. However, in 1956, in a lengthy and well-developed opinion, The Judge Advocate General advised the Provost Marshal General that earlier opinions were "unduly pessimistic and restrictive."[128] He advised that earlier opinions were not based upon legal principle, but based upon policy. Thus, joint patrols were permitted with the understanding that military police would be thoroughly instructed as to the limits of their authority.

In 1976, the Kansas Supreme Court addressed the legality of a joint patrol between civilian police and the Fort Riley military police.[129] In that case, a joint patrol received notice of a liquor store robbery. They stopped a car fitting the description of the robbery vehicle and both officers assisted in a consent search of the car. The military policeman found a pistol under the passenger seat. The trial judge suppressed all evidence concerning the arrest because of the Posse Comitatus Act. On appeal, the Supreme Court of Kansas reversed. The court concluded that the activities of the military policeman constituted a technical violation of the Act. But the court gave weight to the fact that the military policeman was acting innocently, with no knowledge of the Act, and that no court at that time had ever applied the exclusionary rule to the Act.

Can the joint patrol work? If there is to be a joint patrol, both members must be thoroughly versed in what is legally permissible. Nonetheless, the problems of the joint patrol are overwhelming. For example, if the civilian police officer apprehends a civilian offender, the military policeman should not participate in the arrest. Is the military policeman's presence at the scene, with his helmet, brassard, and weapon a form of assistance? Is this a case of the civilian being subjugated to military authority? Presence creates the appearance of assistance. If a thug accompanied by two individuals stops a citizen and demands his wallet, the presence of the two individuals standing by may affect the citizen's decision. These two individuals also may have some difficulty in convincing a court that they were not involved. Thus, presence and appearance of authority may affect activities. Further, the possibility that the civilian police officer may be in dire need of assistance is forseeable. It is hard to accept the theory that the military policeman is merely like any other citizen under such circumstances. The military policeman is a trained law

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[127]JAGA 1952/4810, 26 May 1952.
[128]JAGA 1956/8555, 26 Nov. 1956.
[129]State v. Danko, 219 Kan. 490, 548 P.2d 819 (1976).

enforcer who has been assigned by military orders to accompany the civilian policeman. No one would expect the military policeman to walk away from a life threatening situation. No set of instructions, however, can solve these Posse Comitatus problems.

VII. REIMBURSEMENTS

> Section 377. *Reimbursement.* The Secretary of Defense shall issue regulations providing that reimbursement may be a condition of assistance to a civilian law enforcement official under the chapter.[130]

Whether the Department of Defense will be reimbursed is a major controversy. The cost of the assistance can be enormous. Shortly after the enactment of the new Act, the United States Customs Service implemented Operation Thunderbolt. During the operation, Navy E2-C aircraft with sophisticated radar equipment, capable of detecting low flying aircraft were used. The cost of using the E2-Cs for 72 days was $800,000.[131]

The Secretary of Defense issued his regulation in Enclosure 5 to DOD Directive 5525.5. The guidance advised that, in most cases when equipment or services are provided, the Economy Act[132] requires Department of Defense reimbursement.[133]

The Directive sets out three situations when a waiver of reimbursement may be granted: when the assistance provided is incidental to the military purpose of the mission; when the DOD personnel involved receive training and operational benefits equivalent to the benefits provided; or, "when reimbursement is not otherwise required by law" and waiver will not adversely affect military preparedness.[134]

The Department of Justice did not agree as to when reimbursement was mandatory. In a 9 August 1982 letter to the Secretary of Defense, the Attorney General advised that reimbursement under section 377 was discretionary with the Secretary of Defense and that he was looking forward to department cooperation "on a non-reimbursable basis in staunching the flow of illegal drugs across our

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[130] 10 U.S.C. § 377 (Supp. V 1981).

[131] Testimony of Mr. James Julian, Principal Deputy Assistant Secretary of Defense, Manpower, Reserve Affairs, and Logistics, Department of Defense at the hearings before Government Information and Individual Rights Subcommittee of the Committee on Government Operations on 22 Feb. 1982.

[132] 31 U.S.C. § 686 (1976).

[133] DOD Dir. 5525.5, Encl. 5, para. B.1.

[134] *Id.* at Encl. 5, para. B.2.

borders."[135] An opinion of the Office of Legal Counsel of the Justice Department was attached to the Attorney General's letter.[136] The opinion argued that the use of the word "may" in section 377 clearly made the question of reimbursement permissible and not mandatory. The opinion agreed that, under the Economy Act, agencies providing services were generally required to seek reimbursement for the actual cost of the services provided. However, the new Act, provided separate and specific authority for one agency to assist another, and, thus, there was no need to rely on or apply the Economy Act to such cases.[137] In the new Act, Congress provided specific authority and made reimbursement permissible. Concerning Section 377, the Conference Committee stated that the "regulation should reflect sufficient flexibility to take into consideration the budgetary resources available to civilian law enforcement agencies."[138] The Office of Legal Counsel insisted that the Conference Committee would not be addressing "sufficient flexibility" if reimbursement were mandatory.[139]

The Department of Defense had made its position known to the Justice Department as early as March 1982. Its views were considered and rejected in the Office of Legal Counsel Opinion. Certain points in the Defense Department's position are difficult to ignore. First, section 372 of the new Act states that the Secretary of Defense, *"in accordance with other applicable law,"* may make equipment available:

> This phrase was added to the legislation by the House Judiciary Committee, with the support of the Government Operations Committee, to ensure that the clarification of the Posse Comitatus Act, 18 U.S.C. 1385, did not produce any changes in law governing the transfer of property and services among government agencies.[140]

The Conference Committee stated that "in accordance with other applicable law" was added to assure the continued application of

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[135]William French Smith, Attorney General, letter to Caspar Weinberger, Secretary of Defense, 9 Aug. 1982.

[136]Memorandum for The Attorney General, subject: Reimbursement for Defense Department Assistance to Civilian Law Enforcement Officials, from Theodore B. Olson, Office of Legal Counsel, Department of Justice, 24 July 1982 [hereinafter cited as memo for A.G.].

[137]*Id.* at 6.

[138]H.R. Rep. No. 97-311, at 122.

[139]Memo for A.G., *supra* note 136, at 13.

[140]William H. Taft IV, General Counsel, Department of Defense, letter to Theodore B. Olson, Office of Legal Counsel, Department of Justice, 11 June 1982 [hereinafter cited as Taft letter].

existing law.[141] This seems inconsistent with the Justices Department's position that a new and specific statutory authority had been created.

The Department of Defense also offered a persuasive explanation as to why the permissive word "may" was used in section 377. Had the section stated "reimbursement *shall* be a condition," then the Secretary of Defense would be required to collect, even in cases where the service provided was incidental to the military function.[142]

It is no coincidence that the opinions of both departments strongly support the interests of their particular agency. This is advocacy at its finest. However, in a bureaucracy, the agency with the greatest influence in the Executive branch will undoubtedly be determined to be correct.

VIII. SUMMARY AND CONCLUSION

In its effort to encourage the military to provide assistance to civilian law enforcement officials, Congress provided clarification and slight modification to the Posse Comitatus Act. The first three sections of the new Act were intended to clarify existing law. Commanders who were hesitant to respond prior to the new Act no longer have reason to pause.

The new Act authorized the providing of criminal information obtained during the normal course of military operations, of military equipment and facilities for law enforcement purposes, of military personnel to train civilian law enforcement personnel in the operation and maintenance of equipment provided under the new Act, and of expert advice. The authority of the military to act in these areas is probably wider than that spelled out in the legislation. But because of the nonpreemption provision in the new Act, wider authority, such as training law enforcement personnel in crowd and riot control, still exists.

Military personnel are now authorized to operate military equipment to assist civilian law enforcement. However, except in emergency circumstances, the military personnel may only use the equipment for "monitoring and communicating the movement of air and sea traffic."[143] The test for meeting the requirements of an emergency circumstance is difficult and the increase in assistance provided by the military is meager. Only by using the Navy and

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[141]H.R. Rep. No. 97-311, at 119.
[142]Taft letter, *supra* note 140, at 2.
[143]10 U.S.C. § 374(b) (Supp. V 1981).

Marine Corps, who have never been covered by the Posse Comitatus Act, has the Department of Defense developed a procedure for providing aggressive assistance.[144] The procedure which permits the Navy and Marine Corps to interdict vessels, arrest, search, and seize will surely be challenged in the future.

Many of the daily contacts between the military and the local civilian law enforcement authorities were not addressed in the new Act. The issue of the military undercover agent and how deeply the agent may become involved in off-post activities remains ripe for litigation. The military law enforcement officer who can document that his or her off-post activities primarily accomplish official military functions related to protecting discipline, morale, safety, and security of the installation will be in the best position to succeed in litigation. The officer must also insure that his or her activities do not constitute an exercise of authority over civilians.

The Department of Defense cannot afford to pay the costs of the assistance provided under the new Act. However, pressure can be applied by Congress and the Administration to cause that result. It will be difficult to determine when the expense has reached the point that it will affect military preparedness. If the Department of Defense Department prevails in its views on reimbursement,[145] Congress would be required to appropriately fund the requesting law enforcement agencies.

Probably the most significant aspect of the new Act, is that it seems to have adopted the active/passive philosophy of *Red Feather*[146] and *McArthur*[147] in developing limits on military assistance. This adds credence to the rationales of those cases and should result in a more logical development of the law in this area.

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[144]DOD Dir. 5525.5, Encl. 4, para. C.2.

[145]31 U.S.C. § 686 (1976).

[146]392 F. Supp. 916 (D.S.D. 1975), *aff'd sub nom.* United States v. Casper, 541 F.2d 1275 (8th Cir. 1976), *cert. denied*, 430 U.S. 970 (1977).

[147]419 F. Supp. 186 (D.N.D. 1976).

REPORT TO THE JUDGE ADVOCATE GENERAL BY THE WARTIME LEGISLATION TEAM

by Lieutenant Colonel E. A. Gates*
and
Major Gary V. Casida**

I. INTRODUCTION

Military Justice must be effective, efficient and fair, both in times of peace and war. To this end we must constantly strive, as military justice is not an end in itself, but an important means by which to promote discipline through just leadership.

In 1950, Congress promulgated the Uniform Code of Military Justice (UCMJ).[1] Among the purposes articulated for enactment of the UCMJ were the need for uniformity among the military services,[2] the desire to prevent future excessive punishments as perceived to have been imposed during World War II, and the desire to prohibit commanders from exercising improper command influence.[3] Congress expressed its confidence that the new code would work equally well in times of war and peace, and would not unduly restrict the conduct of military operations.[4]

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*Judge Advocate General's Corps, United States Army. Currently assigned as a military judge, Wurzburg, Federal Republic of Germany. Formerly, Chief of Wartime Legislation Team, Criminal Law Division, Office of The Judge Advocate General. J.D., University of Missouri, 1967; B.S., University of Missouri, 1964. Member of the bars of the state of Missouri, the United States Supreme Court.

**Judge Advocate General's Corps, United States Army. Currently assigned to the Office of the Chief Trial Judge, U.S. Army Legal Services Agency. Formerly, member of the Wartime Legislation Team, Criminal Law Division, Office of The Judge Advocate General. J.D., University of Colorado, 1975; B.S., University of Colorado, 1968. Member of the bars of the state of Colorado, the United States Court of Military Appeals, and the United States Supreme Court.

[1] 10 U.S.C. §§ 801-940 (1976).

[2] Historically, military justice in the Army was governed by the Articles of War, the Navy applied the Articles for the Government of the Navy, and the Coast Guard applied the Disciplinary Laws of the Coast Guard.

[3] *See generally* H.R. Rep. No. 491, 81st Cong., 1st Sess. (1949); *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. (1949).

[4] We cannot escape the fact that the law which we are now writing will be as applicable and must be as workable in time of war as in time of peace, and, regardless of any desires which may stem from an idealistic conception of justice, we must avoid the enactment of provisions which will unduly restrict those who are responsible for the conduct of our military operations.

H.R. Rep. No. 491, 81st Cong., 1st Sess. 8 (1949).

Whether or not the original Code would have fulfilled these expectations gradually became a moot question. The United States Court of Military Appeals quickly established a new doctrine called "military due process of law," a powerful concept whereby the court applies legal protections derived from principles applicable in civilian criminal proceedings, but not provided by the UCMJ.[5] In other areas, especially self-incrimination, soldiers were initially accorded greater protections than were enjoyed by defendants in civilian courts.[6] The Military Justice Act of 1968[7] enhanced the role that lawyers would play in the maintenance of unit discipline by expanding the accused' rights to representation by legally-qualified counsel, by converting the summary court-martial to one of consensual jurisdiction, and by creating an independent trial judiciary composed of military judges for special as well as general courts-martial, which led to substantial modification of court-martial procedures. In 1973, Secretary of Defense Laird directed that service members facing nonjudicial action under Article 15, UCMJ, would be allowed an opportunity to consult with legal counsel.[8] Also, the Court of Military Appeals subsequently tied the provision of legally qualified defense counsel to the use of summary courts-martial convictions[9] and records of nonjudicial punishment[10] for punishment enhancement and aggravation in subsequent courts-martial.

These statutory enactments, regulatory actions, and court decisions, while certainly not inclusive, serve to illustrate the "judicialization" of the military disciplinary system. Discipline in the armed forces has come to depend more and more on the actions of lawyers and the provision of legal advice, with a concomitant decline in the scope of commanders' disciplinary authority. While the heart of the Code—the punitive articles—has remained relatively untouched since 1950, the procedures and processes which drive the system have become labyrinthine. Concern was expressed long ago that the

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[5]United States v. Clay, 1 C.M.A. 74, 1 C.M.R. 74 (1951).

[6]*See* Willis, *The Constitution, the United States Court of Military Appeals and the Future*, 57 Mil. L. Rev. 27 (1972); Wurfel, *"Military Due Process": What Is It?*, 6 Vand. L. Rev. 251 (1953).

[7]Pub. Law. No. 90-632, 82 Stat. 1335 (1968).

[8]Memorandum for The Secretaries of the Military Departments, Subject: Report of the Task Force on the Administration of Military Justice in the Armed Forces (Secretary of Defense, 11 Jan. 1973).

[9]United States v. Booker, 3 M.J. 443 (C.M.A. 1977), *on reconsideration*, 5 M.J. 246 (C.M.A. 1978).

[10]United States v. Mack, 9 M.J. 300 (C.M.A. 1980).

system might not perform adequately in time of war,[11] and the warnings recently have become more insistent.[12]

In 1982, because of his increasing concern that the system might not operate efficiently during major combat operations, The Judge Advocate General of the Army directed the formation of the Wartime Legislation Team (WALT) to evaluate the military justice system and to make recommendations for improving its effectiveness in wartime. WALT, established as a non-permanent study group, conducted its work between August 1982 and September 1983.

II. MISSION

The mission of WALT was to review the UCMJ, the Manual for Courts-Martial (MCM), Department of Defense directives, and Army regulations (AR) dealing with military justice. The primary objective was to ensure that the military justice system in an armed conflict would be able to function fairly and efficiently, without unduly burdening commanders, or unnecessarily utilizing resources. The system was to be equally workable in high or low intensity conflicts of short or prolonged duration. Whenever possible, procedures were to be streamlined and simplified, and administrative support requirements reduced. While case law was to be considered, it was not to dictate the result except where case holdings were clearly premised on a constitutional or military due process basis. Specifically excepted from the study were major changes to the punitive articles (Subchapter X, UCMJ).[13] Also excluded were the administrative actions, such as administrative discharges and bars to reenlistment, which sometimes complement the military justice system as alternative methods of disciplinary enforcement. The goal was to produce a complete legislative packet, including a "speaker letter," an implementing Presidential executive order, DOD directives, Army regulations, and any necessary letters of instruction or guidance.

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[11]King, *Changes in the Uniform Code of Military Justice Necessary to Make it Workable in Time of War*, 22 Fed. J. 49 (1962).

[12]*See* Lasseter & Thwing, *Military Justice in Time of War*, 68 A.B.A.J. 566 (1982); Westmoreland & Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 Harv. J. of Law & Pub. Policy 1 (1980); Bonney, *The UCMJ in Future Hostilities: Towards a More Workable System* (Unpub. thesis, 1974).

[13]10 U.S.C. §§ 877-934 (1976).

III. ASSUMPTIONS AND LIMITATIONS

The study was purposely not designed as a joint-service effort,[14] nor were any representatives of other services consulted about the study. It was believed the the efficiency of the study group could be hampered if interservice coordination was effected during the initial study. Once completed, coordination could be accomplished to determine which proposals could be implemented immediately and to gain DOD-wide acceptance for proposals which had only wartime applicability.

The assumption that some or all of the proposals derived would not be implemented until wartime led the study group to establish another limitation—if its proposals would not be implemented until wartime, no radically new procedures or systems could be proposed. The introduction of a radically new military justice system at the outbreak of hostilities would obviously be counterproductive. Not only would it be difficult for both active duty and reserve judge advocates to assimilate a totally new system just when the caseload would probably be rising, but the basic familiarity that commanders and other laymen now have with the system would be seriously undermined, with no assurance of time for retraining. Because of this limitation, the study group rejected otherwise thought-provoking concepts which were proposed by various contributors; for example, suggestions for creating courts of continuing jurisdiction and for centralizing referral of cases in legal services agencies.

WALT was also limited to considering systemic modifications which related directly to enhancing the delivery of legal support in wartime. Modifications which did not offer promise of increased systemic efficiency in wartime were not considered.[15]

Upon consideration of the foregoing assumptions and limitations, WALT concluded that its primary function should be to attempt to correct certain problem areas unique to wartime military justice and to streamline the system by modifying or eliminating, where appropriate, detractors from efficiency through simplification of procedures and paperwork reduction. The addition of new procedures or complications was avoided whenever possible. New proce-

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[14]There is precedent for this approach. *See, e.g., Report to the Secretary of the Army by the Ad Hoc Committee on the UCMJ, Good Order and Discipline in the Army* (Powell Report) (1960); *Report to General Westmoreland by the Committee for Evaluation of the Effectiveness of the Administration of Military Justice* (1971).

[15]There are, of course, more appropriate vehicles for exploring evolutionary development of the military justice system, such as the Joint Service Committee on Military Justice and subsection (g) of Article 67, UCMJ.

dures were recommended only when they replaced more complex or burdensome procedures.

Underlying all of the factors involved in the study was the necessity to keep the function of the military justice system in proper perspective. The system must contribute to the maintenance of military discipline, as well as serving society's interest in redressing criminal misconduct. The military justice system is not, however, the most important factor in maintaining discipline in combat. While the system undoubtedly enhances discipline in units not facing combat, even to the point of helping to install a sense of discipline in new trainees, the disciplinary contribution of military justice in combat is speculative. Accepted as more important are such factors as unit leadership, unit cohesiveness, peer pressure, patriotism, self-discipline, and the political environment surrounding the hostilities. Further, if designed or applied incorrectly or unfairly, the military justice system can detract from discipline. American society has come to expect a high level of "due process" to be built into its punitive systems. In military law, this is seen in a myriad of protections, such as free legal advice or representation for nearly every adverse personnel action, redundant pretrial and post-trial reviews, and automatic appeals of courts-martial. Too many shortcuts in the system will lead to perceptions of unfairness, which could undercut the positive effects the system has on discipline. WALT analyzed every proposed modification to ensure that fairness was not unduly sacrificed for efficiency, and to ensure that changes were not counterproductive to discipline.

Because WALT was formed to study the operation of the military justice system in wartime, it was imperative that the study group develop familiarity with current combat doctrine. In developing its methodology, the study group concentrated on the environment that the military justice system would face in a combat theater. It was assumed that units and institutions not in proximity to combat would have to deal with fewer, and more easily resolved, hurdles.

Simplistically stated, most doctrinal development seems to focus on the large-scale, national-survival type war. Naturally, this is most often expressed in terms of a NATO-Warsaw Pact confrontation in Europe. The battlefield is expected to be extremely lethal, with or without use of nuclear, chemical or biological weapons. Electronic warfare will be extremely disruptive of communications, particularly hindering tactical units' communications.

Army doctrine is presently being revised to encompass a concept called "AirLand Battle." As part of this revision, tactical units are

being reorganized into the "Corps 86" and "Division 86" structures. These reorganizations are designed to enhance the mobility, firepower and combat effectiveness of combat units. The factors of mobility, lethality, and massing of force and firepower are expected to make battle lines indistinct. Opposing forces will rarely fight along distinct, orderly lines. Rapid and massive troop concentrations or immensely destructive fires will make some penetrations by both sides nearly inevitable and linear warfare will most often be a temporary condition at best, distinctions between rear and forward areas will be blurred. Special emphasis is placed on the autonomy and maneuverability of small units (battalions). Also gaining in importance is the "deep attack," which encourages tactical thrusts through the enemy forward echelons to disrupt or destroy enemy second echelon formations, logistical support and command and control. At the same time, the enemy will attempt to disrupt our rear areas, even the deep rear, so that few areas in the theater would be immune from engagement.[16]

Because this environment offers the greatest challenge to the administration of military justice, WALT concentrated on this hypothetical overseas battlefield. A system designed for this battlefield should function even better in a lower intensity war, such as was seen in Vietnam.

IV. METHODOLOGY

A. BASIC RESEARCH

As the basic assumptions and limitations were being developed, WALT also developed its plan for analyzing the system and proposing modifications. The first stage was a review and overview of the historical bases of the UCMJ and the Articles of War and, concurrently, an examination of current law and practices. This examination continued for the length of the study, and a bibliography of nearly one-hundred books, treaties, articles, and other sources of information was developed. Statistics reflecting the caseloads of each general court-martial jurisdiction in World War II were located and studied. Countless cases were also studied during the course of the project.

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[16]For a more complete explanation of AirLand Battle doctrine, *see* U.S. Dep't of Army, Field Manual No. 100-5, Operations, chs. 1, 2, 7 (20 Aug. 1982). *See also* Hanne, *Doctrine, not Dogma*, Mil. Rev., June 1983, at 11; Holder, *Maneuver in the Deep Battle*, Mil. Rev., May 1982, at 56.

B. CONTRIBUTIONS FROM THE FIELD

The study group decided that suggestions for improving the system should be sought from a variety of persons. The commanders and staff judge advocates of every Army major command, every corps and division, three separate brigades, and four Training and Doctrine Command (TRADOC) installations were consulted. In addition, every retired Army four-star general officer and every retired Army general officer of the Judge Advocate General's Corps was asked to contribute. The study group developed a tentative list of issues that it wanted general court-martial convening authorities to consider. While the study group wanted the respondents to discuss any issue that they considered noteworthy, the list of issues was presented in questionnaire or survey form so that the study group could get a sampling of the attitudes of respondents who were not inclined to write at length. Staff judge advocates were asked to consult with their commanders, with their own personnel, and with subordinate commanders within their jurisdictions. The questionnaire, designed primarily to suggest issues to commanders, did not cover issues which would be of primary interest only to judge advocates, such as rules of evidence or appellate proceedings. Several "non-legal" questions, dealing with the placement and utilization of legal resources and the anticipated situs of trials in combat theaters, were included. The questionnaire often presented the most polarized resolutions of an issue, and intermediate resolutions were left to be suggested and explored by the respondents.

The instructions to the questionnaire asked respondents to relate the questions to wartime military justice. The instructions did not, however, ask respondents to relate their responses to a particular locality, *i.e.*, combat theaters versus peaceful areas. Many respondents did, however, draw this distinction in their comments to specific questions.

The questionnaire assumed that the respondent possessed a moderate level of knowledge of the military justice system, and little background information was supplied. This approach was taken primarily to minimize the length of the questionnaire and because the questionnaire was designed primarily for general court-martial convening authorities, who are exposed to the system regularly.

Because the questionnaire was originally designed to suggest issues for further discussion, it was not pretested, nor were the potential respondents selected in accordance with accepted sampling procedures.

Many staff judge advocates provided the questionnaire to their staffs and subordinate commanders and staff officers within their units or installations. In all, more than four hundred completed questionnaires were returned to WALT. The active-duty respondents included legal clerks, judge advocates, and commanders and staff officers in grades 0-3 through 0-10.

Because of the volume of response, the data from the questionnaire proved to be invaluable for gauging attitudes toward concepts later developed by WALT. A large number of written suggestions were also received, many addressing areas not covered by the questionnaire. These suggestions prompted substantial research and analysis, resulting in the development of several proposed modifications. The quantifiable questionnaire responses are presented in Appendix A. A few of the written comments are summarized in Appendix B.

C. DEVELOPMENT OF PROPOSALS

Following a detailed review of the UCMJ and the Manual for Courts-Martial and a preliminary review of the survey responses and suggestions, WALT developed a list of "issues" or areas for detailed study. Following research, analysis and discussion, a paper, designated "concept paper", was written to cover each issue or area. Each concept paper stated the problem considered, contained a detailed discussion of the issues, and made specific recommendations for changes, usually involving statutory or regulatory modifications. Following circulation of each paper for comment, a final decision memorandum was then prepared covering each revised concept, again with specific recommendations. These memoranda were forwarded to The Judge Advocate General for decision.

After each concept was finally approved, the study group drafted the legislation and regulations necessary to implement it. Because of the pendency of the Military Justice Act of 1983 (S. 974), drafting sometimes had to be separately derived from both the current law and S. 974. As the legislative packet was drawn together, a "speaker letter" was prepared, summarizing the proposed legislation for forwarding to the Speaker of the House of Representatives.

V. CONCEPTS IDENTIFIED

Following are summary discussions and rationale for the concepts developed by WALT. Also included are summarizations of comments received upon coordination, WALT's final position, and the decision of The Judge Advocate General.

A. JURISDICTION OVER CIVILIANS

Civilian employees and civilian contractors' employees, particularly technicians, render important services to the armed forces. Weapons systems and combat support systems are becoming increasingly complex. This complexity will increase as the American armed forces continue to emphasize quality over quantity in weapons systems development. Because of the inability of the military services to train and retain sufficient numbers of uniformed technicians, and because of rapid technological advances, civilian technicians are used, both in the United States and overseas, for operation and maintenance of these complex systems and for training soldiers.

Concern has been expressed within DOD that many of these civilians may not be willing to remain at their places of duty overseas when their personal or family safety is endangered by imminent or actual hostilities. We have insufficient historical experience to judge the reliability of civilian employees in a combat environment. The problem has been studied by mobilization planners in the office of the Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics for some time, but the scope of the problem has not been objectively measured. We do know, however, that we have a vulnerability. We know that there are civilians overseas operating systems which are critically important to combat operations, and that the failure of these systems in hostilities could lead to catastrophic results.[17]

DOD is preparing to establish policy which would encourage critical civilian employees to agree contractually to remain on duty in areas of hostility in return for assurance that their families will be evacuated and that the employees will be issued "non-combatant" identification. Contractor employees who fail to honor their promise would suffer a monetary penalty. No remedies against government employees are specified.

This issue is too important to rely solely upon contractual promises. An employee who is tempted to desert in the face of danger is unlikely to be dissuaded by monetary penalties or employment termination. An additional means of enforcing duty performance in wartime is the genuine threat of criminal prosecution, with the concomitant authorization of military commanders to exercise physical restraint over civilians.

[17]For example, the JCS World Wide Military Command and Control Systems are essential for maintenance of command and control. They are heavily dependent upon civilian contractors.

Two jurisdictional problems arise in considering the imposition of criminal sanctions upon civilians. First, it is important that the military have the ability to enforce duty performance during the period of time immediately preceding the inception of hostilities, even though this period of time would probably be construed as a time of peace,[18] and adverse judicial precedent could prevent such sanctions. Second, upon inception of hostilities, adverse judicial precedent could also block jurisdiction over civilians.

The Supreme Court has held Article 2(a)(11), UCMJ, to be unconstitutional insofar as it purports to establish court-martial jurisdiction over civilians accompanying a force overseas in peacetime.[19] While various proposals have been advanced to cure this problem, WALT concluded that a proposal advanced by Justice Clark in *McElroy v. United States ex rel. Guagliardo*[20] would place the least burden on recruitment and personnel administration. Justice Clark suggested that court-martial jurisdiction might be asserted in peacetime against *critical* civilians who are advised at the time of their employment of their susceptibility to such jurisdiction. WALT therefore drafted a statute which would subject certain previously identified and notified civilian employees to court-martial jurisdiction upon Presidential invocation of the statute.

The problem with asserting jurisdiction over civilians after the inception of hostilities arises from the decision of the United States Court of Military Appeals in *United States v. Averette*,[21] in which the term "in time of war" in Article 2(a)(10), UCMJ, was construed as meaning a congressionally declared war. WALT concluded that this limitation is inappropriate because of the recent prevalence of limited engagements, the political considerations which might auger against a declaration of war, and the procedural delay inherent in declaring war. WALT therefore recommended the addition of the words "declared or undeclared" to better define "in time of war" in Article 2(a)(10).

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[18]Standard United States doctrine predicts that we can expect several days' warning of a Warsaw Pact attack of NATO forces in Europe. During this time, mobilization might begin, NATO forces would deploy to their defensive positions, and American dependents and civilians would be evacuated. If American civilian employees are disinclined to remain at their posts, this might be their best opportunity to leave the combat theater.

[19]*See* cases annotated following Article 2(a)(11) in Manual for Courts-Martial, United States, 1969 (Rev. ed.), at A2-3.

[20]361 U.S. 281 (1960).

[21]19 C.M.A. 363, 41 C.M.R. 363 (1970).

Finally, because WALT was concerned with dissuading civilian employees and contractor employees from leaving their posts, WALT recommended making Articles 85 (desertion) and 86 (absence without leave) applicable to any person subject to court-martial jurisdiction rather than military personnel only.

The Judge Advocate General approved these recommendations.

B. CONTINUATION OF JURISDICTION

While Congress was conducting hearings in 1949 on the proposed UCMJ, the Supreme Court overturned the court-martial conviction of a serviceman who had abused subordinate servicemen while they were interred as prisoners of war during World War II.[22] Congress reacted quickly by adding Article 3(a),[23] which purported to preserve court-martial jurisdiction over service members and former servicemembers for offenses committed during a prior enlistment if the offense was punishable by confinement for five years or more and could not be tried in a domestic court. In 1955, the Supreme Court held Article 3(a) to be unconstitutional when applied to former service members who had severed all connections with the military after their discharge.[24] Jurisdiction is not lost when a service member is discharged prior to completion of obligated service if the discharge is followed immediately by re-enlistment or re-entry.[25] This occurs frequently when a soldier is discharged before expiration of term of service in order to immediately re-enlist. But we are still faced with the anomalous situation that a service member can commit an offense, be discharged at the end of his or her obligated service, re-enlist immediately, and then defy military jurisdiction. In wartime, criminal offenses occasionally go undetected, unsolved, or uncharged for extended periods, and neither logic nor fairness dictate that the offender should escape punishment.

WALT recommended that Article 3(a) be amended to permit prosecution of a service member who commits an offense under the Code during a completed prior obligated tour of duty. The result is that the military would not be precluded from trying a soldier who has re-enlisted since the commission of an offense, regardless of the authorized punishment or the concurrent jurisdiction of domestic courts. Military courts are uniquely qualified to determine the needs of military discipline. The Judge Advocate General approved this recommendation.

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[22]United States *ex. rel.* Hirshberg v. Cooke, 336 U.S. 210 (1949).

[23]*Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong., 1st Sess. 617 (1949).

[24]Toth v. Quarles, 350 U.S. 11 (1955).

[25]United States v. Clardy, 13 M.J. 308 (C.M.A. 1982).

C. PUNITIVE POWERS AND PUNISHMENTS

In wartime, the punitive aspects of the military justice system could become a two-edged sword unless applied intelligently. The system operates in support of soldier discipline primarily as a deterrent. Punishment is threatened in the hope that the transgression will not occur.

In examining the contribution that the military justice system can make, the study group concluded that, in a general war, punitive actions will probably fall heaviest at the two ends of the spectrum. For minor misconduct or misconduct of a soldier who remains suitable for further service, the commander will want simple, speedy, and effective correctional tools. Manpower will be at a premium—those who are fit to fight will be called upon to do so. Conversely, in cases involving serious offenses or soldiers without further military potential, commanders will probably seek lengthy terms of confinement, together with any adjudged punitive discharge. Special courts-martial, particularly those empowered to adjudge bad-conduct discharges, are likely to decline in use. In wartime, the utility of returning a soldier to duty after prolonged confinement is questionable and commanders are unlikely to favor allowing soldiers to escape the rigors of war through discharge after a short period of confinement. A number of contributors urged that small unit commanders be given sufficient punitive power to allow expedient corrective action at the lowest reasonable level. The study group therefore concentrated on the punitive powers of nonjudicial punishment and summary courts-martial.

With regard to nonjudicial punishment administered under Article 15, UCMJ, the study group recommended minor enhancement in commanders' punitive powers and major procedural changes to enhance speed and finality. Field-grade commanders would be allowed to impose restriction, extra duty, and correctional custody under summarized proceedings. Correctional custody would be enforceable through the use of physical restraint and would be imposable against soldiers in grades E-5 and below. Reduction authority would be divorced from promotion authority, and every enlisted soldier could be reduced at least two grades by certain field commanders. Commanding officers in pay grades 0-6 and above would have the greatest reduction authority. The study group also recommended allowing commanding officers in pay grade 0-6 to impose forfeitures and detention of pay upon officers. Procedurally, the study group recommended eliminating the right to decline nonjudicial punishment, but only during wartime.

With regard to summary courts-martial, the study group recommended that the maximum imposable confinement, hard labor without confinement, and forfeitures be increased to three months, and that the punishments apply to soldiers in pay grades E-6 and below. The study group also recommended eliminating the right to decline trial by summary court-martial for service members in pay grades E-6 and below, and elimination of the right to consult with counsel about summary courts-martial. Further, the study group recommended that imposition of confinement at summary court-martial not require automatic reduction to the lowest enlisted grade. The sentence limitations currently applicable to senior enlisted personnel would continue for personnel in pay grades E-7 and above.

The Judge Advocate General approved these modifications, and they are summarized in Appendix C.

D. SWEARING OF CHARGES

Article 30, UCMJ, requires that a person signing court-martial charges do so under oath before a commissioned officer of the armed forces authorized to administer oaths. In the Army, only judge advocates and adjutants can swear charges. In wartime, this requirement could constitute an unnecessary obstacle if the accuser does not have ready access to judge advocate or adjutant.

WALT considered substituting a requirement that charges be certified by the accuser in place of the oath requirement. It was believed, however, that the oath requirement adds a solemn and purposeful air to the process and should be retained.

The Judge Advocate General approved WALT's recommendation that Army Regulation 27-10 be amended, as authorized by Article 136(a)(7), UCMJ, to allow any commissioned officer to administer the oath for this purpose.

E. PRETRIAL CONFINEMENT AND MILITARY MAGISTRATES

Article 10, UCMJ, gives broad authority for the use of pretrial confinement when it states, *inter alia*, that a person charged with an offense "shall be ordered into arrest or confinement, as circumstances may require." The limitations placed on this broad authority by the Court of Military Appeals in *United States v. Heard*[26] might, at first blush, be viewed as imposing unreasonable limitations in war-

[26]3 M.J. 14 (C.M.A. 1977). Under constitutional analysis, the court allowed pretrial confinement only in two situations: when necessary to insure the accused's presence at trial or to prevent foreseeable future serious criminal conduct.

time which would prevent commanders from incarcerating soldiers whose disciplinary violations might constitute a threat to the combat effectiveness of a unit. WALT concluded, however, that there is sufficient flexibility in the *Heard* test to allow a commander to isolate and control these disciplinary threats.[27] Further, statutory modification to broaden the already broad provisions of Article 10 could not override principles of military due process or constitutional law. In addition, pretrial confinement often will not be a commander's first choice in temporarily resolving disciplinary problems when his unit is in or near contact with the enemy. Moreover, establishment of confinement facilities may rate a low priority in a combat theater, and commanders should find it distasteful to reward their problem soldiers with a safe refuge.

The provision of Article 10 which discourages the use of pretrial confinement for offenses normally tried by summary court-martial caused the study group no concern. While the study group has proposed that summary courts-martial be allowed to adjudge three months' confinement, the study group does not believe that summary courts-martial will be used for soldiers who are candidates for pretrial confinement. A soldier whose conduct is disruptive to unit discipline in time of war is unlikely to be tried by summary court-martial. Rather, summary courts-martial will be a rehabilitative tool useful in cases of relatively minor misconduct whereby the convening authority can gain leverage over the soldier's future behavior by suspending the confinement.

WALT did suggest that certain modifications be made to the military magistrate provisions of AR 27-10, including:

a. Allowing TJAG to delegate the authority to appoint part-time magistrates down judicial channels to supervising military judges;

b. Allowing the Army to apply its magistrate provisions to pretrial detainees from other services confined in Army facilities, while allowing other services to apply their own magistrate provisions to Army pretrial detainees in their confinement facilities;

c. Creating military exigency exceptions to time limits established for magistrate visits and releases from confinement; and

d. Allowing commanders to appeal adverse magistrate determinations on pretrial confinement to the supervising military judge.

The Judge Advocate General approved this concept.

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[27] A persuasive articulation of this argument is presented in United States v. Otero, 5 M.J. 781 (A.C.M.R. 1978).

F. PLEADINGS

It was suggested that the military pleadings system should be studied to determine whether some of the verbiage currently placed in the form specifications in Appendix 6, MCM, could be eliminated. The oft-cited military rule that all elements of the offense, including words of criminality, must be pled is probably grounded in the Constitution's Eighth Amendment by a series of Supreme Court decisions in the late nineteenth century. Further, military pleadings are significantly less complex, with less verbiage and formalism, than federal criminal pleadings. While some of the form specifications could be shortened ("robbery" is the example usually given), the study group concluded that this would be unwise. First, there is uncertainty about whether lesser-included offenses are preserved when specifications are shortened. Second, shortening specifications could lead to increased usage of motions to make more specific (bills of particular), which would increase, rather than decrease, the volume of paperwork. Finally, deletion of a few words from the form specifications will not have any appreciable effect on the effort expended in any particular case.

The study group was able to propose other substantial, streamlining modifications to the current system. First, there is no reason why the name of the accused and the accompanying identifying data which allege *in personam* jurisdiction must be repeated in every specification. WALT recommended allowing these entries to be made once at the top of each page of charges. This would produce an immediate saving of effort, especially for trained and untrained administrative personnel, in every case involving multiple specifications. In appropriate cases, the subject-matter jurisdiction pleadings required by *United States v. Alef*[28] could also be consolidated.

Second, the federal practice of presenting repetitive information in tabular format should be illustrated in the MCM. Thus, in cases involving multiple specifications under the same charge, the elements common to each specification are presented once, and the elements which vary from specification to specification such as dates, amounts, places, items, are placed in a table. This practice could be very useful in cases involving repeated bad checks, unauthorized absences, and larcenies. While there appears to be no current prohibition of this practice, it is not widely used.

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[28] 3 M.J. 414 (C.M.A. 1977).

Third, the study group recommended ending the use of specifications, preferring instead that each act of misconduct alleged be denoted as a separate charge. The present system confuses court members and leads to mistakes.

Fourth, a two-page charge sheet, adapted from a form designed by the Joint Service Committee for the proposed MCM, was recommended. The new form would be used for general and special courts-martial, and includes the minimum amount of data needed for sentencing, room for charges, and all the information found on page 3 of the current form. An illustration of these proposals, not yet approved by The Judge Advocate General for further implementation, is in Appendix D.

The Judge Advocate General has deferred action on these proposals so that senior legal clerks and warrant officers can assess their administrative impact on legal office operations.

G. DELEGATION OF CONVENING AUTHORITY FUNCTIONS

Throughout American history, the disciplinary systems used by American military forces have been controlled and guided by commanders. Perceptions of abuse of this authority during World War I brought proposals for reform, including a proposal for creation of a Court of Military Appeals,[29] but resulted in little impact upon commanders' powers. Once again, perceptions of abuse during World War II carried over to the congressional hearings on the then-proposed UCMJ in 1949 and 1950, and numerous suggestions were made toward reducing the power that commanders wield in the court-martial process.[30] Most suggestions would have limited the authority of commanders in detailing court members and defense counsel. In the end, the only substantial limitation imposed was the insertion of Article 37, which prohibits unlawful tampering with courts-martial, but the scope of commanders' functions was not reduced. Commanders exercising convening authority functions continue to order cases tried, appoint all the court personnel, review the case after trial, and perform myriad other functions.

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[29]Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 Mil. L. Rev. 39 (1972).

[30]*See, e.g., Hearings Before a Subcomm. of the Comm. on Armed Services, U.S. Senate, on S. 857 and H.R. 4080* 81st Cong., 1st Sess. 80-84 (1949); Senate Report to accompany H.R. 4080, No. 486, *Hearing Before the Senate Comm. on Armed Services*, 81st Cong., 1st Sess. 5-6 (1949).

Because the convening authority is required to personally exercise most of his powers, the processing of cases is hampered when the convening authority is not continuously and readily available. In wartime, these requirements may have two adverse effects: case processing will depend on the convening authority's availability, while his judicial duties could detract from other important duties.

In its survey, WALT posed several questions in this area. Questions suggesting severing of the commander from these duties or allowing complete delegation of these duties were soundly rejected. Questions which suggested allowing delegation of what might be considered ministerial functions, however, gained general acceptance.

WALT concluded that convening authorities at all levels should be allowed to delegate some functions which are not outcome determinative. Specifically delegable to deputy and assistant commanders, executive officers and chiefs of staff is court member selection. In addition to the above-listed personnel, staff judge advocates and principal legal officers could be delegated the authority to excuse members and replace them from a list of alternates, and to rule on witness requests, requests for depositions, requests for individual counsel, and sanity inquiries. In addition, the military judge would be allowed to excuse members for good cause after assembly.

WALT also proposed relieving convening authorities of the duty of detailing military judges and counsel, and allowing the service Secretaries to establish procedures appropriate for their organizations. This should result in procedures which are more efficient and more in tune with actual current practice.

The most important functions which would not be delegable include referral of the case to trial, immunization of witnesses, dismissal of charges, acceptance of pretrial agreements, and initial action on the record.

The Judge Advocate General approved this concept.

H. DEFENSE COUNSEL

Prior to the inception of this study, some commentators argued that the rights of service members to be represented at courts-martial by counsel of choice should be limited or eliminated in wartime.[31] In the survey, WALT asked whether the service Secretaries should be allowed to suspend, in areas of hostility, the accused's

[31]Lasseter & Thwing, *supra* note 12; Westmoreland & Prugh, *supra*, note 12.

right to civilian counsel, and to limit military representation to detailed counsel. The respondents expressed considerable support for both propositions, particularly the former. WALT also received suggestions which recommended elimination of the right to individual military counsel (IMC) entirely, limiting IMC to general courts-martial, and precluding civilian representation in specifically defined hostile fire areas.

While exercise of the right to individual counsel can cause delay of trials, and while accused may abuse it to delay trials,[32] WALT concluded that this right should be limited only when it interferes with a higher public need. Thus, in an overseas combat theater, the desire of an accused for representation by civilian or military counsel from the continental United States might be contrary to mission or security considerations, or the need for timely resolution of the case. On the other hand, if absolute geographical limitations concerning retention of counsel are established, the accused might be denied representation by counsel who is readily available. In balancing the need to recognize legitimate military considerations with the desire to impinge on accuseds' rights only when clearly necessary, WALT identified two specific procedural problem areas.

First, when an accused requests military counsel from a command other than his own, the convening authority in most instances is required to forward the request to the requested counsel's commander. In a combat environment, the potential communications difficulties inherent in such a procedure seem obvious. Even when the request can be forwarded to the other command, a decision that the requested counsel is unavailable may be appealed, causing additional delay. In short, a procedure that works well in peacetime may not work at all in wartime. WALT concluded that the accused's convening authority should be allowed to deny such a request if, due to military exigencies or other good cause, the forwarding of the request or the delay that would result from such forwarding would unduly delay trial of the case. The convening authority's denial should, however, be reviewable by the military judge for clear abuse of discretion.

Second, with regard to civilian counsel, delays are sometimes encountered because the accused has not made arrangements for representation, but expresses a desire to do so, or the accused and his civilian counsel have not come to terms, or the civilian counsel is not available on the trial date. This problem is sometimes raised for the first time at the beginning of trial. While this is a common, but

[32] *See, e.g.*, United States v. Kinard, 21 C.M.A. 300, 45 C.M.R. 74 (1972).

manageable, problem in peacetime, its effect in wartime may be substantially more adverse. WALT concluded that the most appropriate solution is to force the accused to make his or her decision early in the case and then to take expedient action. WALT proposed that the accused be required to make a timely and detailed request for civilian counsel to the convening authority. The convening authority would determine whether, under the attendant conditions, it would be possible for the civilian counsel to appear, whether either processing the request or the subsequent appearance of counsel would delay trial, and, if so, whether other factors would preclude on otherwise reasonable delay. The convening authority's decision denying civilian counsel should also be reviewable by the military judge, but only for clear abuse of discretion. In cases where the accused has failed to make a pretrial request, the military judge could decide whether the failure results in an untimely request and, if appropriate, consider the merits of the request himself. In any event, if civilian counsel is present at the trial and ready to proceed, he would not be excluded because of failure to make a request or because of prior denial of a request.

While these proposals would be most applicable in combat theaters or areas of hostility, the proposals were not limited to such areas. Not only would the problems relating to specifying geographical limitations be raised again, but military exigencies might also exist in non-hostile areas.

The Judge Advocate General approved this concept.

I. PRETRIAL INVESTIGATION

The pretrial investigation, required by Article 32, UCMJ, before referral of charges to a general court-martial, often consumes substantial resources, presents logistical difficulties, and delays the timely processing and trial of charges. Errors relating to the conduct of the investigation sometimes become issues unrelated to the merits of the case.[33] Witnesses are transported around the world,[34] and the investigation has taken on the appearance of a mini-trial, complete with its own procedural rules.[35] Compliance with the intricacies required in the pretrial investigation may be difficult in a combat environment.

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[33]*See, e.g.*, United States v. Maness, 23 C.M.A. 41, 48 C.M.R. 512 (1974) (denial of civilian counsel representation at investigation).

[34]*See, e.g.*, United States v. Ledbetter, 2 M.J. 37 (C.M.A. 1976).

[35]*See, e.g.*, United States v. Payne, 3 M.J. 354 (C.M.A. 1977) (legal advisor to the investigating officer must be neutral and detached).

On the other hand, the investigation often serves useful and valuable purposes.[36] WALT's survey revealed that a majority of the respondents were not inclined to eliminate the investigation altogether, but a significant number of respondents urged simplification and streamlining of investigation procedures.

WALT initially proposed a rather radical change which would have converted the pretrial investigation into an informal investigation similar to the informal investigation described in Chapter 4 of Army Regulation 15-6. There would have been no formal hearing. All testimony would have been reduced to written statements, and the completed report would have been submitted to the accused, who would have been allowed to submit his own statement or other evidence. WALT also proposed that the investigation be optional, with any commander in the accused's chain of command having the authority to order an investigation. This proposal was made because many cases have been thoroughly investigated by police agencies and the charges are obviously supported by evidence and are of a serious nature.

The initial proposal had some weaknesses. In addition to limiting the accused's ability to discover evidence and cross-examine witnesses, there would be a danger that evidence supporting the charges would not be fully developed or analyzed. In addition, many charges in the past have proven unfounded or have been referred to inferior courts because of the thorough pretrial investigation process.

WALT's final recommendations, approved by The Judge Advocate General, focused on reducing the delays and expense occasioned by the pretrial investigation without altering the nature of the investigation. Specifically, the accused would be required to sumbit requests for individual counsel, military or civilian, to the convening authority, who could deny the request if military exigencies or other good cause exist which are likely to prevent the requested counsel from appearing at the situs of the investigation in a timely manner. A regulatory limitation on witness availability would provide that any witness located more than one hundred miles from the investigation situs would be unavailable *per se*, and that the availability of witnesses located within one hundred miles would be determined by

[36]Congress envisioned three primary purposes in enacting Article 32: (1) To determine whether evidence exists to support the charges; (2) To consider the form of the charges; (3) To provide a recommendation to the convening authority as to disposition of the charges. CMA has specified at least a fourth purpose of the investigation, pretrial discovery by the accused. United States v. Samuels, 10 C.M.A. 206, 27 C.M.R. 280 (1959).

balancing the significance of the witness' testimony against the difficulty, expense, delay and effect on military operations involved in obtaining the witness. Further, the investigating officer would be allowed to consider unsworn statements of unavailable witnesses. Finally, another modification would permit the addition of charges which are revealed during the investigation without the necessity for ordering a new investigation.

J. PRETRIAL ADVICE

Under Article 34, UCMJ, and paragraph 35, MCM, as currently applied in the field, the pretrial advice is often a multi-page document which summarizes the evidence relating to the charges, sets forth matters in extenuation and mitigation, gives the subordinate commanders' recommendations in the case, and provides the convening authority with his staff judge advocate's recommendation. Preparation of the advice is a lengthy process which consumes valuable lawyer time.

WALT recommended that Article 34 be amended to require that the staff judge advocate advise the convening authority of his conclusions as to whether each specification alleges an offense, each charge is warranted by the evidence, and a court-martial would have jurisdiction over the accused and the offense. The recommendation of the staff judge advocate would complete the advice. WALT also recommended that the advice be allowed to be rendered orally.

The Judge Advocate General approved the recommendations except that he directed that the advice be in writing. The burden here is minimal, since the advice could be a form or could be handwritten.

K. RECORDS OF TRIAL

In cases where a verbatim record of trial is required, it is not uncommon for more time to lapse between the announcement of sentence in the case and the convening authority's actions than between preferral of charges and trial. The time after trial is consumed almost entirely by paperwork, primarily preparation and authentication of the record of trial and preparation of the post-trial review. Since, historically, the number of courts-martial increases in wartime, post-trial processing of cases is likely to become a bottleneck in the system.

The current method of creating records of trial may not be satisfactory in wartime. Most military court reporters use steno masks, whereby they repeat every word spoken in court into a microphone, which is then recorded on a tape cassette. After the trial, the reporter

must transcribe the record onto paper. In wartime, sufficient numbers of trained reporters may not be available,[37] the tape recorders used may not function well under field conditions, and the electric typewriters and word processors used for transcription may not be available or functional.

Solutions to this problem are limited by technological innovation, but some modifications in current procedures are realistic under present technical capabilities. WALT therefore recommended that videotape and audiotape recordings of the actual trial proceedings be allowed to serve as the record of trial and that the recorder operator be allowed to authenticate these records. WALT also recommended that consideration be given to developing and procuring equipment which would withstand the rigors of field usage and could be operated on its own power system.

The advantages of these proposals include:

a. Recorder operators would require much less training than court reporters;

b. The necessity for written transcriptions is eliminated;

c. The operator can monitor the recording during the recording process and then authenticate the record immediately after trial;

d. Copies of the record can be reproduced electronically.

The proposal does have at least two drawbacks. First, unless the post-trial review is made less burdensome, review of the record of trial at the trial suits will require viewing or listening to the tape, which is less efficient than using a written transcript. Second, for the same reason, appellate review may be less efficient. However, acquisition of the proper equipment at the appellate level would minimize this problem. Also, during wartime, written transcripts of tape-recorded trials, when needed, could more easily be prepared at the appellate level than at the trial situs.

The study group also recommended that the requirement for verbatim records in one category of cases be eliminated, that is, general courts-martial in which more than six months confinement is adjudged, but which are not automatically reviewable under Article 66(b), UCMJ.

Finally, in an area related to records of trial, WALT examined the requirements for live witness testimony at trial. While there are

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[37]Some commands are heavily dependent upon civilian court reporters, and their availability in overseas combat theaters is doubtful.

several provisions in military law which allow the use of substitutes for live testimony, it is unlikely that additional substitutes would pass constitutional muster under the Confrontation Clause of the Sixth Amendment.

WALT did, however, propose a relaxation of the rules relating to the taking of depositions. While depositions are not widely used in peacetime—the deponent must be unavailable for trial testimony—they may be an important means of preserving evidence in serious cases arising in areas of hostility. One proposal allows depositions to be taken prior to preferral of charges, with a concomitant requirement that the suspected offender be advised of the nature of the offense to enable him to intelligently cross-examine the deponent. Another proposal allows videotape and audiotape recordings to serve as the record of the deposition. Finally, the attorney-client relationship between the accused and counsel for the deposition would be severed statutorily when required by military exigencies.

The Judge Advocate General approved this concept.

L. POST-TRIAL REVIEW

The post-trial review, required by Article 61, UCMJ, is the vehicle by which the staff judge advocate provides advice in certain cases to the convening authority after trial to enable the convening authority to take action in the case under Article 60. In WALT's opinion, the post-trial review, as presently structured, is among the most unnecessary and resource wasting procedures in the military justice system. In addition, unnecessary issues and errors are caused by this requirement in cases otherwise free of error.

Because the post-trial review is designed primarily to provide the convening authority with sufficient information with which to judge the legal and factual correctness of the findings and sentence, WALT's first recommendation converts the convening authority's function when taking action to one primarily of exercising clemency. While the convening authority would no longer be required to review the case for legal sufficiency, WALT would not deprive him of the authority to modify the findings or sentence in appropriate cases.

WALT recommended that the post-trial review be converted to a written recommendation, the contents of which would be prescribed by the President. WALT contemplated that the only required element of the recommendation would be the staff judge advocate's recommendation itself. The staff judge advocate could also, on his or her own initiative, include other matters about the case or the accused which might assist the convening authority in taking action.

WALT also included a provision allowing the convening authority to be orally briefed on the contents of the recommendation. WALT also recommended allowing the action itself to be read to the convening authority, and his approval of the action could be denoted by signature of the staff judge advocate or other delegate on behalf of the convening authority. Thus, in most cases, the convening authority could be advised and take action in a case over a radio or telephone, without the necessity for carrying any paperwork to him. This would offer the maximum flexibility and least administrative burden possible for effecting action on sentences in wartime.

Because of the limited content of the staff judge advocate's recommendation, the utility of the trial defense counsel's *Goode*[38] response is greatly reduced. WALT therefore recommended that the staff judge advocate have the option of serving, or not serving, his recommendation on the defense counsel. His decision would probably be determined by the relative difficulty of conveying the document to the defense counsel, the inclusion or non-inclusion of controversial matters in the recommendation, and his commander's preferences. If the recommendation were served, the rules of *Goode* would apply, including waiver. If not served, the legal propriety of the recommendation could be raised and judged on appeal.

So that the accused has a means of communicating with the convening authority after trial, WALT recommended allowing the accused three days, extendible by ten days, to prepare and submit anything he or she desires the convening authority to consider prior to taking action in the case.

Because the post-trial recommendation would normally relate merely to the exercise of clemency, WALT recommended deletion of the requirement found in paragraph 85c, MCM, that the convening authority explain any failure to follow the staff judge advocate's recommendation.

The Judge Advocate General approved this concept.

M. ORDERS AND ACTIONS

The study group also examined the formats of convening orders, promulgating orders, and actions.

With regard to convening orders, the study group recommended ending the requirement that the qualifications and status as to oaths of the military judge and counsel be delineated. The military judge inquires into counsel qualifications at the beginning of a trial. List-

[38]United States v. Goode, 1 M.J. 3 (C.M.A. 1975).

ing counsels' branch will trigger an inquiry when a questionable circumstance arises and, at the appellate level, qualifications are easily checked. The study group also recommended deletion of the standard language in the introductory paragraph of convening orders regarding what cases the court-martial is convened to hear. The critical step here is the referral on the charge sheet of a particular case to a particular court.

Further, the study group recommended substantial modification of the format of the promulgating order, including allowing the specifications to be summarized or "gisted," rather than repeated verbatim. These modifications should reduce substantially the length of promulgating orders.

The study group also recommended deletion of the prohibition, presently contained in Article 57(a), UCMJ, on applying forfeitures before final action in cases where the accused is not confined. This provision occasionally causes mistakes in actions. The study group concluded that Congress had not intended to frustrate the intent of the sentencing authority when it promulgated Article 57(a), and recommended amending Article 57(a) to allow the convening authority to order forfeitures either executed or applied in every case at time of initial action. The study group also recommended that language now placed in actions relating to place of confinement and forwarding of the record of trial for supervisory or appellate review be deleted. A promulgating order illustrative of these proposals, but not yet approved by The Judge Advocate General for further implementation, is at Appendix E.

The Judge Advocate General has deferred action on these proposals so that senior legal clerks and warrant officers can assess their administrative impact on legal office operations.

N. APPELLATE SYSTEM

An increased caseload in wartime will obviously strain the military appellate system. It should be noted that caseload fluctuations can be partially offset by rules already in force. For example, each service's Judge Advocate General is allowed to establish as many panels of the Court of Military Review as are needed. Service Secretaries can establish branch offices in the field, and additional panels can be placed at these offices, as was done in World War II. The Court of Military Appeals can control its caseload through the petition process.

WALT considered and rejected a number of proposals for reducing the appellate workload. For example, elimination of appeal of

special courts-martial under Article 66(b) was considered. This was rejected, however, because of the permanent stigma associated with bad-conduct discharges and because WALT doubts that many "bad-conduct" special courts-martial will be tried during a general war. As previously noted, commanders are unlikely to allow military accused to escape the rigors of wartime service with a short period of confinement, followed by discharge. This might actually encourage criminal misconduct.

Another proposal would limit appellate review of guilty pleas to issues of jurisdiction, sentence appropriateness, and, perhaps, fraud on the court and gross miscarriage of justice. The objective was to limit review of the providency of guilty pleas. This was rejected because of the critical role played by military appellate courts in ensuring the integrity of the military justice system.

Another proposal would have moved the review of guilty pleas to Article 69, UCMJ. It appears, however, that the review process is not much more burdensome under Article 66 than under Article 69. Also, confusion might result in cases with mixed pleas if appellate review were split.

Also considered was a proposal to suspend appellate review of cases in which the convening authority has suspended the punishments giving rise to automatic review. This proposal was rejected because the time lapse between action, vacation of the suspension, and appellate review might preclude the retrial of cases overturned on appeal.

WALT did recommend, and The Judge Advocate General approved, a proposal to allow the accused to affirmatively waive appellate review. This proposal would have the additional benefit of negating the requirement for a verbatim record of trial when appeal has previously been waived.

O. EXTRAORDINARY POWERS FOR COMBAT COMMANDERS

On a battlefield in which nuclear, chemical, or biological weapons are being employed, it is entirely possible that combat units will become totally isolated for prolonged time periods from higher headquarters. Morale and discipline may be challenged, with neither the time nor the ability for resort to normal disciplinary actions. Even in conventional warfare, with emphasis on small-unit maneuver and thrusts into enemy reserve echelons, challenges to discipline may arise which cannot await routine resolution. At the suggestion of several contributors, the study group explored the advisability for a

statutory articulation of a commander's power to summarily discipline his subordinates.

This summary punitive authority is not overtly recognized by current military law, nor can it be said that commanders inherently have such authority as part of the customs of the service. The only hint of such authority is found in the 1901 and 1917 Manuals for Courts-Martial, where martial law was divided into two branches; martial law at home and martial law applied to the Army. No further explanation was provided, and the reference to martial law applying to the Army was eliminated from the 1921 MCM.

The reference to martial law, however, provides a compelling analogy. Martial law is authority over domestic society exercised by a military commander out of clear necessity in the face of overpowering social disorder. Martial law is bounded by no set limits; rather, the military commander defines the limits of his power according to what is reasonable and necessary under the circumstances. The commander's actions are judged after the fact to determine whether, under an objective standard, the actions taken were reasonable and necessary. If, as is legally recognized, a commander can exercise extraordinary power over his civilian countrymen, then he surely must have at least the same authority over his military subordinates.

Although a doctrine of necessity apparently will permit the commander to take reasonable actions necessary to mission accomplishment when traditional military disciplinary systems have "broken down," the study group concluded that such a doctrine should not be made part of statutory law. A general statutory grant of such power would have no meaningful definition. An attempt to draw a specific statute might result in inadvertently limiting the commander's discretion in this vital area. Further, an anticipatory political consensus as to a definition of a doctrine so inextricably linked to the combat circumstances is unlikely. Therefore, The Judge Advocate General approved the study group's recommendation that no further action be taken on this issue.

P. COMMAND RESPONSIBILITY FOR SUBORDINATES' WAR CRIMES

Prompted by papers written by Colonel William G. Eckhardt[39] and Major Thomas R. Keller,[40] the study group's only direct examination of the punitive articles concerned whether a commander's duty to prevent violations of the law of war should be articulated in statute or regulation.

Army policy states that persons subject to the military law of the United States will normally be tried under the UCMJ for violations of the law of war.[41] The UCMJ does not, however, specifically proscribe many of the acts or omissions that might be committed by commanders with regard to war crimes committed by subordinates. For example, a commander would be liable under the theory of principals if he ordered or encouraged subordinates to commit crimes; but a commander who merely looks the other way might escape liability as a principal because, as yet, no duty to intervene has been clearly articulated in military law. Similarly, a commander who is negligent in the requisite degree in failing to learn of such offenses by his subordinates, thereby preventing corrective action from being timely taken, might, under appropriate circumstances, be guilty of dereliction of duty. But this offense's maximum permissible confinement of three months, with the two-year statute of limitations, is hardly conducive to effective enforcement.

Article 86 of Protocol I, Additional to the Geneva Conventions of 1949, which was promulgated by the Conference in 1977, requires that the parties thereto repress and suppress breaches of the Geneva Conventions. It also states that a superior is not absolved from liability for crimes committed by subordinates if the superior knew or had information which should have enabled him to conclude that offenses were or would be committed by subordinates.

Primarily to provide notice of their duties to commanders and other leaders, WALT initially recommended that the MCM be amended to establish a duty upon commanders to intervene to prevent subordinates' offenses. The study group also recommended that

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[39]Eckhardt, *Command Criminal Responsibility: A Plea for a Workable Standard*, 97 Mil. L. Rev. 1 (1983).

[40]Keller, *Command Responsibility: A Search for New Alternatives*, a paper submitted to Dr. William D. O'Brien's Law of War Writing Seminar in the National Security Studies Program, Georgetown University (April 1983).

[41]U.S. Dep't of Army, Field Manual No 27-10, The Law of Land Warfare, para. 507b (July 1956).

Article 92(3), UCMJ (dereliction), be expanded to cover "dereliction in armed conflict," with a maximum sentence of ten years, and that no statute of limitations be set for this offense.

After considering the comments submitted, however, the study group's final recommendation was that no action be taken at this time. First, Protocol I, Additional is not part of American municipal law because the Senate has not ratified it, nor do many of the Protocol provisions have the status of customary international law.[42] Therefore, WALT's recommended changes would anticipate, rather than respond to, changes in international law, and would impose requirements on our forces which might not apply to other parties to a conflict. Second, articulation of these sanctions might cause timidity in field commanders at times when aggressive combat action is necessary. Finally, most situations covered by the WALT recommendations can presently be pleaded as violations of the UCMJ, particularly Articles 133 and 134. In those situations where the punitive articles do not apply, a military tribunal can be convened to judge a commander's actions.

The Judge Advocate General approved this recommendation.

Q. COMBAT DOCTRINE AND RESOURCES

The study group also examined the issue of how Army legal assets will be assigned, deployed, and supported on the battlefield. The study covered three areas: force structure, battlefield deployment, and equipment.

With regard to force structure, the Corps is actively and continuously working and planning to ensure that sufficient judge advocate personnel are included on combat unit TOE to adequately support each unit. The legal support structures for Division 86 (heavy division and airborne/air assault divisions) have been defined and approved.

Judge advocate planning for battlefield deployment and operations, however, has historically been left to the staff judge advocate and the commander. Battle doctrine for the combat arms and support organizations has always been a matter of Army-wide concern and development. There is, however, little or no Army-wide doctrine on execution of the judge advocate mission in a combat theater.[43] It

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[42] *See* Keller, *supra* note 50, at 38-39.

[43] The Developments, Doctrine and Literature Department of The Judge Advocate General's School has recently circulated for comment a first draft of a paper which articulates Armywide JAGC doctrine.

also appears that the Army legal community, unlike most of the Army, does not regularly practice going to war.

Senior personnel of the Corps are divided on doctrine. Some would establish no doctrine at all, preferring instead to maintain complete flexibility as to personnel placement and utilization. Others would apparently want general doctrine established, based upon experimentation and analysis. More specifically, there is a division of thought over whether judge advocate personnel can contribute to the mission of a combat-engaged division, or whether they should be deployed in echelons above division during active hostilities.

WALT recommended experimentation and testing of combat deployment with a view toward development of doctrine and the marking of the boundary between JAGC doctrine and individual unit planning. The study group recommended involvement of several major commands in this effort, and follow-up of unit planning.

With regard to equipment, there may be substantial deficiencies in combat. Staff judge advocates have very limited dedicated transportation assets. Battlefield mobility (assuming the battlefield and rear areas can be traversed by administrative vehicles or aircraft) will be important for investigation of war crimes and other offenses, claims matters, and advisement of commanders. But currently, dedicated transportation resources do not appear to be adequately available and probably little, if any, transportation resources will be available in wartime. Similarly, the efficiency of legal offices has been substantially enhanced by the acquisition of word processors, copiers, court-reporting equipment, and other modern equipage. Much of it has been acquired off-the-shelf by individual organizations for peacetime use. But is this equipment suitable for the battlefield environment? Will it function? Can it be readily repaired? Is greater standardization required? Does the Corps need a dedicated effort in research and development to produce standardized equipment with modular components for easy repair? Because this study produced so many unanswered questions, WALT recommended Army-level examination of the need for tactical vehicles and equipment suitable for JAGC field use.

In the future, The Judge Advocate General and The Assistant Judge Advocate General will receive semi-annual briefings on JAGC "go-to-war" capabilities from the Commandant of The Judge Advocate General's School.

VI. IMPLEMENTATION OF CHANGES

In accordance with its mission statement, the study group focused on modifications to the military justice system which could be implemented at the initiation of hostilities. Nevertheless, the study group identified numerous changes which are also appropriate for peacetime application and which could be implemented immediately. These include:

1. Eliminate the limitations on jurisdiction over offenses committed during a prior enlistment.

2. Shorten the pretrial advice and post-trial review.

3. Apply Army rules regarding the military magistrate's role in pretrial confinement to all persons confined in Army facilities, and allow the other services to apply their rules to Army personnel confined in their facilities.

4. Allow additional misconduct identified during the pretrial investigation conducted pursuant to Article 32, UCMJ, to be charged without a new investigation; allow the investigating officer to consider the unsworn statements of unavailable witnesses; and limit the available ability of witnesses.

5. Authorize videotape and audiotape records of trial and depositions.

6. Modify pleadings, orders, and actions as recommended by WALT after field testing of these proposals.

7. Allow convicted accused to waive appellate review.

8. Authorize convening authorities to delegate those functions recommended by WALT as delegable, except court member selection.

Other changes, particularly jurisdiction over civilians, designed solely for wartime application, necessarily require immediate legislative implementation so that wartime applicabilty is assured.

VII. CONCLUSION

The primary objective of this study was to ensure that the military justice system will function fairly and efficiently during wartime. WALT concluded that, although the current system will work with reasonable efficiency during a short, low intensity conflict, several changes are necessary in order to be confident that the system will operate effectively during a general war. The study group also concluded that commanders and legal personnel must be familiar with

the military justice system at the outbreak of hostilities and that most of its modifications would not be implemented until a major war is imminent. Accordingly, the foregoing modifications are, for the most part, designed to eliminate unnecessary procedures and paperwork, and to enhance the effectiveness and timeliness of disciplinary actions without radically changing current practice. The study group is confident that, if these approved modifications are effected, the military justice system will better serve the ends of justice and discipline without undue sacrifice of the basic legal protections which should be accorded American soldiers.

APPENDIX A: SURVEY DATA[1]

QUESTION	GCM CA*		SJA**		OTHER JA***		RETIRED 0-10		RETIRED**** JAGC GO		OTHER*****	
	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO
1. Should the general prohibition which precludes pretrial confinement for persons charged only with minor offenses be retained?	14	10	13	7	58	20	20	10	7	0	169	102
2. Should a service member have the right to decline nonjudicial punishment and demand trial by court-martial?	6	21	3	17	41	35	17	15	2	5	138	134
3. Should the punishments authorized for a company grade Article 15 for enlisted members be expanded to include confinement at hard labor for some period?	15	10	11	10	24	52	15	17	3	4	131	148
How many days? (Median) ...	30 days		14 days				7 days		7 days		14 days	

QUESTION	GCM CA*		SJA**		OTHER JA***		RETIRED 0-10		RETIRED**** JAGC GO		OTHER*****	
	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO
4. Should field-grade Article 15 punishments for enlisted service members be expanded to include confinement at hard labor?	21	4	18	3	27	37	21	11	5	2	216	57
How many days? (Median)	30 days		30 days				30 days		14 days		30 days	
5 Should confinement at hard labor, imposed under Article 15, if deemed appropriate, necessarily be limited to specified lower enlisted grades?	14	10	13	8	30	32	19	10	4	2	148	118
6. If authorized, should confinement imposed on enlisted service members under Article 15 automatically require reduction to pay grade E-1?	10	15	3	18	12	52	15	16	2	4	90	158
7. As to nonjudicial punishment of officers, should imposing												

commanders other than general or flag officers have broader powers, i.e., forfeiture of pay? ...	15	10	13	6	37	39	15	16	1	6	177	94
8a. Should commanders be authorized to delegate to other individuals their authority to administer nonjudicial punishment?	9	16	8	13	27	53	7	25	4	3	63	209
b. If so, should the commander have the power to delegate to noncommissioned officers nonjudicial punishment authority over lower ranking enlisted service members?	2	16	0	16	16	47	4	23	0	6	37	162
9. Should service members be denied the right to appeal Article 15 punishments?	4	23	2	19	11	65	14	17	1	6	43	230
10. Should appeals of certain Article 15 punishments continue to be referred to a judge advocate for review and advice?	16	9	14	6	60	17	16	13	6	1	139	134

QUESTION	GCM CA*		SJA**		OTHER JA***		RETIRED 0-10		RETIRED**** JAGC GO		OTHER*****	
	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO
11. Should any Article 15 punishment be delayed for any period while an appeal is pending?	5	20	4	16	35	41	6	23	4	3	97	175
12. Should the service member be accorded the right to consult with counsel before accepting or rejecting nonjudicial punishment?	6	19	7	14	37	40	13	19	2	4	101	166
13a. Should Article 15 punishments which do not involve reduction or forfeiture be required to be recorded in writing?	17	8	15	5	42	26	20	11	5	2	181	93
b. If so, should the Army return to the use of a company punishment book?	17	5	15	3	41	19	19	10	4	2	175	66
14. Should summary courts-martial be eliminated?	7	20	6	15	31	45	7	24	1	6	76	193

15. If summary courts-martial[2] are retained, should punishment authority be expanded?	15	8	13	6	31	37	16	10	2	4	158	93
16. If summary courts-martial are retained, should a service member have the right to refuse trial by summary court?	6	18	3	16	43	33	11	19	1	5	93	174
17. Should the punishment[3] authority of special courts-martial be expanded?	17	10	17	4	43	34	8	18	0	7	98	167
18. In trials with court[4] members, should the detailed military judge determine the *sentence* in all instances?	5	23	8	14	35	42	4	26	1	6	60	211
19. Should trials before court members be eliminated, i.e., all cases would be tried before a military judge alone?	1	26	2	18	16	56	0	30	0	7	29	241
20. Should commanders' authority to convene courts-martial be eliminated and that authority transferred to staff judge advocates?	1	26	0	20	36	37	0	31	1	5	14	257

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24. If commanders retain the authority to convene courts-martial, should they be allowed to delegate the following functions:												
a. Selection of court members?	16	11	13	7	42	34	16	16	4	3	153	118
b. Granting of immunity to potential witnesses?	14	13	11	8	46	30	16	14	6	1	101	169
25. Should the service secretaries or some other authority be allowed to suspend the right to civilian counsel in areas of hostility?	24	2	20	1	62	16	30	2	5	1	240	19
26. Should the "Article 32 pretrial investigation" be eliminated?	11	16	9	13	38	39	7	23	0	7	119	151

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QUESTION	GCM CA*		SJA**		OTHER JA***		RETIRED 0-10		RETIRED**** JAGC GO		OTHER*****	
	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO
b. Alternatively, would the provision of legal services be enhanced by assigning all legal clerks to the office of the staff judge advocate?	3	19	3	14	34	41	13	11	1	3	31	231
35a. Should some court reporters and judge advocates be located with battalions?	6	19	3	15	15	61	6	19	1	4	164	102
b. Should some of these legal resources be located at the brigade level?	17	6	9	9	45	28	17	9	6	0	232	37
c. Alternatively, should these legal resources be located only at the division rear?	6	16	12	4	31	36	13	15	0	3	49	209
36. Generally, within a combat theater, in what geographical area(s) should court-martial cases be tried?												

Units above corps	8		4		9		15		3		57	
Corps	11		11		21		15		3		109	
Division rear	20		17		50		27		6		184	
Forward brigade	7		8		23		9		2		60	
Forward battalion	1		4		3		5		1		24	
37. Is it critically important in wartime that the military have jurisdiction to court-martial civilian employees and contractor employees serving overseas?	25	1	20	1	50	25	27	4	4	2	219	36

* General court-martial convening authorities
** Staff judge advocates
*** Other judge advocates
**** Retired judge advocate general officers
***** Primarily commanders and staff officers, grades 0-3 through 0-8

[1]Total number of responses for each group vary from question to question because of lack of response to some questions.

[2]Most common recommendation: Confinement for 3 months. Suggestions ranged from confinement for 45 days to confinement for 6 months. Some suggestions to extend confinement to higher grades.

[3]Most common recommendation: Confinement for 1 year. Several suggestions that every special court-martial be empowered to adjudge a bad-conduct discharge.

[4]Many respondents would allow the military judge to determine the sentence in every case in which the acused pleads guilty to all charges and in all special courts-martial not empowered to adjudge a bad-conduct discharge.

APPENDIX B: SURVEY COMMENTS

In the last analysis, a disciplined, effective military force is far more the product of good leadership than a smooth-running punitive process. The court-martial, good as it may be, is a narrow and limited deterrent to misconduct. It is, especially in wartime, essentially an alternative tool for a commander to be used when other, more effective, methods have failed or are likely to do so. And its employment cannot be allowed to derogate mission accomplishment. On the contrary, the military justice system should be employed only to support mission accomplishment in times of military stress. Keeping these factors in mind is essential to the value and timeliness of the study you have initiated.

The military justice system should not, indeed, it must not, become a haven for those who wish to avoid their fair share of duty, risks, and responsibilities. And the system should be such that when the stress is finally overcome and peacetime normality returns, the malefactors who did not do their duty do not share equally with those who loyally and properly performed their jobs as soldiers.

—Retired JAGC general officer (0-8)

The military justice system has become considerably more complex over the years since World War II. Perhaps the most bothersome aspect of these changes is a perception among the younger officers that the system is too laborious administratively. In seeking to improve the system anything that could be done to reduce the time delay between the commission of an offense and the ultimate sentencing by a court-martial would be a major step forward in assisting commanders. Obviously, the rights of the individual must be protected, but ofttimes it appears that the system has gone so far in this regard that it overlooks the fact that the purpose of the military justice system is to support the commander in maintaining good order and discipline in his unit. Obviously, this issue is further compounded during combat situations.

—Retired general officer (0-10)

Overall, we have a good system, but some streamlining of procedures is possible. We are often too prone to destroy systems that work well in the interest of management efficiency and then end up with

confusion and greater problems. Military justice is too important to trifle with unnecessarily.

—General court-martial convening authority (O-8)

For a commander at any level, the essence of maintaining good order and discipline during combat is the quality of leadership demonstrated by officers and non-commissioned officers at all levels of command. Whether our democratic system relies upon volunteers or conscripts, it is not the details of our military justice system that determine the ultimate success of a commander, but the respect and confidence the individual soldier has in his leaders. Americans, acutely conscious of our system of justice in peacetime, cannot be expected to set aside practices which affect assumed constitutional rights in the interest of what we might consider to be greater efficiency in combat. Accordingly, I counsel against potential shortcuts to military justice considered in the interest of efficiency in combat.

—Retired general officer (O-10)

The present disciplinary system will, with some modifications, accommodate the need for discipline in nearly any conventional warfare situation. On a nuclear battlefield, however, where smaller units are likely to become dispersed and isolated and the need for discipline is paramount, the commander should have extraordinary summary punitive authority.

—Retired general officer (O-10)

If general hostilities were to commence in Europe, there would be no time to convene courts, conduct investigations, etc. With an expected casualty rate of 25-50% in the first 3 to 10 days, friendly and enemy units intermingled, friendly units split up, and command posts heavily attrited and constantly moving, the military justice system as we know it will be irrelevant. Fighting for survival and on the edge of the nuclear threshold, justice and discipline will have two essential aspects: (1) the discipline learned in peacetime will carry over, and (2) at the height of WWIII in Europe, justice will be summary and unrecorded. Confinement is out of the question. With no individual replacements available, every soldier will stay and fight.

We must protect commanders who take reasonable measures designed to preserve the fighting force. Commanders who survive

should not be punished for taking actions necessary to preserve their units.

—Brigade commander (O-6)

Military justice today is overly technical and vastly over-lawyered. But before dismissing out of hand all changes effected since 1920, it is essential to examine the conditions that led to those changes. Those charged with the present project should read and study the legislative history of enactments since 1920.

—Retired JAGC colonel (O-6)

Retain and strengthen the commander's authority. I honestly believe that, with rare exception, all commanders understand and respect our justice system and do not deliberately or consciously tamper with it or try to influence it. But I urge allowing commanders to delegate some or all of their Military Justice powers.

—Retired JAGC general officer (O-7)

The commander is the custodian of the disciplinary system and he is responsible for discipline and good order. Do not allow him to divest himself of his role.

—Retired general officer (O-10)

The commander, not the judge advocate, must be responsible for discipline. The commander must be responsible for his acts and can not hide behind the judge advocate.

—Retired general officer (O-10)

The legal system has become too centralized at too high a level. We must enhance the authority of the commander in the legal system and in all areas.

—Retired general officer (O-10)

In reviewing the requirements placed on a commander during combat some may consider the military justice system a distraction, but it is essential that the system continue to be responsive to the commander's needs. I do not believe it is in the best interests of the Army for the commander to be relieved of his responsibilities for administering military justice merely because of a combat environment. The key question should be how to relieve the commander of some of the details relating to the administration of the military

justice system, but at the same time, allow him to retain responsibility for the system.

—Retired general officer (O-10)

Return Article 15 to the chain of command and let the lawyers take care of the judicial system.

—Group commander (O-6)

Even in peacetime, I think that lawyers should be removed from being involved in Article 15 proceedings. The present procedures are overly complicated and time consuming. The Army should return to using the unit punishment book and eliminate the present rules on filing records of NJP.

—Judge advocate (O-5)

In wartime, commanders should keep courts-martial to a minimum, generally using them only to rid the service of those members who can not or will not soldier, all the while seeking to preserve manpower. Personnel in confinement, awaiting trial, and the like do not contribute to the war effort.

—Retired general officer (O-10)

One punishment authorized under Article 15 should be transfer to a front-line unit.

—Brigade-level commander (O-6)

The irony in a combat situation where people can and are being killed is that there is no punishment which can equal the danger you face. Many times, in fact, punishment which removes a man from front-line duty is seen more as a reward. If you used an approach habitually which put a man in confinement you could end up with no one in the trenches.

—Battalion commander (O-5)

Concerning summary courts-martial, we need to take whatever action is necessary to give a commander authority to impose summary punishment, to include some period of confinement. If it is to be "summary," it must be by a summary court officer (or judge) acting alone without the interjection of a defense counsel which causes delay.

—Retired JAGC general officer (O-7)

The summary court-martial should be eliminated. There are too many green, uneducated youngsters passing judgment on other green, youthful offenders.

—Retired general officer (O-10)

I favor a system which decentralizes the administration of justice. We should be very careful in how we select and train our officers, and then invest them with the disciplinary powers necessary to perform their functions properly.

—Retired general officer (O-10)

On the next battlefield, brigade commanders must have GCM convening authority. That will be a life and death decision which should be made where life and death decisions are routinely made.

—Division artillery commander (O-6)

APPENDIX C:

Proposed Modifications in Punitive Powers—NJP & SCM

1. Nonjudicial punishment (Article 15):

a. Permit use of reasonable restraint for enforcement of correctional custody, and allow imposition of correctional custody upon all EM in pay grades E-5 and below.

b. Eliminate right to consult with legal counsel prior to imposition of NJP.

c. Allow summarized proceedings for field-grade restriction, extra duty and correctional custody.

d. Eliminate right to demand trial by court-martial.

e. Reduction authority:

Over Enlisted Personnel

Level	*May reduce*
Commanding officers in pay grade 0-3 and below	E-4 and below to E-1 or intermediate pay grade E-5 not more than one pay grade
Commanding officers in pay grades of 0-4 and 0-5	E-4 and below to E-1 or intermediate pay grade E-5 and E-6 not more than two pay grades
Commanding officers in pay grade 0-6	E-4 and below to E-1 or intermediate pay grade E-5 and E-6 not more than three pay grades E-7, E-8 and E-9 not more than two pay grades
General officer commanders	E-4 and below to E-1 or intermediate pay grade E-5 and E-6 not more than three pay grades E-7, E-8 and E-9 not more than two pay grades

f. Additional punitive powers over officers:

Level	*May impose*
Commanding officers in pay grade 0-6	Forfeiture or detention of not more than 1/2 of 1 month's pay for 2 months
Commanding officers in pay grades 0-7 and higher	Forfeiture or detention of not more than 1/2 of 1 month's pay for 2 months

2. Summary courts-martial:

a. Allow imposition of CHL for three months and forfeiture of 2/3 pay per month for three months.

b. Allow imposition of CHL and hard labor without confinement for pay grades E-6 and below.

c. Eliminate right to refuse trial by SCM for pay grades E-6 and below.

d. Eliminate right to consult with legal counsel prior to trial by SCM.

e. Eliminate automatic reduction provision for SCM sentences of CHL and hard labor without confinement.

APPENDIX D: CHARGE SHEET

PERSONAL DATA		
ACCUSED (Last name, first name, middle initial) Doe John	SERVICE NUMBER 000-00-0000	GRADE OR RANK AND PAY GRADE SGT E5

UNIT OR ORGANIZATION (including branch of service)
Company A, 1st Battalion, 7th Infantry, Fort Blank, Missouri US Army

PAY PER MONTH	NATURE OF RESTRAINT OF ACCUSED	DATE
BASIC:$700 SEA OR FOREIGN DUTY: TOTAL:$700	Confinement	6 Sep 82

CHARGES

Charge 1: Article 80. In that the accused did, at Fort Blank, Missouri, on or about 21 May 1982, attempt to steal a watch, of a value of about $50, the property of Sergeant Sam Jones.

Article 86. In that the accused did, on or about the dates alleged in Charges 2 through 4, without authority, absent himself from his unit, to wit: Company A, 1st Battalion, 7th Infantry, located at Fort Blank, Missouri, and did remain so absent until on or about the dates alleged hereinafter in each charge.

Charge	Inception date	Termination Date
2	24 June 1982	25 June 1982
3	28 June 1982	1 July 1982
4	12 July 1982	6 September 1982

Article 123a. In that the accused did, at Fort Blank, Missouri, on or about the dates alleged in Charges 5 through 7, with intent to defraud and for the procurement of lawful currency or a thing of value, as alleged hereinafter, wrongfully and unlawfully make a certain check for the payment of money upon the Moniteau National Bank in words and figures as alleged hereinafter, then knowing that he, the maker thereof, did not or would not have sufficient funds in or credit with such bank for the payment of said check in full upon its presentment.

Charge	Date of check	Number of check	Payee	Amount of check	Currency or item procured
5	2 July 1982	101	AAFES	$50.00	$50.00 U.S. Currency
6	4 July 1982	102	Richard Roe	$124.00	Camera
7	5 July 1982	103	AAFES	$498.40	Microwave oven

JURISDICTIONAL BASIS (for Charges 1,5,6 and 7):
1. The offenses were committed on a military installation subject to the exclusive jurisdiction of the US Government.
2. The victims of Charges 1 and 6 were military servicemembers.
3. The victim of Charges 5 and 7 is an instrumentality of the US Army.
4. The offenses posed a threat to the military post and personnel and activities located thereon.
5. The charges are among those traditionally prosecuted in courts-martial.

APPENDIX E

ILLUSTRATIVE PROPOSED PROMULGATING ORDER

DEPARTMENT OF THE ARMY
Headquarters, 20th Infantry Division
Fort Blank, Missouri 63889

GENERAL COURT-MARTIAL ORDER NUMBER 3 — 26 February 1982

Private (E2) John Doe, 102-23-6017, US Army, Company A, 1st Battalion, 66th Infantry, Fort Blank, Missouri 63889 was tried with the following results:

Charge 1: Article 85. Desertion from 16 August 1979 until 31 December 1981. Plea: Not guilty. Finding: Guilty.

Charge 2: Article 121. Larceny of property of a value of $200 on 16 August 1979. Plea: Not guilty. Finding: Not guilty.

Sentence adjudged on 29 January 1982:

Dishonorable discharge, forfeiture of all pay and allowances, confinement at hard labor for 18 months, and reduction to E1.

ACTION

In the case of Private (E2) John Doe, the sentence is approved. The forfeitures shall apply to pay and allowances becoming due on or after the date of this action. The service of the sentence to confinement was deferred on 1 February 1982, and the deferment is rescinded effective this date.

BY COMMAND OF MAJOR GENERAL BLUNT:

DISTRIBUTION:

/s/ James S. Slade
JAMES S. SLADE
CW2, USA
Acting Asst AG

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EDITOR *(Name and Complete Mailing Address)*

CPT Stephen J. Kaczynski, The Judge Advocate General's School, Charlottesville, VA 22901

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