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**BOOK REVIEWS**

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## MILITARY LAW REVIEW

**SUBMISSION OF WRITINGS:** Articles, comments, recent development notes, and book reviews should be submitted typed in duplicate, double-spaced, to the Editor, *Military Law Review*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903-1781.

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## THESIS TOPICS OF THE 35TH JUDGE ADVOCATE OFFICER GRADUATE COURSE

Twenty-one students from the 35th Judge Advocate Officer Graduate Course, which graduated in May 1987, participated in the Thesis Program. The Thesis Program is an optional part of the graduate course curriculum. It provides students an opportunity to exercise and improve analytical, research, and writing skills and, equally important, to produce publishable articles that will contribute materially to the military legal community.

All graduate course theses, including those of the 35th Graduate Course, are available for reading in the library of The Judge Advocate General's School. They are excellent research sources. In addition, many are published in the *Military Law Review*. For example, the *Review* will publish many of the theses from the 35th Graduate Course in future issues.

Following is a listing, by author and title, of the theses of the 35th Judge Advocate Officer Graduate Course:

Captain David E. Bell, *Asset Forfeiture: A Weapon in the War Against Drugs*.

Captain William Charters, *Automation of The Judge Advocate General's Corps: A Primer*.

Captain Alan D. Chute, *Due Process and Unavailable Evidence*.

Captain Michael Ditton, *The Doctrine of Primary Jurisdiction and Federal Procurement Fraud: The Role of the Boards of Contract Appeals*.

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# THE STATUTE OF LIMITATIONS AS APPLIED TO MEDICAL MALPRACTICE ACTIONS BROUGHT UNDER THE FEDERAL TORT CLAIMS ACT

by Lieutenant Colonel Carl T. Grasso\*

## I. IMPORTANCE TO MEMBERS OF THE MILITARY

Suits under the Federal Tort Claims Act (FTCA) are, of course, brought against the United States Government. Service members may not sue under the FTCA for "service-connected" injuries, including those resulting from medical malpractice, because of the doctrine announced in *Feres v. United States*.<sup>1</sup> Why then should statutes of limitations in medical malpractice actions under the FTCA be of interest to service members?

There are several reasons why this area of the law should be of special interest to all members of the military. First, a service member's spouse and children are entitled to free medical care at government facilities, and the *Feres* doctrine in no way bars suit on their behalf. The federal case reporters are filled with suits alleging medical malpractice committed upon service members' dependents in the course of receiving this free care.<sup>2</sup> The statute

\*Judge Advocate General's Corps, United States Army Reserve. Attorney Associate, Herzfeld & Rubin, P.C., New York, New York. Currently assigned as Legislative and Legal Officer, 353d Civil Affairs Command (USAR), Bronx, New York. Formerly assigned as Assistant Staff Judge Advocate, 301st Support Group (USAR), Fort Totten, New York, 1985; Assistant Staff Judge Advocate, 8th Medical Brigade (USAR), Fort Hamilton, New York, 1983 to 1985; Commander, 305th Engineer Detachment (Real Estate) (USAR), 1980 to 1983; various staff positions, 411th Engineer Brigade (USAR), Brooklyn, New York, 1974 to 1980. B.S., Polytechnic Institute of Brooklyn, 1969; J.D. (cum laude), New York Law School, 1979. Graduate, Command and General Staff College, 1981; Judge Advocate Officer Advanced Course, 1986; Judge Advocate Officer Basic Course, 1984. Member of the bars of the State of New York and the United States District Courts for the Eastern and the Southern Districts of New York. This article was originally submitted in satisfaction of the writing requirement of the Judge Advocate Officer Advanced Course.

<sup>1</sup>340 U.S. 135 (1950).

<sup>2</sup>Of the sixty-seven FTCA medical malpractice cases discussed in this article, twenty-four (36%) were brought on behalf of dependents treated at military service medical facilities. Thirty-six (54%) were brought by ex-service members treated at VA or PHS facilities, or retirees treated at active military facilities. The remaining seven cases (10%) were brought by seamen entitled to PHS care, individuals treated by medical personnel employed by the government, or federal prisoners.

of limitations is especially important to a service member's minor dependents because, unlike the vast majority of civil jurisdictions, the FTCA recognizes no tolling of the statute of limitations until a claimant has come of age.<sup>3</sup> This can (and has) resulted in rather harsh consequences against small children in the medical malpractice area, e.g., *Arvayo v. United States*,<sup>4</sup> *Fernandez v. United States*<sup>5</sup> or *Camire v. United States*.<sup>6</sup> In each of these cases, the courts held that claims of minor children were time-barred, notwithstanding the child's minority. Clearly, the statute of limitations concern is far from academic.

Second, service members do not remain on active duty forever. In *United States v. Brown*,<sup>7</sup> the Supreme Court specifically sanctioned a medical malpractice suit brought by an honorably discharged serviceman who was treated in a Veterans Administration hospital for a service-connected injury. The Court held that the *Feres* doctrine did not apply, but rather that the rationale of an earlier case, *Brooks v. United States*,<sup>8</sup> controlled:

The injury [malpractice] for which suit was brought [in *Brown*] was not incurred while respondent was on active duty or subject to military discipline. The injury occurred after his discharge, while he enjoyed a civilian status. . . . unlike the claims in the *Feres* case, this one is not foreign to the broad pattern of liability which the United States undertook by the Tort Claims Act . . . .<sup>9</sup>

Many cases have been brought by veterans who received treatment at VA facilities, for service-connected problems as well as problems arising after their military service ended. Also, the language in *Brown* is broad enough to encompass military retirees receiving treatment (in "civilian status") at active military facilities.

Finally, although the *Feres* doctrine is in force today, it may not always remain so. The Supreme Court in *Feres* made it clear that it was interpreting the FTCA largely in a vacuum, without

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<sup>3</sup>28 U.S.C. § 2401(b) (1982); see *Jastremski v. United States*, 737 F.2d 666, 669 (7th Cir. 1984) ("the parents or guardian of a minor must bring the minor's claim in a timely fashion because the child's minority does not toll the running of the federal tort claims statute of limitations. *Leonhard v. United States*, 633 F.2d 599, 624 (2d Cir. 1980), cert. den. 451 U.S. 908, 101 S.Ct. 1975, 68 L.Ed.2d 295 (1981)").

<sup>4</sup>766 F.2d 1416 (10th Cir. 1985).

<sup>5</sup>673 F.2d 269 (9th Cir. 1982).

<sup>6</sup>535 F.2d 749 (2d Cir. 1976), on remand, 489 F. Supp. 998 (N.D.N.Y. 1980).

<sup>7</sup>348 U.S. 110 (1954).

<sup>8</sup>337 U.S. 49 (1949).

<sup>9</sup>*Brown*, 348 U.S. at 112.

clear indications of Congressional intent:

There are few guiding materials for our task of statutory construction. No committee reports or floor debates disclose what effect the statute was designed to have on the problem before us, or that it was even in mind. Under these circumstances, no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy.<sup>10</sup>

In the years since *Feres* was decided, Congress has been silent in terms of legislation affecting the Supreme Court's decision, but this could well change in the near future. In July 1985 the House of Representatives had before it a bill to legislatively overrule *Feres* in medical malpractice cases, and the House Judiciary Subcommittee on Administrative Law took testimony in public hearings on the question. All of the public (as opposed to governmental) witnesses at hearings conducted on 8 and 9 July 1985 spoke in favor of the bill.<sup>11</sup> In fact, there is a citizens group, "Civilians Against Military Injustice" (CAMI), made up of service persons, ex-service persons, and spouses, whose main purpose is to lobby for passage of the bill; most of the testimony before the committee was from members of CAMI. The bill, renumbered H.R. 3174,<sup>12</sup> was approved by voice vote by the House Judiciary

<sup>10</sup>*Feres*, 340 U.S. at 138.

<sup>11</sup>Hearings on H.R. 1161 before the House Committee on the Judiciary, 99th Cong., 1st Sess. (1985).

<sup>12</sup>H.R. 3174, 99th Cong., 1st Sess. (1985). It would have added a new section, § 2681, to Title 28, Chapter 171—Tort Claims Procedure. The text was as follows:

§ 2681. Certain claims by members of the Armed Forces

(a) CLAIMS OF MEMBERS OF ARMED FORCES.—Subject to all the provisions of this chapter, claims may be brought under this chapter for damages against the United States for personal injury or death of a member of the Armed Forces serving on active duty or on full-time National Guard duty (as defined in section 101(42) of title 10), under the conditions prescribed in this section.

(b) WHERE CARE PERFORMED.—The personal injury or death referred to in subsection (a) must have arisen out of medical or dental care furnished the member of the Armed Forces in a fixed medical treatment facility operated by the Secretary of a military department or any other fixed medical facility operated by the United States.

(c) DEFINITION.—For purposes of this section, a fixed medical facility is a medical center, hospital, or clinic that is located in a building, structure, or other improvement to real property.

(d) REDUCTION OF CLAIMS BY OTHER BENEFITS.—The payment of any claim of a member of the Armed Forces under this section shall be reduced by the present value of other benefits received by the member and the member's estate, survivors and beneficiaries, under title 10, title 37, or title 38 that are attributable to the physical injury or death from which the claim arose.

Committee,<sup>13</sup> and passed the House of Representatives on October 7, 1985. While the bill failed to pass the Senate, the level of interest indicates that *Feres* may be legislatively overruled, allowing service members on active duty at the time of medical treatment to sue the United States under the FTCA.<sup>14</sup>

## II. THE BASIC DOCTRINE AND *UNITED STATES V. KUBRICK*

In ordinary tort cases alleging negligence, the statute of limitations begins to run at the time of the injury, which usually occurs simultaneously with the negligent act. The Federal Tort Claims Act clearly contemplated something of this nature:

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency *within two years after such claim accrues* or unless action is begun within six months after the date of the mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.<sup>15</sup>

The emphasized phrase, "within two years after such claim accrues" has been the subject of much litigation.

Classical analysis of when a claim "accrues" treated medical malpractice actions like other run-of-the-mill torts: a claim "accrued" when the culpable conduct caused an "injury." Early on, the unfairness of this doctrine in medical malpractice actions became apparent; often the "injury," although caused immediately by the practitioner's negligence, was not known by the plaintiff, or, for that matter, by the practitioner. Also, the "injury" was frequently not an abrupt thing, but rather developed over a considerable period of time after the negligent acts.

*Urie v. Thompson*<sup>16</sup> adopted the "discovery" doctrine in a Federal Employers' Liability Act (FELA) case brought by a worker who developed silicosis after inhaling silica dust for years. The Supreme Court found that if plaintiff were time barred, "[i]t would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with

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<sup>13</sup>H.R. Rep. No. 99-288, 99th Cong., 1st Sess. (1985).

<sup>14</sup>Bills to partially overturn *Feres* were reintroduced in both the Senate and the House of Representatives at the start of the current legislative session. See S. 347 and H.R. 1054, 100th Cong., 1st Sess. (1987).

<sup>15</sup>28 U.S.C. § 2401(b) (1982).

<sup>16</sup>337 U.S. 163 (1949).

knowledge of the slow and tragic disintegration of his lungs . . ."<sup>17</sup> The Court said "we do not think that the humane legislative plan intended such consequences to attach to blameless ignorance"<sup>18</sup> and also that to bar recovery was not consistent with "the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights."<sup>19</sup>

If there was any doubt that the "discovery" doctrine applied to medical malpractice cases brought under the FTCA, the Supreme Court laid them to rest in *United States v. Kubrick*.<sup>20</sup> However, in affirming the "discovery" doctrine (which already had been used for years at the circuit court level),<sup>21</sup> the Supreme Court opened the door only part way.

The "rule" as stated in the earlier circuit court cases was that "a malpractice action against the United States can be maintained within two years after the claimant discovered, or in the exercise of reasonable diligence should have discovered, the existence of the acts of malpractice upon which his claim is based."<sup>22</sup> This rule, although high-sounding, was flexible enough to mean almost anything a sympathetic court wanted it to mean, and a trend developed in a number of circuits that greatly expanded the discovery rule.<sup>23</sup> In *Kubrick*, the Supreme Court cut back considerably on the federal courts' ability to expansively interpret the discovery rule.

In April 1968 Kubrick was treated at a VA hospital for an infection in his right leg. The treatment included direct irrigation with the antibiotic neomycin. About six weeks after his discharge, Kubrick noted difficulties with a totally different part of his body: a ringing sensation in his ears and some hearing loss. A private physician, Dr. Soma, diagnosed his condition as bilateral nerve deafness, and another private physician, Dr. Sataloff, after reviewing the VA hospital records, told Kubrick in January 1969 "that it was highly possible that the hearing loss was the result of the neomycin treatment."<sup>24</sup> Kubrick apparently believed him, because he filed for an increase in VA benefits, citing this

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<sup>17</sup>*Id.* at 169.

<sup>18</sup>*Id.* at 170.

<sup>19</sup>*Id.* at 170 (emphasis added).

<sup>20</sup>444 U.S. 111 (1980).

<sup>21</sup>*E.g.*, *Quinton v. United States*, 304 F.2d 234 (5th Cir. 1962); *Hungerford v. United States*, 307 F.2d 99 (9th Cir. 1962).

<sup>22</sup>*Quinton v. United States*, 304 F.2d at 235.

<sup>23</sup>*See, e.g.*, cases cited in *Kubrick*, 444 U.S. at 121 n.8.

<sup>24</sup>*Kubrick*, 444 U.S. at 114.

condition as having been caused by the neomycin treatment (he was already receiving payments for a service-connected disability). The VA denied the claim in September 1969, and in the course of his administrative appeal, Kubrick was told by Dr. Soma on June 2, 1971 "that the neomycin caused his injury and *should not have been administered.*"<sup>25</sup> Kubrick then consulted an attorney and eventually filed suit (actually prior to his filing an administrative claim; this irregularity was held moot by the District Court, however, and was not pursued on appeal).

The District Court did not "believe it reasonable to start the statute running until the plaintiff had reason at least to suspect that a legal duty to him had been breached."<sup>26</sup> For Kubrick, this did not happen until he heard it from Dr. Soma in June 1971. The Third Circuit affirmed, holding that even though a plaintiff knows of his injury and that the defendant caused it, the statute of limitations does not run where plaintiff shows that "in the exercise of due diligence he did not know, nor should he have known, facts which would have alerted a reasonable person to the possibility that the treatment was improper."<sup>27</sup>

The Supreme Court framed the issue as follows: ". . . whether the claim 'accrues' within the meaning of the Act when the plaintiff knows both the existence and the cause of his injury or at a later time when he also knows that the acts inflicting the injury may constitute medical malpractice."<sup>28</sup>

The court, almost in passing, adopted the "discovery" rule, citing *Urie v. Thompson*<sup>29</sup> and the "wave of recent decisions" analyzed in the Restatement of Torts, all in a footnote.<sup>30</sup> Interestingly, the Restatement cited by the Supreme Court only said that this "wave" of decisions construed statutes of limitations "as not intended to start to run until the plaintiff has in fact discovered the fact that he has suffered injury or by the exercise of reasonable diligence should have discovered it."<sup>31</sup> This Restatement rule, focusing on discovery of the injury and ignoring knowledge or lack of knowledge of the *cause* of the injury, is actually more restrictive than the rule approved in *Kubrick*.<sup>32</sup>

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<sup>25</sup>*Id.* at 114 (emphasis added).

<sup>26</sup>436 F. Supp. 166, 185 (E.D. Pa. 1977).

<sup>27</sup>581 F.2d 1092, 1097 (3d Cir. 1978).

<sup>28</sup>*Kubrick*, 444 U.S. at 113.

<sup>29</sup>337 U.S. 163 (1949).

<sup>30</sup>*Kubrick*, 444 U.S. at 120 n.7.

<sup>31</sup>Restatement (Second) of Torts, § 899, Comment e, at 444-45 (1979).

<sup>32</sup>The Supreme Court did not adopt the cited Restatement rule, which would

The Supreme Court held that Kubrick's claim accrued when he both knew of his injury, and what caused it. The court found that Kubrick "was aware of these essential facts in January 1969,"<sup>33</sup> i.e., when Dr. Sataloff told him what had caused his injury. The Court was "unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment."<sup>34</sup>

The Supreme Court drew a clear distinction between "knowledge" of the injury and what caused it, and "knowledge" that the cause of the injury amounted to negligence. Until an injury manifests itself, the plaintiff probably cannot even know he has been "injured," and "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least, very difficult to obtain."<sup>35</sup> The Supreme Court has thus accepted that even after a plaintiff knows of an injury, he may still have no reason to suspect the cause, and it is unlikely that the defendants will come forward and tell plaintiff that their treatment caused his injury.<sup>36</sup> The Supreme Court then made the point:

The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask.<sup>37</sup>

The Supreme Court has thus imposed upon plaintiff a modicum of effort to preserve his cause of action: once he knows who injured him, he should consult with an attorney or another doctor (or probably both), and should do this "promptly," within two years of when he gained the knowledge: "To excuse him from promptly doing so by postponing the accrual of his claims would undermine the purpose of the limitations statute, which is to

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have started the period running six weeks after Kubrick's discharge, i.e., when he first became aware of his hearing problems.

<sup>33</sup>*Kubrick*, 444 U.S. at 121.

<sup>34</sup>*Id.* at 122.

<sup>35</sup>*Id.*

<sup>36</sup>The Supreme Court did not discuss whether in the context of a doctor-patient relationship a "fiduciary" duty arises to reveal acts of culpability, or whether silence was equivalent to concealment. See, e.g., *Harrison v. United States*, 708 F.2d 1023 (5th Cir. 1983).

<sup>37</sup>*Id.* at 122.

require the reasonably diligent presentation of tort claims against the Government."<sup>38</sup>

There was a strong dissent by three justices, who asserted, without citing any cases, that the majority had overruled "the rule that has been applied in the federal courts . . . that the statute of limitations does not begin to run until after fair notice of the invasion of the plaintiff's legal rights."<sup>39</sup> The dissent asserted there were "essentially" two possible approaches to interpreting "accrues": (1) at the moment of injury, disregarding harsh consequences or (2) ". . . when a diligent plaintiff has knowledge of facts sufficient to put him on notice of an invasion of his legal rights."<sup>40</sup> The "invasion of legal rights" language comes directly from *Urie v. Thompson*<sup>41</sup> The dissent argued that "a fair application of this rule" cannot distinguish between plaintiff's knowledge of the cause of his injury and knowledge that his doctor was negligent. "[I]n both situations the typical plaintiff will, and normally should, rely on his doctor's explanation of the situation."<sup>42</sup>

Essentially, the dissent argued that a prospective plaintiff normally should rely on the defendant's explanations, and the statute should not run until the defendant admits negligence, or the plaintiff learns of the negligence from some other source. In *Kubrick* the dissent pointed to the government's denial that it was negligent. The logical extension of this reasoning would toll the statute whenever the defendant denies negligence. As "negligence" is nearly always in dispute, such reasoning would effectively do away with the statute of limitations altogether. This situation is to be distinguished from that where a defendant has actually concealed information from the plaintiff, i.e., committed fraud (fraud has traditionally tolled statutes of limitations). The dissent pointed to "what may have been a fabrication"<sup>43</sup> by the government; the majority, however, considered this to be a mere dispute over liability. Courts faced with particularly egregious

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<sup>38</sup>*Id.* at 123.

<sup>39</sup>*Id.* at 126. The majority did address this assertion in footnote 8, citing three circuit court decisions rendered before, and one after, the Third Circuit's holding in *Kubrick*: *Exnicious v. United States*, 563 F.2d 418 (10th Cir. 1977); *Bridgford v. United States*, 550 F.2d 978 (4th Cir. 1977); *Jordan v. United States*, 503 F.2d 620 (6th Cir. 1974); *DeWitt v. United States*, 593 F.2d 276 (7th Cir. 1979). The majority found these cases "departures from the general rule and . . . of quite recent vintage." They also distinguished *Urie* and *Quinton*. See *id.* at 126 n.8.

<sup>40</sup>*Id.* at 126. Compare the Fifth Circuit's analysis in *Lavallee v. Listi*, 611 F.2d 1129 (5th Cir. 1980), discussed *infra* text accompanying notes 357-63.

<sup>41</sup>337 U.S. at 170.

<sup>42</sup>*Kubrick*, 444 U.S. at 127.

<sup>43</sup>*Id.* at 128.



conduct by a defendant government agency have found ways to "finesse" the *Kubrick* rule.<sup>44</sup> No such case has gotten as far as the Supreme Court yet, and it may be that the Justice Department would not be interested in petitioning for certiorari in these circumstances.<sup>45</sup>

In the simplest injury situation, a person is injured, knows he is injured, and knows who injured him. If the person is ignorant, naive or otherwise grossly uninformed so as not to realize that his "legal rights" have been violated, and does not know enough to consult an attorney, few people would suggest that he should not be held to an applicable statute of limitations that bars his otherwise valid claim. There is no logical reason why the Government should be treated differently than any other prospective defendant, or held to some higher standard of accountability. The intent of the FTCA was clearly the opposite: it created causes of action against the government only where ordinary legal entities could already have been sued, and the period of limitation is actually shorter than many state statutes of limitations for torts or medical malpractice claims. The Supreme Court in *Kubrick* apparently intended to put a plaintiff alleging injuries through medical malpractice on a similar footing with other personal injury plaintiffs. If a person is injured, whether from being struck by a car or through a doctor's negligence, the statute should start to run when the injury manifests itself and the person knows the cause of his injury, whether he learns it when he regains consciousness in the hospital,<sup>46</sup> or when he learns his injury was from a drug given by the doctor.

Although not stated explicitly, the Supreme Court essentially decided that a person who knows that someone caused an injury to him should at least be sophisticated enough to suspect that his "legal rights" had been violated, and that he might be entitled to redress. This finding is probably proper where a pedestrian is struck by a car; it is doubtful that such an injured party should be able to sue long after the fact by claiming that he relied on the driver's statement at the scene of the accident that the traffic light was in the driver's favor, and only years later came across a witness who says differently. The finding is more open to question

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<sup>44</sup>See, e.g., *infra* text accompanying notes 352-56.

<sup>45</sup>But see *Barrett v. United States*, 689 F.2d 324 (2d Cir. 1982), cert. denied, 426 U.S. 1131 (1983), where the Supreme Court denied a petition for certiorari.

<sup>46</sup>Typically state tort statutes of limitations are tolled when the injured person is under a disability, such as being incompetent (or being in a coma following an accident), e.g., N.Y. Civ. Prac. L & R 208 (McKinney Supp. 1987), although in FTCA cases incompetency does not usually toll the period.

in the context of a doctor-patient relationship, where traditionally (and properly it is hoped most of the time) the patient is expected to rely on what his doctor tells him.<sup>47</sup>

In *Kubrick*, plaintiff's hearing loss was a "side effect" from the use of neomycin in his treatment. The opinion does not state explicitly whether Kubrick had been warned in advance that hearing loss *could* occur; the opposite is suggested in that Kubrick was said to have first learned from Dr. Sataloff that his injury was caused by the neomycin. On such facts, where (presumably) Kubrick had never been warned of such a possible side effect, he clearly should have suspected negligence when he learned for the first time from an independent source that the VA treatment had caused his injury. Accordingly, on the above presumed facts, the Supreme Court's decision and restriction of the "discovery" rule makes sense. Difficulties can arise, however, when the facts are different, as we shall see below.

Kubrick had actual knowledge of the cause of his injury in January 1969, and although the opinion does not state when the claim was made, it was easy to hold it time barred because the time when the Court found it accrued (January 1969) was more than two years before plaintiff argued it accrued (June 1971). Accordingly, questions of when Kubrick "should have" had knowledge, or whether he had been "reasonably diligent" were not raised. The Supreme Court did write in a footnote: "[a]lthough he diligently ascertained the cause of his injury, he sought no advice within two years thereafter as to whether he had been legally wronged. The dissent would excuse the omission. For statute of limitations purposes, we would not."<sup>48</sup> Also, as earlier noted, the Court had said a purpose of the limitations statute was "to require the reasonably diligent presentation of tort claims against the Government."<sup>49</sup> Lower courts were quick to read into *Kubrick* a requirement for "reasonable diligence" in the absence of actual knowledge. This requirement makes sense, and does have indirect support in *Kubrick* as discussed above. Nevertheless, when courts are evaluating diligence some subjectivity will creep into what is ideally an objective standard,<sup>50</sup> and the area can become fraught with uncertainty. This uncertainty is simply the price we must pay if a "humane legislative plan" is to balance the competing

<sup>47</sup>See *Kubrick*, 444 U.S. at 127 (dissent).

<sup>48</sup>*Id.* at 123 n.10.

<sup>49</sup>*Id.*

<sup>50</sup>Compare, e.g., *Jastremski v. United States*, 737 F.2d 666 (7th Cir. 1984) with *Arvayo v. United States*, 766 F.2d 1416 (10th Cir. 1985).

interests of "blamelessly ignorant" plaintiffs to have meritorious causes of claim preserved, and of defendants to be free of stale claims.

Immediately following are discussions of significant cases decided in the District of Columbia Circuit and the First through the Eleventh Circuits, with references and comparisons included within the case discussions.

### III. DISTRICT OF COLUMBIA CIRCUIT

In the District of Columbia Circuit, prior to *Kubrick* the rule was fairly vague: the statute of limitations did not begin to run in medical malpractice actions "until the injured party knew, or through the exercise of reasonable diligence, should have known, of the facts giving rise to his claim."<sup>51</sup> Just what facts would "giv[e] rise to his claim" was not explicitly stated. In *Sanders v. United States*,<sup>52</sup> the court had no problem dismissing the FTCA claim of an Air Force dependent (who was a nurse), where problems of kidney disease occurred on and off almost from the time of the alleged negligent treatment during her childbirth (July 1965) until she filed her claim in April 1974. Also, she had actually looked at her medical records as early as December 1965, and then had possession of them since December 1970. The court did not state just when during the nine-year period the claim had accrued.

Since *Kubrick*, the only published decision directly on point by the D.C. Circuit has been *Page v. United States*.<sup>53</sup> Page was a pro se plaintiff who had accused the VA of wrongfully treating him with drugs during the period 1961 to 1980. An earlier action, brought in 1972, had been dismissed by the district court "apparently on the ground that it was statutorily time-barred,"<sup>54</sup> and was summarily affirmed by the D.C. Circuit when plaintiff did not oppose the government's motion. Page filed an administrative claim on March 5, 1981, asserting the wrongful conduct for the entire twenty-year period. The circuit court agreed with the district court that the claim for wrongful conduct from 1961 to 1972 was barred by res judicata, but held logically that res judicata could not apply to conduct committed after the decision in 1972. The circuit court then found that the course of treatment

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<sup>51</sup>*Sanders v. United States*, 551 F.2d 458, 460 (D.C. Cir. 1977); *Jones v. Rogers Memorial Hosp.*, 442 F.2d 773 (D.C. Cir. 1971).

<sup>52</sup>551 F.2d 458 (D.C. Cir. 1977).

<sup>53</sup>729 F.2d 818 (D.C. Cir. 1984).

<sup>54</sup>*Id.* at 819.

from 1972 to 1980 was "continuous" for purposes of the statute of limitations and, quoting the Eighth Circuit's *Gross v. United States*,<sup>55</sup> held that "[w]hen the tortious conduct is of a continuing nature, the *Kubrick* rule does not apply."<sup>56</sup> The D.C. Circuit did not, however, take into consideration that *Gross* was not a medical malpractice case. The trend in the Eighth Circuit, unlike most other circuits, is reluctance to apply *Kubrick's* reasoning outside of the FTCA medical malpractice area, so arguably the Eighth Circuit did not intend for *Gross* to be read in this way. Thus, in a very casual manner, and on questionable authority, the D.C. Circuit decided *Kubrick* did not apply to a whole class of FTCA medical malpractice cases. Only one other circuit, the Ninth, has gone this far.<sup>57</sup>

Interestingly, the D.C. Circuit said that even before *Kubrick*, "[t]his court already had adopted a similar rule,"<sup>58</sup> and cited *Sanders* and *Jones v. Rogers Memorial Hospital*<sup>59</sup> for this proposition. Accordingly, it seems as if the District of Columbia Circuit was content with the *Kubrick* rule, and yet was quick enough to find that *Kubrick* did not apply to continuous treatment.

Briefly (and somewhat anomalously), the District of Columbia Circuit mentioned *Kubrick* in a footnote in *Keene Corp. v. Insurance Co. of North America*.<sup>60</sup> An insulation manufacturer had sought judgment of rights under liability insurance policies and the court discussed, among other things, statutes of limitations, in construing the word "injury" in an insurance policy. It found the statute of limitations cases were not particularly relevant, but said in dicta:

The date that a disease is deemed to occur for purposes of statutes of limitations is generally the date of manifestation. *E.g.* [*Kubrick*]. If the date of a disease's origin were to begin the statute of limitations period, meritorious claims would be barred. As a matter of policy, courts have held that the purpose of the statutes of limitations—to protect defendants against stale claims—does

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<sup>55</sup>676 F.2d 295, 300 (8th Cir. 1982), discussed *infra* text accompanying notes 515-22.

<sup>56</sup>Page, 729 F.2d at 822 (quoting *Gross*, 676 F.2d at 300).

<sup>57</sup>See *infra* text accompanying notes 594-607.

<sup>58</sup>Page, 729 F.2d at 821 n.20.

<sup>59</sup>442 F.2d 773 (D.C. Cir. 1971).

<sup>60</sup>667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

not warrant barring such claims. See, e.g. [*Kubrick and Urie v. Thompson*].<sup>61</sup>

Such statements, even in dicta, are troubling, and may reflect incomplete consideration or understanding of *Kubrick*. *Kubrick* did no more than cite with approval *Urie v. Thompson's* "discovery doctrine" in the occupational disease context. As we have seen, *Kubrick* in a medical malpractice context did not require claim accrual as of the date of manifestation of injury.

In *Hohri v. United States*,<sup>62</sup> Japanese-Americans interned during World War II sued on various theories, including tort claims. The court held the common law tort claims barred for failure to file claims under the FTCA, but held various other causes of action not time barred. Specifically, it found that the government had fraudulently concealed that there really was no military necessity to intern plaintiffs, and held that this tolled the limitations period for claims under the "taking" clause of the fifth amendment of the United States Constitution.

The court noted that its analysis should not contradict *Kubrick*, because

*Kubrick* simply did not address the question of when fraudulent concealment will toll the statute of limitations. Rather, *Kubrick* concerned the question of when a cause of action 'accrues' in a case where there have been no allegations of fraudulent concealment. Indeed in *Kubrick* the defendant's failure to concede facts pertinent to the question of causation was deemed to be of little importance given that the plaintiff could have discovered the relevant information by asking any competent doctor.<sup>63</sup>

The court then said it had found only one court of appeals case that even suggested that *Kubrick's* analysis of what a plaintiff must know in the absence of fraudulent concealment might apply also where there is fraudulent concealment,<sup>64</sup> and "[w]e believe logic to be on the side of those Courts of Appeal that have rejected this extension of *Kubrick*."<sup>65</sup>

<sup>61</sup>*Id.* at 1043 n.17.

<sup>62</sup>782 F.2d 227 (D.C. Cir. 1986).

<sup>63</sup>*Id.* at 249 n.56 (emphasis by the court).

<sup>64</sup>*Premium Management Inc. v. Walker*, 648 F.2d 776 (1st Cir. 1981). If this case made such a suggestion, the suggestion is subtle, at best. See *infra* text accompanying notes 101-03.

<sup>65</sup>*Id.* at 249 n.56 (citing *Arvayo v. United States*, 766 F.2d 1416 (10th Cir. 1985), and *Barrett v. United States*, 689 F.2d 324 (2d Cir. 1982), cert. denied, 462 U.S. 1131 (1983)).

The court also said that even though it was not extending *Kubrick's* holding to *Hohri*, the *Hohri* holding was

in accord with the underlying rationale governing that case. The *Kubrick* Court based its holding on the view that a victim of medical malpractice has some duty to make further inquiry about his condition once he is aware of his injury. [*Kubrick* citations omitted] . . . we would require appellants, even though the victim of fraudulent concealment, to conduct the sort of inquiries mandated by the *Kubrick* Court.<sup>66</sup>

Thus, it appears that the D.C. Circuit accepts *Kubrick's* rationale as persuasive in an undefined area of cases (in this case, apparently including "constitutional torts"). At the same time, the court apparently would find *Kubrick* simply inapplicable to even FTCA medical malpractice cases where there is fraudulent concealment.

In *Marbley v. United States*<sup>67</sup> plaintiff's wife was murdered at the Washington Navy Yard on July 9, 1979 (her body was discovered four days later). On October 23, 1980, Adrian Hall was found guilty of the murder. Plaintiff filed his claim on October 22, 1982, alleging a duty of the Navy to protect decedent from "unreasonable attacks".

The district court dismissed the claim as time barred (dismissal was also on the grounds that the government was in no way liable for decedent's death). Plaintiff argued the claim did not accrue until Hall was convicted, but the court held this was no reason for a delay in filing a claim for relief, and found that plaintiff had the knowledge needed to make his claim on July 13, 1979 (when his wife's body was found). Although not explicitly stated, it is apparent that the identity of the murderer was not essential to plaintiff's claim against the government. The court cited *Kubrick* as holding "that a cause of action accrues under the FTCA when a plaintiff knows both of the existence and the cause of the injury, not at a later time when claimant knows the act which inflicted the injury constitutes negligence."<sup>68</sup>

The district court found that accrual of a wrongful death action may extend beyond the date of death, but only "where the claimant does not, and in the exercise of normal diligence could

<sup>66</sup>*Id.* at 249 n.56.

<sup>67</sup>620 F. Supp. 811 (D.D.C. 1985)

<sup>68</sup>*Id.* at 812.

not, know the existence of the cause of action . . . In such instances the claim is said not to 'accrue' until the element of knowledge, absence of which prevents the filing of the complaint, has been supplied.'<sup>69</sup>

This exception, the court said, was not applicable in the instant case, and dismissed the claim as untimely. Although it did not apply to Marbley's claim, the exception does make sense, and certainly is not inconsistent with *Kubrick*.<sup>70</sup>

#### IV. FIRST CIRCUIT

Prior to *Kubrick*, the First Circuit was the sole circuit to avowedly apply state law in determining when a cause of action accrued in FTCA malpractice cases. This position dated back to *Tessier v. United States*.<sup>71</sup> Plaintiff had argued *Urie* should apply, in an "unquestionably . . . sad case,"<sup>72</sup> where metal needles had been left inside him during an appendectomy at a VA hospital. The First Circuit affirmed the district court's dismissal, holding that a claim accrued "when it may be made the basis of a judicial action,"<sup>73</sup> and because state law determined liability in an FTCA action, it also should control accrual. *Tessier* distinguished *Urie* as being a FELA case, i.e., a federally created right of action not dependent on state law. The court followed Maine law, then the majority rule, which held the claim accrued when the needles were negligently left in plaintiff's body.

This case retained vitality even up through 1978, in *Hau v. United States*.<sup>74</sup> Interestingly, *Hau* was written by a Second Circuit judge sitting by designation, who unabashedly found that the rule was "unlike other Circuits which follow the federal rule."<sup>75</sup> *Kubrick*, of course, later held that the federal rule would prevail.

<sup>69</sup>*Id.* (quoting *Pollard v. United States*, 384 F.Supp. 304, 310 (M.D. Ala. 1974) which in turn was quoting the *dissent* in *Kington v. United States*, 396 F.2d 9, 12 (6th Cir.), *cert. denied*, 393 U.S. 960 (1968)). The majority in *Kington* had held that an FTCA claim accrues upon death.

<sup>70</sup>*Compare, e.g., Marbley with Barrett v. United States*, 689 F.2d 324 (2d Cir. 1982), *cert. denied*, 462 U.S. 1131 (1983); *Fisk v. United States*, 657 F.2d 167 (7th Cir. 1981); *Drazan v. United States*, 762 F.2d 56 (7th Cir. 1985); *In re Swine Flu Products Liability Litigation*, 764 F.2d 637 (9th Cir. 1985).

<sup>71</sup>269 F.2d 305 (1st Cir. 1959).

<sup>72</sup>*Id.* at 307.

<sup>73</sup>*Id.* at 309.

<sup>74</sup>575 F.2d 1000 (1st Cir. 1978).

<sup>75</sup>*Id.* at 1001. Had the judge been writing in his own Second Circuit, the contrary rule espoused in *Toal v. United States*, 438 F.2d 222 (2d Cir. 1971), would have applied.

No post-*Kubrick* decisions by the First Circuit Court of Appeals address medical malpractice actions brought under the FTCA, but a district court in that circuit has a decision on point, and several other cases touch the subject.

In *Foskey v. United States*<sup>76</sup> the court denied the government's motion to set aside the court's finding of liability (one basis for the motion being the *Kubrick* decision which came down after the trial). The case involved an infant who was totally disabled as a result of a grand mal seizure on August 2, 1972. Although the claim had been filed in May 1974 (within two years), the government argued that the infant's parents had known of the naval pediatrician's negligence as early as March 1972, because the doctor had treated the baby a month earlier, the mother (a registered nurse) had requested a neurological workup, the doctor had not done so, and the child also had "some type of seizures" as of March 1972.<sup>77</sup> The court found that *Kubrick* did not apply to this case:<sup>78</sup>

*Kubrick* does not vitiate the basic law that there must first be an injury before there can be a cause of action, nor does it hold that a plaintiff has the responsibility of discovering negligence, however subtle, before it has caused an injury . . . . If mere negligent treatment, before any injury occurs, starts the running of the statute of limitations, then depending on the gap between treatment and the occurrence of the injury, a plaintiff could lose his cause of action before it even arose.<sup>79</sup>

*Galarza v. Zagury*<sup>80</sup> was not brought under the FTCA, but was a private medical malpractice action brought against a doctor in Puerto Rico. The First Circuit interpreted the Puerto Rico statute of limitations,<sup>81</sup> which stated that the action must be brought

<sup>76</sup>490 F. Supp. 1047 (D.R.I. 1979, 1980).

<sup>77</sup>*Id.* at 1067.

<sup>78</sup>*Id.*

<sup>79</sup>*Id.* at 1068.

The District Court also observed that the Supreme Court "is saying [in *Kubrick*] that when one is told that it was 'highly probable' a treatment caused a known injury it is sufficient to trigger the running of the statutory time." *Id.* at 1066. Query whether this court would take the position that the time begins to run when a patient is perhaps advised that his "injury" could be from several causes, one of which is medical treatment by the government, and is not advised that such treatment was negligent. Compare *Fidler v. Eastman Kodak Co.*, 714 F.2d 192 (1st Cir. 1983), decided by the First Circuit three years later in a slightly different context.

<sup>80</sup>702 F.2d 29 (1st Cir. 1983).

<sup>81</sup>P.R. Laws Ann. Tit. 26, § 4109 (Supp. 1981).



within one year of when the "damage" occurred, or one year from when the "damage" was discovered or should have been discovered (but still not later than two years from when the "damage" occurred). Plaintiff argued that "damage" implied negligence, and so discovery of "damage" required knowledge that her treatment had been negligent. The court said that *Kubrick* "provides helpful guidance in analyzing this case,"<sup>82</sup> and quoted *Kubrick* at great length, noting that the Supreme Court had concluded that "the limitations period began to run when the plaintiff knew of the existence and the cause of the injury."<sup>83</sup> The First Circuit found that Mr. Kubrick "had a stronger position in his contention as to the construction of the [FTCA] than does Ms. Galarza in the instant case,"<sup>84</sup> since it was "more plausible to argue that the word 'claim' includes the notion of negligence or malpractice than, as is argued here, the word 'damages' includes such notion."<sup>85</sup> Nevertheless, the court went on to reverse the district court's grant of summary judgment to the defendant doctor, on a technicality that a document relied upon was not part of the record.

Another case not precisely on point, but still useful for its analysis, is a product liability action, *Fidler v. Eastman Kodak Co.*<sup>86</sup> Some time after several myelograms were performed on plaintiff, she learned that some small amounts of the injected dye had been left in her, causing head and face pain. Over the next five years, plaintiff visited numerous doctors, and was told that the dye possibly was the cause, but no definite relationship could be established. Finally, she found a doctor who would testify that the dye had caused her injuries, and alleged failure to warn and breach of warranties against the manufacturer of a component of the dye. In analyzing Massachusetts's statute of limitations,<sup>87</sup> the First Circuit noted that *Olsen v. Bell Telephone Laboratories, Inc.*<sup>88</sup> (an "insidious occupational disease case") held that plaintiff's "cause of action did not accrue before he knew or should reasonably have known that he had contracted asthma as a result of the conduct of the defendants."<sup>89</sup> The First Circuit noted that, before *Kubrick*, several federal courts of appeals had adopted the rule that in FTCA medical malpractice cases the

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<sup>82</sup>702 F.2d at 31.

<sup>83</sup>*Id.*

<sup>84</sup>*Id.*

<sup>85</sup>*Id.* at 32-33.

<sup>86</sup>714 F.2d 192 (1st Cir. 1983).

<sup>87</sup>Mass. Gen. L. Ann. ch. 260, § 2A (West Supp. 1987).

<sup>88</sup>388 Mass. 171, 445 N.E. 2d 609, 610 (1983).

<sup>89</sup>*Fidler* at 196 (quoting *Olsen*, 445 N.E. 2d at 611-12).

limitations period did not start until plaintiff had "reasonable opportunity to discover each element of a cause of action—duty, breach, causation and damages"<sup>90</sup> The Massachusetts court in *Olsen* rejected this rule and took an approach indistinguishable from *Kubrick's*. Interestingly, the First Circuit also found that plaintiff had reason enough to know the cause of her injuries was the dye, even though most medical opinions she had obtained indicated this was only a "possibility." This "was enough to lift the issue of causation out of the realm of the 'inherently unknowable' wrong."<sup>91</sup> The court pointed out that if plaintiff was unable to find authority to corroborate her causation theory, this could simply indicate her case was weak.<sup>92</sup>

In *Richman v. United States*<sup>93</sup> the First Circuit refused to apply the *Kubrick* rule where the plaintiff alleged a tort other than malpractice. Plaintiff had been assaulted by George Chalpin on January 11, 1979, and at the criminal trial in December 1980 learned for the first time that Chalpin had been under treatment by the VA for "nervous breakdown and emotional disturbances." Plaintiff filed suit on January 9, 1981, just within two years of the assault, but the action was dismissed for failure to file the necessary administrative claim. She later made a claim, and after rejection, again filed suit. She argued that the VA committed malpractice, apparently by failing to physically confine Chalpin, and that she only learned of the malpractice in December 1980. The court held that "Plaintiff was not a patient, and her difficulty is not, and is not comparable to, a malpractice injury; it is simply that she did not realize there was another party she might be able to make a claim against."<sup>94</sup>

The court pointed out that the limitations period ran against a pedestrian hit by a negligent driver, even if he did not know about the driver's employer or a bar that let the driver drink too much. The court also pointed out that even in *Kubrick*, "if the plaintiff knew of the injury, but failed to inquire and learn of the doctor's fault, the statute was not tolled."<sup>95</sup> One might question whether the First Circuit would apply this dicta in all circumstances. What if there was no reason for a patient to suspect his

<sup>90</sup>*Id.* at 198.

<sup>91</sup>*Id.* at 200.

<sup>92</sup>Compare *Fidler with Stoleson v. United States*, 629 F.2d 1265 (7th Cir. 1980) and *Harrison v. United States*, 708 F.2d 1023 (5th Cir. 1983).

<sup>93</sup>709 F.2d 122 (1st Cir. 1983).

<sup>94</sup>*Id.* at 123.

<sup>95</sup>*Id.*

"injury" was caused by his doctor, rather than simply being a natural consequence of his illness?<sup>96</sup>

The court also cited a Massachusetts case holding that mere failure to disclose a wrongdoing, where there is no fiduciary relationship, is not a fraudulent concealment that would toll the statutory period.<sup>97</sup> Would the First Circuit hold that a doctor-patient relationship is fiduciary for this purpose, and find that a doctor's silence thus is automatic "fraudulent concealment" so as to toll the statute? Or would the First Circuit find no fiduciary relationship? If there is no such relationship, and a patient gets worse, or does not get as well as he had hoped, is it necessary to ask one's doctor "Have you committed malpractice on me?" for the purpose of creating a "concealment" if the doctor says "no"?

Even further removed from the medical malpractice area is *Rivera Fernandez v. Chardon*.<sup>98</sup> The First Circuit distinguished *Kubrick* (relied upon by the district court) where teachers were given notice they would be terminated and were then terminated on schedule some time later. The District Court had held that the teachers knew of the "harm" when they received notice of future termination, and the period ran from that date. The First Circuit reversed, holding that the cause of action could not accrue until the teachers were actually terminated. The court pointed out that in *Kubrick*, "plaintiff had no reason to know of the physical harm until sometime after it had occurred. The rule of accrual at the time of notice therefore served to *extend*, rather than to shorten, the limitations period."<sup>99</sup>

The court held that the notice rule "had developed as a safeguard against unfairness to plaintiffs who, through no fault of their own, are unaware of their injuries until after the tortious act occurs. . . . The notice rule does not, however, alter the general rule that no cause of action exists until an unlawful act has occurred."<sup>100</sup>

Accordingly, when a possible choice exists between the "general rule" and the "notice rule," the rule applies that allows accrual later.

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<sup>96</sup>See, e.g., *Waits v. United States*, 611 F.2d 550 (5th Cir. 1980); *Rispoli v. United States*, 576 F. Supp. 1398 (E.D.N.Y. 1983).

<sup>97</sup>*Norwood Trust Co. v. Twenty-Four Fed. St. Corp.*, 295 Mass. 234, 237, 3 N.E.2d 826 (1936). But see *Harrison v. United States*, 708 F.2d 1023 (6th Cir. 1983) (holding that a doctor-patient relationship is fiduciary).

<sup>98</sup>648 F.2d 765 (1st Cir. 1981).

<sup>99</sup>*Id.* at 767 (emphasis added).

<sup>100</sup>*Id.* at 768.

*Premium Management, Inc. v. Walker*<sup>101</sup> (where plaintiff sued his insurance broker for bad advice about switching policies) held that New Hampshire law never tolls the statute of limitations beyond the time when plaintiff should have discovered his injury and also that the injury was caused by defendant's "wrongful conduct,"<sup>102</sup> even where there has allegedly been fraudulent concealment. To the extent this implies that the action does not accrue until the defendant's conduct was discovered to be "blameworthy," the First Circuit noted that "the federal rule, at least in cases involving the United States, is different,"<sup>103</sup> citing *Kubrick*. Thus, the First Circuit has perhaps implied that *Kubrick* applies to all FTCA cases, not just medical malpractice actions.

The Massachusetts District Court applied above proposition in *Maslauskas v. United States*.<sup>104</sup> This case was far removed from medical malpractice: plaintiff alleged he had been illegally incarcerated as a result of negligence by the United States Parole Commission and the United States Bureau of Prisons. The government asserted the limitations period began to run when the Parole Commission mistakenly reviewed plaintiff's case in July 1979, whereas plaintiff asserted it did not begin to run until he was released from custody. The court wrote as a "general rule" in deciding the case that "[o]rdinarily, a claim accrues under the Federal Tort Claims Act when a claimant learns of his injury and its cause."<sup>105</sup> *Kubrick* was cited as authority. Evidently, this district court at least has accepted *Kubrick* as applying not only to medical malpractice cases, or even only to "discovery" cases (such as *Urie v. Thompson*), but to all claims brought under the FTCA. The court went on to find an "exception to the general rule" for continuing torts,<sup>106</sup> relying on the Eighth Circuit decision in *Gross v. United States*.<sup>107</sup>

Finally, in *Vega-Velez v. United States*,<sup>108</sup> plaintiff was a security guard employed by an independent contractor providing security at a government building; he slipped and fell while on duty, allegedly because of a floor wet from a dripping air conditioner. Although the accident occurred on January 27, 1980, he did not file a claim until April 1984. He argued his claim did

<sup>101</sup>648 F.2d 778 (1st Cir. 1981).

<sup>102</sup>*Id.* at 783.

<sup>103</sup>*Id.* at 783 n.7.

<sup>104</sup>583 F. Supp. 349 (D. Mass. 1984).

<sup>105</sup>*Id.* at 351.

<sup>106</sup>*Id.*

<sup>107</sup>676 F.2d 295 (8th Cir. 1982); see also *supra* text accompanying notes 55-58.

<sup>108</sup>627 F. Supp. 773 (D.P.R. 1986).

not accrue until November 1983, when the State Insurance Fund made its final decision in the companion workers' compensation case. The court dismissed, finding the claim against the government accrued on the date he was injured. The court seemed to feel that *Kubrick* controlled in this simple case where plaintiff was aware of both the injury and cause immediately. Plaintiff had argued that, because the workers' compensation statute prevented any suit against a third party (such as the government) until the workers' compensation case was decided, his claim did not accrue until then. The court found otherwise, analogizing plaintiff's "disability" to minority and insanity, which also do not toll the FTCA period. In those latter cases, however, guardians for the injured person could be appointed and sue on behalf of the person. The district court did not state whether it thought Vega-Velez would actually have been able to commence a suit against the United States, where such suit was forbidden by the Puerto Rican statutes, but a prudent claimant in the First Circuit would be well advised to go ahead and file the FTCA claim in any event.<sup>109</sup>

## V. SECOND CIRCUIT

Several significant pre-*Kubrick* decisions have come out of the Second Circuit. *Kossick v. United States*,<sup>110</sup> a case that analyzed the "continuous treatment" doctrine, proved that dicta frequently outlives outcome. *Kossick* was a seaman who was negligently given a potassium iodide enema by the Public Health Service (PHS) in 1950, and required further hospitalization for almost a year. He was later readmitted and finally discharged as "fit for duty" in November 1952, although he would have to use laxatives for the rest of his life. He made "occasional visits" to PHS facilities in later years, and filed suit in April 1963. The Second Circuit affirmed the district court's dismissal of the claim as time barred. Plaintiff had sought to toll the limitation period because of New York's "continuous treatment" doctrine announced in *Borgia v. City of New York*:<sup>111</sup> "[A] claim for malpractice does not 'accrue' so long as the plaintiff is under continuous treatment for the ailment as to which the malpractice occurred or for the malpractice itself."<sup>112</sup>

The Second Circuit found that federal, not state law determined when a cause of action accrued under the FTCA, citing *Quinton v.*

<sup>109</sup>See also *Mendiola v. United States*, 401 F.2d 695 (5th Cir. 1968) (applying a similar rule).

<sup>110</sup>330 F.2d 933 (2d Cir.), cert. denied, 379 U.S. 837 (1964).

<sup>111</sup>12 N.Y.2d 151, 237 N.Y.S.2d 819, 187 N.E.2d 777 (1962).

<sup>112</sup>*Kossick*, 330 F.2d at 934.

*United States*<sup>113</sup> and *Hungerford v. United States*.<sup>114</sup> The court said that Kossick must have known of his injury shortly after the enema in 1950, and he "could have brought a suit at that time;"<sup>115</sup> the two-year FTCA period did not begin "to run so soon," however, because "[c]ourts have long since rejected the mechanical concept that in all cases the limitation period necessarily starts the very moment that a suit can be brought."<sup>116</sup>

The court wrote:

There is much good sense in Chief Judge Desmond's observation in the *Borgia* case that 'It would be absurd to require a wronged patient to interrupt corrective efforts by serving a summons on the physician or hospital superintendent . . .' [cite omitted] and this is not altogether without application when as here the summons would be served on the United States Attorney.<sup>117</sup>

The court then went on to find that this consideration would have expired in November 1952 when Kossick was discharged, that it was "unreasonable" to postpone the period as long as Kossick had a right to further treatment, as he had this right as long as he was a seaman, and also that it doubted that New York courts would have reached a different result.

Although the Second Circuit may not have realized it at the time, *Kossick* was to become a leading case pre- and post-*Kubrick* for the proposition that the "continuous treatment" doctrine could have vitality in FTCA medical malpractice cases.

Another significant pre-*Kubrick* case in this area was *Toal v. United States*,<sup>118</sup> which involved a patient who had been injected with pantopaque dye by a VA doctor who then tried but failed to remove it (he also did not note this failure in the medical records). The VA doctors assured Toal it was normal not to remove all the dye, and when Toal was in an auto accident twelve days later he thought the dye had merely aggravated some of the subsequent accident injuries. It was not until a year later he discovered the dye itself had encysted onto his brain tissues. Citing the *Quinton* rule, the court upheld the lower court's finding that Toal could not have been expected to know his headaches were caused by the

<sup>113</sup>304 F.2d 234 (5th Cir. 1962).

<sup>114</sup>307 F.2d 99 (9th Cir. 1962).

<sup>115</sup>*Kossick*, 330 F.2d at 936.

<sup>116</sup>*Id.*

<sup>117</sup>*Id.* (quoting *Borgia*, 12 N.Y.2d at 156).

<sup>118</sup>438 F.2d 222 (2d Cir. 1971).

dye on his brain, as opposed to his thinking the dye combined with the auto accident caused his pain: "This is not to say that one who knows he has suffered damage from medical malpractice may postpone an action until the full extent of that damage is ascertained."<sup>119</sup> In this case, however, the assurances that everything was normal and the failure to note that the dye had not been removed "prevented Toal from learning that any act of malpractice had occurred."<sup>120</sup>

*Kelley v. United States*<sup>121</sup> was not a medical malpractice case but it shows a contrast to other circuits' post-*Kubrick* decisions. On November 8, 1972, Kelley was hit by a car driven by Hunt, a Department of Agriculture employee on official business. She sued Hunt in a state court and his insurance company defended. Hunt had reported the accident to his federal supervisor, who had an investigation made; however, Hunt did not deliver the suit papers served on him to his supervisor, as required by federal regulations. Early in December 1974, just over two years after the accident, Hunt's insurance counsel sent the pleadings to the U.S. Attorney's office. This office promptly certified that Hunt had been within the scope of his employment, and the month afterward removed the case to federal court under the Drivers' Act portion of the FTCA (which requires that the United States be substituted for the federal driver).<sup>122</sup> Plaintiff filed a FTCA claim in May 1975. The district court denied the government's motion to dismiss, because "plaintiffs were not at fault, [and] had pursued their suit diligently," and the government had had a duty to investigate the accident and certify Hunt's status: "[T]he government could not lull plaintiffs into a false sense of security by waiting until plaintiffs' time to file an administrative claim had expired and thereupon move to be substituted and to dismiss."<sup>123</sup>

The Second Circuit found that "[n]o questions of immunity or jurisdiction are generally involved,"<sup>124</sup> examined the legislative history of the FTCA, and quoted the Supreme Court: "[W]hen dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a

<sup>119</sup>*Id.* at 225 (citing *Ashley v. United States*, 413 F.2d 490 (9th Cir. 1969)).

<sup>120</sup>*Id.*

<sup>121</sup>568 F.2d 259 (2d Cir. 1978).

<sup>122</sup>28 U.S.C. § 2679(b) (1982).

<sup>123</sup>568 F.2d at 262.

<sup>124</sup>*Id.*

self-appointed guardian of the Treasury imprint immunity back into a statute designed to limit it."<sup>125</sup>

The Second Circuit found that *Kelley*, "by the very fact of the United States Attorney's certificate [of within scope of employment] [is] identified as one of the classes of tort cases in which the United States has waived immunity, and the [FTCA Drivers Act] explicitly confers jurisdiction on the district court in such federal cases."<sup>126</sup>

The court did not explicitly find when it thought plaintiff's claim had accrued, but simply found it timely either on the basis that suit had been brought against the employee within two years (analogizing to the FTCA period), or that a suit had been timely brought against the employee within the state statute of limitations.

The decision did not discuss when a plaintiff with "due diligence" should have "discovered" the government's role, and so is not directly contrary to *Kubrick*. Other circuits in the post-*Kubrick* era, however, have likened "discovery" of the government's role to learning of "negligence," which is not required under *Kubrick* before accrual.<sup>127</sup> Thus far, no other circuit has followed *Kelley*, and several have roundly criticized it, but it has not yet been disowned by the Second Circuit.

Post-*Kubrick*, the Second Circuit has not addressed FTCA limitations issues in the context of a medical malpractice action, but *Barrett v. United States*<sup>128</sup> came close. Plaintiff Barrett was the daughter of decedent Harold Blauer, who was an unknowing, involuntary subject of Army chemical warfare experiments in the 1950s. The Secretary of the Army revealed the Army's role in 1975. Blauer, a civilian being treated at New York State Psychiatric Institute, died after being injected with a mescaline derivative. Agents of the Army allegedly covered up the affair, and the autopsy listed as cause of death "Congestion of the viscera; Coronary arteriosclerosis; sudden death after intravenous injection of a mescaline derivative."<sup>129</sup> Blauer's survivors had brought an action for medical malpractice against New York State in 1953, and the district court accepted the government's

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<sup>125</sup>*Id.* at 262-63 (quoting *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69 (1955)).

<sup>126</sup>*Id.* at 263.

<sup>127</sup>See, e.g., *Wilkinson v. United States*, 677 F.2d 998 (4th Cir.), cert. denied, 459 U.S. 906 (1982); *Wollman v. Gross*, 637 F.2d 544 (8th Cir. 1980), cert. denied, 454 U.S. 893 (1981).

<sup>128</sup>689 F.2d 324 (2d Cir. 1982), cert. denied, 462 U.S. 1181 (1983).

<sup>129</sup>*Id.* at 329 (emphasis added by the court).



argument that, under *Kubrick*, plaintiff's action was untimely because in 1953 the estate knew of the injury (death) and the cause, at least in part (mescaline derivative injection). The Second Circuit, however, found that while Blauer's survivors were aware in 1953 of some "critical facts," they were not aware of the "critical facts about causation and who inflicted Blauer's injury," which "were in the control of the Government and very difficult for his estate to obtain."<sup>130</sup> The court made the point that "The gravamen of the FTCA claim is the real reason Blauer died was not medical incompetence, but the fact that he was used as a human guinea pig."<sup>131</sup>

The court also distinguished cases holding that the identity of the government as a defendant need not be known in order for a FTCA claim to accrue<sup>132</sup> because those cases did not involve the government's active concealment of its role.<sup>133</sup> The court found that in *Barrett*, as in *Liuzzo v. United States*,<sup>134</sup> "[t]his case presents an instance in which knowledge of the identity of the tortfeasor is a critical element to the accrual of a claim."<sup>135</sup>

The Second Circuit probably most honestly expressed its feelings when it quoted the District of Columbia Circuit's opinion in *Fitzgerald v. Seaman*s:<sup>136</sup> "Read into every federal statute of limitations . . . is the equitable doctrine that in case of defendant's fraud or deliberate concealment of material facts relating to his wrongdoing, time does not begin to run until plaintiff discovers, or by reasonable diligence could have discovered, the basis of the lawsuit."<sup>137</sup>

The Second Circuit also wrote earlier in the *Barrett* opinion: "The Supreme Court recently discussed the extent of knowledge which a plaintiff must possess in order for his claims to accrue under the FTCA [in *Kubrick*]."<sup>138</sup>

The above sounds as if the Second Circuit is ready to apply

<sup>130</sup>*Id.*

<sup>131</sup>*Id.*

<sup>132</sup>*E.g.*, *Wollman v. Gross*, 637 F.2d 544 (8th Cir. 1980), *cert. denied*, 454 U.S. 893 (1981).

<sup>133</sup>Curiously, the Second Circuit distinguished cases where ignorance of the government's role did not toll the FTCA period because there was no actual concealment (in particular, *Wollman v. Gross*), and yet never cited *Kelley v. United States* in general support of its position.

<sup>134</sup>485 F. Supp. 1274 (E.D. Mich. 1980).

<sup>135</sup>*Barrett*, 689 F.2d at 330 (quoting *Liuzzo*, 485 F. Supp. at 1283).

<sup>136</sup>553 F.2d 220 (D.C. Cir. 1977).

<sup>137</sup>*Barrett* at 327 (quoting *Fitzgerald* at 228).

<sup>138</sup>*Id.* at 328.

*Kubrick's* reasoning to all FTCA cases, not just medical malpractice or "discovery" cases.

In *Camire v. United States*,<sup>139</sup> decided before *Kubrick*, the Second Circuit vacated a district court's dismissal of the suit as time barred. An infant with meningitis was mistakenly diagnosed on April 15, 1971 at an Air Force hospital as merely teething with a cold. Later, in April, a naval hospital correctly diagnosed meningitis.<sup>140</sup> The infant recovered, but later suffered from brain damage and physical problems. The claim was not filed until January 1974. The Second Circuit remanded, finding on the record before it "a genuine issue of material fact existed as to when a reasonable person in the position of the child's mother should have realized that negligent malpractice had occurred."<sup>141</sup>

The matter was again before the district court, which held a trial, and then withheld decision pending the Supreme Court's decision in *Kubrick*. After *Kubrick*, the district court decided that *Kubrick* foreclosed the suit as time barred.<sup>142</sup> The court found that the child's mother became aware of the misdiagnosis and that he was critically ill at least by early May 1971. The child was seen as an outpatient at the naval hospital in summer and fall 1971, during which time the mother became aware that the child had "some" brain damage, had impaired sight and hearing, and was failing to develop normally. Plaintiffs argued that they first learned that the misdiagnosis and delay caused these problems when a civilian doctor told them so in April 1972. The court found that plaintiffs had not exercised due diligence: "The facts possessed by plaintiffs [i.e., child suffering brain injury; misdiagnosis] should have suggested the possibility of cause and effect. In any event, they were more than sufficient to alert them, in the exercise of reasonable diligence, to seek advice."<sup>143</sup>

The court thus found that to take advantage of the "blameless ignorance" rule, plaintiffs must be reasonably diligent.<sup>144</sup>

A few other district court cases are worth examining. In *Lee v. United States*,<sup>145</sup> Kristen Lee, age 3-1/2 years at time of filing of

<sup>139</sup>535 F.2d 749 (2d Cir. 1976).

<sup>140</sup>*Id.* at 751 (dissenting opinion).

<sup>141</sup>*Id.*

<sup>142</sup>*Camire v. United States*, 489 F. Supp. 996 (N.D.N.Y. 1980).

<sup>143</sup>*Id.* at 1002.

<sup>144</sup>*Id.* at 1003. Compare *Arvayo v. United States*, 766 F.2d 1416 (10th Cir. 1985) and *Fernandez v. United States*, 673 F.2d 269 (9th Cir. 1982) with *Jastremski v. United States*, 737 F.2d 666 (7th Cir. 1984), for differing treatments of this issue.

<sup>145</sup>485 F. Supp. 883 (E.D.N.Y. 1980).

the claim, was alleged to have been injured at birth through malpractice at an Air Force hospital, causing brain damage. In this case, the court found that, although Kristen's parents were aware of certain irregular procedures at birth, they were not aware that these had caused their child's problems. This they learned just within two years of filing the claim, when a civilian doctor told them Kristen's problems were not genetic or hereditary, but were due to an "insult at the time of birth."<sup>146</sup> The court observed that, unlike "the usual personal injury case," in medical malpractice actions

[t]he patients may not know that they have been injured or, if they do, they may not know what acts of their doctor have contributed to the injury. The doctor will hardly be inclined to proffer information which may lead to action against him, and relying on his vastly superior knowledge and experience, the patients may be slow to learn the critical facts.<sup>147</sup>

The court noted *Kubrick*, then recently decided, and wrote: "In the end the [Supreme] Court made the test whether a 'reasonably diligent' claimant knows enough so that he 'can protect himself by seeking advice in the medical and legal community.' [citation omitted] At this point the claim 'accrues' . . . ."<sup>148</sup>

The court also wrote that the Supreme Court in *Kubrick* "indicated that to know the 'cause' the plaintiff must know 'who has inflicted the injury.' [citation omitted] In an action for medical negligence the 'cause' which is at issue is the act of the defendant which gave rise to the injury."<sup>149</sup>

Although this may not invariably be the case, in this instance once plaintiff was aware that an "injury" was "caused" at birth, she would know "who" had caused the injury.

*Mortensen v. United States*<sup>150</sup> was decided after *Kubrick*, and indeed cited that Supreme Court case,<sup>151</sup> but curiously, looked largely to a 1962 court of appeals case in the Fifth Circuit for the law: "In general, pursuant to [28 U.S.C.] section 2401(b) 'a claim for malpractice accrues against the government when the claimant discovered, or in the exercise of reasonable diligence should have

<sup>146</sup>*Id.* at 885.

<sup>147</sup>*Id.* at 886.

<sup>148</sup>*Id.*

<sup>149</sup>*Id.* at 887.

<sup>150</sup>509 F. Supp. 23 (S.D.N.Y. 1980).

<sup>151</sup>*E.g., id.* at 27-29.

discovered the acts constituting the alleged malpractice."<sup>152</sup>

Focusing on the "discovery" aspect, the district court then wrote: "In [*Kubrick*], the Supreme Court addressed the question whether the discovery rule applies to a claimant who knows the fact and cause of his injury, but who is unaware that his legal rights have been violated. The Court concluded that it does not."<sup>153</sup>

This is certainly a different approach from other cases and may reflect a misunderstanding of the "discovery rule." The district court ignored *Kubrick's* lengthy discussion of *Urie v. Thompson* and that *Kubrick* in fact did adopt a "discovery rule," with limitations. A "discovery rule" postpones accrual past the time of infliction of injury until the "discovery" of certain facts. To say that a "discovery rule" no longer applies once facts are discovered is really only to say that once *those* facts are discovered, accrual will not wait upon discovery of *additional* facts.

Mortensen was injured in a shipboard accident in September 1975, was treated at Public Health Service clinics from February to July 1976, and from November 1977 to August 1978. He was told he had a nerve injury that would improve with time but would take a long period to heal. He also saw private physicians in the interim period (July 1976-November 1977), and was told in February 1977 he should have surgery. Plaintiff sued the shipowners, and they impleaded the United States in December 1977. An administrative claim was filed in May 1979, alleging malpractice in failing to follow-up, incorrect diagnosis, and failing to perform surgery when it would have helped. The court held that the cause of action did not accrue upon plaintiff's discharge in July 1976 but rather in February 1977, when he was told he should have surgery. Although he had not been told at that time his condition was aggravated by PHS negligence, he should have, with "reasonable diligence, discovered the alleged negligence of the PHS."<sup>154</sup> The court pointed out that plaintiff "was not at the mercy of the PHS"<sup>155</sup> as of that date, and it was incumbent upon him to make inquiry within the following two years.

Plaintiff had also claimed that his "continuous treatment" from February 1976 through August 1978 should toll the statute. The court found that there was no continuous treatment during the

<sup>152</sup>*Id.* at 27 (quoting *Quinton v. United States*, 304 F.2d 234, 240 (5th Cir. 1962)).

<sup>153</sup>*Id.* at 28.

<sup>154</sup>*Id.* at 28-29.

<sup>155</sup>*Id.* at 29.

interim period and that during that period the "mere existence of this right [to treatment by PHS] is not sufficient to provide the continuity needed to toll the statute of limitations."<sup>156</sup> The court cited *Kossick v. United States*<sup>157</sup> as support for this position, although it also cited *Kossick* as the source of the "well-recognized continuing treatment theory."<sup>158</sup>

As plaintiff filed a claim in May 1979, one might think that any "malpractice" committed by PHS after May 1977 would still be actionable (i.e., the entire second period of treatment). Nevertheless, the court held that all claims of malpractice for this period were "identical" to the claim that accrued February 1977, i.e., failure to follow-up plaintiff's condition. Where the only claim really was failure to follow-up, a later failure to follow-up does not create a new cause of action.<sup>159</sup> This case is thus useful for its analysis of continuous treatment and failure to follow-up, but its analysis of *Kubrick* and the "discovery" rule are of limited value.

In *De Girolamo v. United States*<sup>160</sup> the district court dismissed plaintiff's claim as time barred. Plaintiff sustained knee injuries in 1969, was treated by VA facilities in 1969-1975, and in October 1975 underwent a menisectomy to remove torn cartilage. Within four months his knee rendered him "virtually immobile," and in July 1976 private physicians told him that a piece of cartilage had been left in the knee. In September 1976 VA doctors told plaintiff that it was very common that some cartilage was left after menisectomies, and he was treated by the VA through May 1978. Plaintiff filed suit in May 1979.

The court found that plaintiff's cause of action accrued at least by late 1976, when he knew of both his injury (knee) and its cause (cartilage left in knee). The court noted that "[t]he accrual date is often postponed . . . in cases where a patient is receiving continuous treatment from a given physician and relying on his advice."<sup>161</sup> The reasons for this are that "it would obviously be both absurd and inappropriate to force a claimant to institute suit against either a hospital or a physician while still undergoing corrective medical treatment"<sup>162</sup> and "it prevents the concealment by physicians of malpractice acts until the time in which to sue

<sup>156</sup>*Id.* at 30.

<sup>157</sup>330 F.2d 933 (2d Cir.), cert. denied, 379 U.S. 837 (1964).

<sup>158</sup>*Id.* at 29.

<sup>159</sup>*Id.*

<sup>160</sup>518 F. Supp. 778 (E.D.N.Y. 1981).

<sup>161</sup>*Id.* at 780 (citing *Kossick*).

<sup>162</sup>*Id.* at 780-81.

has expired."<sup>163</sup> Nevertheless, the court recognized that the continuing treatment toll "is lifted when the facts become 'so grave as to alert a reasonable person that there may have been negligence related to the treatment received . . .'"<sup>164</sup> and the toll "has no merit when a person knows of the acts constituting negligence."<sup>165</sup> The court also noted that the continuing treatment toll is often lifted where later different government treating physicians are not accused of malpractice.

Plaintiff argued that because the VA doctors advised him that the menisectomy was not negligently performed, the government misled him and caused the delay in bringing the action. Rejecting this, the district court wrote:

If this position were accepted, the natural corollary would make it incumbent upon the VA doctors to admit their acts of malpractice. No court can force a Government defendant to admit its malfeasance or suffer the consequences, to wit, toll the statute of limitations until an injured party has actual notice that a particular act constituted malpractice.<sup>166</sup>

The Court also rejected tolling the period in light of "fraud" or "misrepresentation" by the VA doctors, because plaintiff failed to show fraud. It expressly did not decide if fraud would toll the statute on equitable principles.<sup>167</sup>

In *Rispoli v. United States*,<sup>168</sup> Mr. Rispoli severely injured his leg in an auto accident, was initially treated in a private hospital and then transferred to a VA hospital, where he underwent a number of complex and painful skin grafts in an attempt to close the leg wounds. During his treatment he complained about one of the treating doctors. After one of the skin-graft procedures in January 1976, the leg wound was successfully covered but the heel and top of his foot had come off completely. He was assured they would eventually heal, although they did not, and he later saw a

<sup>163</sup>*Id.* at 781.

<sup>164</sup>*Id.* (quoting *Reilly v. United States*, 513 F.2d 147 (8th Cir. 1975), a pre-*Kubrick* case).

<sup>165</sup>*Id.* (quoting *Tyminski v. United States*, 481 F.2d 257 (3d Cir. 1973), another pre-*Kubrick* decision). After *Kubrick*, one might argue that knowledge of the negligence is not required to "untoll" the continuing treatment exception; merely knowing the injury and its cause would be sufficient.

<sup>166</sup>*Id.* at 782. Compare this position with the language about fiduciary obligations in *Harrison v. United States*, 708 F.2d 1023, 1028 (5th Cir. 1983).

<sup>167</sup>*Id.* at 783. Compare *De Girolamo with Holmberg v. Armbrecht*, 327 U.S. 392 (1946).

<sup>168</sup>576 F. Supp. 1398 (E.D.N.Y. 1983).

civilian doctor in late 1977; he filed a claim on April 13, 1978. The government moved to dismiss Rispoli's action as time barred, suggesting that the claim accrued when Rispoli expressed dissatisfaction with his VA doctor. The court examined the record and found that Rispoli was only complaining about the doctor's abusive manner and not that his medical treatment was improper. "A patient's complaint about a doctor's bedside manner is insufficient to mark the accrual of a patient's claim of malpractice."<sup>169</sup> The government also suggested that Rispoli was aware of his injury in January 1976, when he knew "parts of his foot were missing. However, [the court said] in this case, this awareness does not constitute knowledge of an injury" since he had been told to expect severe pain and complications.<sup>170</sup> The court said:

A plaintiff should not be deemed 'armed with the critical facts' [under *Kubrick*] where (1) he knows a procedure normally involves the type of results that also could be considered signs of malpractice; and (2) he is assured by his doctor that his pain and unseemly side-effects are normal given the nature of the treatment.

. . . .

. . . Where a patient has been told that complications will arise and, when they do arise, is told further that they can be treated, he cannot be deemed to have knowledge of an injury. In such circumstances, he can only be deemed to have knowledge after a sufficient period of time has passed so as to alert him that the treatment is unsuccessful."<sup>171</sup>

This holding is logical and deserves to stand on its own. However, the district court essentially said it was basing its holding on *Kubrick*, in which, said the district court, the Supreme Court

held that a claim accrues when the claimant has discovered or, in the exercise of reasonable diligence, should have discovered, the existence, *permanence* and physical cause of the injury, regardless of whether he believes he has an actionable claim . . . . In other words, a claim accrues when a claimant is 'armed with the facts' of both

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<sup>169</sup>*Id.* at 1402 (citing *DeWitt v. United States*, 593 F.2d 276 (7th Cir. 1979), *rev'd on rehearing*, 618 F.2d 114 (7th Cir. 1980), a pre-*Kubrick* case) *DeWitt's* principal holding was overruled by *Kubrick*.

<sup>170</sup>*Id.* at 1402.

<sup>171</sup>*Id.* at 1402-03.

the existence of his injury and its causation sufficient to alert him that a basis for investigating the possibility of malpractice exists.<sup>172</sup>

It may be that in adding the word "permanence," the district court had in reality gone beyond *Kubrick's* actual holding. Both the Ninth Circuit<sup>173</sup> and the Tenth Circuit<sup>174</sup> have held that knowledge of the "permanence" of the injury was not necessary to start the period running. An obvious distinction in *Rispoli* were the doctor's assurances that his condition was *not* permanent.

In *Kelly v. United States*,<sup>175</sup> plaintiff was treated for bleeding ulcers in 1964 at a VA hospital, and alleged that as a result of the surgical procedures, he suffered from "dumping syndrome." Plaintiff was clearly aware of his injury and its cause by July 1966, but he claimed, among other things, "continuous treatment," and that the statute was tolled by his "mental incompetency" (he had been treated at the VA in 1964 for an "obsessive personality disorder").

The district court found that, although the "continuous treatment" doctrine had been "favorably mentioned [in *Kossick*],"<sup>176</sup> the court had not found it applied in any federal decision. Instead, "[t]he cases typically assume its existence and find it inapplicable on the facts."<sup>177</sup> As in *De Girolamo*, the court discussed the two rationales for the continuous treatment exception, noting that "[t]he doctor may be tempted to conceal from the patient the things he should know" and also the confidential relationship [between doctor and patient] excuses the making of inquiry which questions the care which has been or is being given during the existence of the relationship.<sup>178</sup> The court also noted that an "investigation" might actually interrupt the care being given.

Ultimately, the district court found that the above reasoning at most excused a patient from making more diligent inquiry than if the treatment had ended. Accordingly, "the continuous treatment doctrine is not an exception to the requirement of reasonable diligence set forth in the *Kubrick* case but rather a factor in determining whether that requirement has been met."<sup>179</sup> As

<sup>172</sup>*Id.* at 1401-1402 (*Kubrick* citations omitted) (emphasis added).

<sup>173</sup>*Ashley v. United States*, 413 F.2d 490 (9th Cir. 1969).

<sup>174</sup>*Robbins v. United States*, 624 F.2d 971 (10th Cir. 1980).

<sup>175</sup>554 F. Supp. 1001 (E.D.N.Y. 1983).

<sup>176</sup>*Id.* at 1003.

<sup>177</sup>*Id.*

<sup>178</sup>*Id.*

<sup>179</sup>*Id.* at 1004.



plaintiff knew of his injury and its cause in 1966, the doctrine was not available for him.

The court also noted that mental incompetency in general does not toll the period under the FTCA. It said in dicta, "[t]here may be an exception when the mental condition bears on plaintiff's ability to understand the nature and cause of his injuries,"<sup>160</sup> but then found that plaintiff's statements in 1965 and 1966 "clearly reflect such an understanding."<sup>161</sup>

*Dundon v. United States*<sup>162</sup> denied the government's summary judgment motion, finding the claim was not time barred. Dundon had headaches and evident personality disorders, and was treated by the VA from 1970-1975 for psychiatric illness, including electroconvulsive therapy. In July 1975, he received a neurological workup, and he and his parents were informed he had a brain tumor in August 1975. After operations in October and November 1975, the tumor burst. He lapsed into a coma in January 1976, and died September 30, 1977 (after being comatose for twenty months). Plaintiff parents filed their claim in January 1979, alleging both misdiagnosis and negligence in the surgery. The government argued that the critical facts were known in August 1975 (at least as to the misdiagnosis), while plaintiffs argued the action accrued when the true extent of harm became known, i.e., upon death, that "continuous treatment" tolled the statute and that decedent's mental incompetency tolled the statute.

The court assumed for the purposes of the motion that the claim accrued August 1975. It rejected plaintiff's continuous treatment theory (also citing *Kelly*), finding the doctrine may exist (under *Kossick*) but was inapplicable on the facts. It found that the doctrine "presupposes more continuity of treatment than occurred here," which in case was "a series of different physicians in different departments in different VA hospitals."<sup>163</sup> The court also recognized that continuous treatment at different government facilities is not enough to invoke the doctrine where the later government treatment is by others not accused of malpractice.<sup>164</sup>

The court then examined the mental competency issue. It acknowledged that disability due to mental incompetence does not

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<sup>160</sup>*Id.* at 1005 (citing *Zeidler v. United States*, 601 F.2d 527 (10th Cir. 1979)).

<sup>161</sup>*Id.*

<sup>162</sup>559 F. Supp. 469 (E.D.N.Y. 1983).

<sup>163</sup>*Id.* at 473. It would seem rather frequent when receiving free care at government medical facilities that treatment is not given by the same doctors, especially if treatment is over a period of years.

<sup>164</sup>*Id.*

toll the FTCA limitation period.<sup>185</sup> The court then wrote, however:

To treat this case as one involving mere mental incompetency in the general sense proffered by the government is to lose sight of the decedent's extraordinary situation. The decedent's mental condition, allegedly caused by his treating physicians, directly prevented his understanding the nature and cause of his injuries.<sup>186</sup>

The court observed that

[d]uring the comatose period, the decedent clearly was incapable of comprehending the elements of possible malpractice or of pursuing a remedy for the injuries sustained. More significantly, the very tort that allegedly forms the basis of this suit caused that incapacity. The effect of the operations was to take away the decedent's mental functions entirely.<sup>187</sup>

The court relied on the Tenth Circuit's *Zeidler v. United States*<sup>188</sup> for a "narrow" exception for "brain damage or destruction" that tolled the statute: "The exception is narrow and merely prevents 'blameless ignorance' from being penalized, by avoiding the anomalous result of having an arguably wronged comatose patient denied his right to press a claim by virtue of the very malpractice of which he seeks to complain."<sup>189</sup>

The government argued that a guardian could have been appointed for the decedent, but the court rejected this, because decedent was of age and had not been declared legally incompetent (ignoring whether or not plaintiffs or others should have taken this step). The court then found that, assuming the claim accrued in August 1975, it then became tolled after five months in January 1976, and did not start to run again until the death in September 1977. Parent's filing of the claim sixteen months after the death was thus after only twenty-one months of the two-year period had elapsed, and so was timely. This last was partly based upon New York's wrongful death statute, which made the wrongful death claim dependent upon the ability of decedent to have made the claim had he lived. Since decedent could have filed in January 1979 if he had come out of the coma in September 1977, his parents could file then also.

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<sup>185</sup>*Id.* at 474.

<sup>186</sup>*Id.*

<sup>187</sup>*Id.*

<sup>188</sup>601 F.2d 527 (10th Cir. 1979).

<sup>189</sup>559 F. Supp. at 475.

Interestingly, the court, in citing *Kubrick* earlier in the opinion, wrote that the Supreme Court had held that "under the [FTCA], a tort claim occurs when the claimant has discovered, or in the exercise of reasonable diligence, should have discovered, the existence, *permanence* and physical cause of the injury, whether or not he has an actionable claim."<sup>190</sup>

The district court, as in *Rispoli*, seems to have gone slightly beyond *Kubrick*, and has even extended this discovery of "permanence" of injury to nonmalpractice FTCA claims as well.

This opinion is also interesting for what the court did not do, i.e., consider whether a wrongful death claim under the FTCA could ever accrue prior to death. The approach of the Seventh Circuit's *Fisk v. United States*<sup>191</sup> would surely have made analysis of this case less complicated.

*Lotrionte v. United States*<sup>192</sup> was decided twenty days after *Dundon*, and involved a veteran who died of a heart attack on April 11, 1978 while being treated in a VA hospital. The court wrote:

In a federal tort claim arising out of an allegedly wrongful death, the cause of action accrues at death. In the absence of an allegation that the defendant covered up evidence that would prove the physical cause of death, the running of the two-year statute of limitations is not tolled until plaintiff discovers that she has a legal cause of action.<sup>193</sup>

Accordingly, a claim had to be presented to the appropriate federal agency by April 11, 1980. Although plaintiff produced copies of letters dated April 9, 1980 to the Public Health Service, the court held that, because these letters were not received by April 11 (and also that they were sent to an "inappropriate agency"), the claim was time barred.

From the wording of the decision, the court would seem to be holding that even in medical malpractice cases, a wrongful death claim accrues at time of death, unless fraud is alleged, and that *Kubrick* supports this. Compare this to *In Re Swine Flu Products*

<sup>190</sup>*Id.* at 477 (emphasis added).

<sup>191</sup>657 F.2d 167 (7th Cir. 1981). *Fisk* held that a claim for wrongful death accrued at the time of death, regardless of the time of injury or plaintiff's knowledge of its cause. See *infra* text accompanying notes 439-41.

<sup>192</sup>560 F. Supp. 41 (S.D.N.Y. 1983).

<sup>193</sup>*Id.* at 42 (citing *Kubrick*).

*Liability Litigation*,<sup>194</sup> which applied the same "knowledge" standards to the survivors as to a plaintiff suing for his own injuries, and cited *Kubrick* as authority for its position. Note also that, unlike *Dundon*, the *Lotrionte* court did not consider whether the wrongful death action could be maintained under New York law.

In *Schroer v. Chmura*<sup>195</sup> plaintiff mother was attended at childbirth by Dr. Chmura, who performed an episiotomy on July 9, 1983. On August 25, 1983, Dr. Chanatry examined plaintiff and told her the anal sphincter had been torn. Surgery to repair the laceration and other related complications was performed in September 1984 and June 1985, and as a result plaintiff could only deliver future children by caesarean section. Plaintiff said she first realized Dr. Chmura had caused her injury in September 1984, when she saw what Dr. Chanatry wrote on a medical insurance form.

In January 1986 plaintiff sued various defendants, including Dr. Chmura, in New York State court. The United States attorney removed the case to federal court and certified that Dr. Chmura had been an employee of the National Health Services Corporation, a government agency. The government moved to substitute the United States and to dismiss for failure to file a timely claim.

The district court dismissed, citing *Kubrick*: "[t]he victim need not know that the cause of the injury was negligence, but the statute of limitations begins to run if the cause of the injury was known and further inquiry would have led to discovery of the negligence."<sup>196</sup>

Plaintiff knew of her injury on August 25, 1983, knew it was related to childbirth, and that Dr. Chmura had done the delivery. Although plaintiff at that time was not aware of the "technical cause" of the injury, further inquiry then would have led to discovery of Dr. Chmura's arguable negligence. "Once a victim knows of the injury and of the cause of the injury, the burden is on the victim to inquire further and discover that a defendant's fault caused the harm."<sup>197</sup>

Not discussed was the issue of knowledge of the United States as a party. Plaintiff had sued Dr. Chmura within the 2-1/2 year New York medical malpractice statute of limitations (according to

<sup>194</sup>764 F.2d 637 (9th Cir. 1985).

<sup>195</sup>634 F. Supp. 941 (N.D.N.Y. 1986).

<sup>196</sup>*Id.* at 943 (citing *Barrett*).

<sup>197</sup>*Id.*

the opinion), but evidently was unaware that the doctor was a federal employee. Plaintiff might have made a *Kelley* argument, and claimed that her ignorance of the doctor's status excused the failure to file a timely FTCA claim (with possibly better luck in the Second Circuit than in others),<sup>198</sup> but apparently never did. In any event, suit was not brought within two years ("analogizing" to the FTCA period as *Kelley* had) and there was no issue of the government lulling plaintiff into forgoing suit.

*Kubrick*-type issues were also addressed in the following Second Circuit district court cases.

In *Snorgrass v. United States*<sup>199</sup> plaintiff alleged wrongful imprisonment by U.S. Customs agents upon arrival at an airport. He later moved for leave to also file a claim against the Drug Enforcement Administration (DEA). The court denied the motion, holding that even though plaintiff did not know the DEA was involved, there had been no government concealment to trigger the "diligence" and "discovery" rules under *Kubrick* and *Barrett*, and the cause of action accrued at the time of injury.

*Smitherman v. N.Y.C. Dept. of Corrections Investigations Complaint Unit*<sup>200</sup> was a civil rights action, under 42 U.S.C. § 1983, which, however, was essentially a medical malpractice action against state prison officials. The court wrote "plaintiff's claim in this case accrued at the time he knew or had reason to know of the injury that is the basis of his claim."<sup>201</sup> The court held that neither delay in delivery of medical records later requested, nor subsequent side effects that were related to the original injury delayed the accrual of the cause of action past the date medical treatment was terminated (August 3, 1977). *Kubrick* was not cited, and no consideration was given to plaintiff's knowledge of the "cause" of his injury, although here the implication is clear that if plaintiff knew he had been "injured" in this sense, he must have known who "injured" him.

*Zenobi v. Exxon Co., U.S.A.*<sup>202</sup> held in a suit alleging violations of federal regulations in petroleum sales that plaintiff's being unaware of his legal rights (i.e., the regulations) "is insufficient to

<sup>198</sup>See *Kelley v. United States*, 568 F.2d 259 (2d Cir. 1978). Compare *Kelley with Wilkinson v. United States*, 677 F.2d 998 (4th Cir.), cert. denied, 459 U.S. 906 (1982), and *Wollman v. Gross*, 637 F.2d 544 (8th Cir. 1980), cert. denied, 454 U.S. 893 (1981).

<sup>199</sup>567 F. Supp. 33 (E.D.N.Y. 1983).

<sup>200</sup>557 F. Supp. 877 (S.D.N.Y. 1983).

<sup>201</sup>*Id.* at 878.

<sup>202</sup>577 F. Supp. 514 (D. Conn. 1983).

delay the accrual date of his cause of action against Exxon," citing *Kubrick*.<sup>203</sup>

Finally, in *Kramer v. Secretary, U.S. Dept. of the Army*,<sup>204</sup> a government contractor alleged that government employees had revealed information that were her trade secrets. The district court wrote: "The standard under the FTCA is that a cause of action accrues when the injured party knows of the injury and its probable cause."<sup>205</sup>

Courts in the Second Circuit have not been slow to extend the *Kubrick* doctrine beyond the medical malpractice area.

## VI. THIRD CIRCUIT

One pre-*Kubrick* decision by the Third Circuit that has retained considerable vitality in the post-*Kubrick* era<sup>206</sup> is *Ciccarone v. United States*.<sup>207</sup> In *Ciccarone* an Army veteran received diagnostic treatment at a VA hospital for recurrent bouts of bacterial meningitis. On July 14, 1963 methylene blue dye was injected into his spinal column; as he was being helped off the operating table, he fell and broke his nose. That same day he complained of pain and numbness in his legs. His condition later worsened, and he was unable to walk until he started to improve in September 1963. He was discharged in November 1963, and from then through July 1965 he sporadically visited the VA hospital and also consulted other government and private physicians. On July 8, 1965, he told a VA neurologist the blue dye treatment "had caused a drastic change in his physical condition."<sup>208</sup> Plaintiff filed suit on September 29, 1967, alleging negligence in the blue dye treatment; after a trial the district court found the claim was time barred and also that no malpractice had been committed. The Third Circuit affirmed both findings, but in so doing wrote some interesting dicta that is still cited by the federal courts.

The Third Circuit found that in general the limitation period commences "when a trauma coincides with the negligent act and some damage is discernible at the time, even though the ultimate

<sup>203</sup>*Id.* at 517.

<sup>204</sup>623 F. Supp. 505 (E.D.N.Y. 1985).

<sup>205</sup>*Id.* at 509 (citing *Kubrick* and *Peterson v. United States*, 694 F.2d 943 (3d Cir. 1982)).

<sup>206</sup>Perhaps not coincidentally, pre-*Kubrick* decisions tending to restrict extension of limitations tolling (and deciding against plaintiff) have retained greater vitality post-*Kubrick* than decisions tending to extend tolling theories.

<sup>207</sup>486 F.2d 253 (3d Cir. 1973).

<sup>208</sup>*Id.* at 255.

damage is unknown or unpredictable,"<sup>209</sup> and that "[d]amages are discernible when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice."<sup>210</sup>

Accordingly, the Third Circuit read even into the pre-*Kubrick* rule that a claimant need not know, nor even be able to know, the ultimate extent of his injury for the limitations period to begin running. If this dicta was "conservative," however, the dicta that followed could be considered "liberal":

[I]t has been held that as long as the physician patient relationship continues, the statute will be tolled [citations omitted] . . . .

The rationale for this latter proposition is that the claimant is entitled to place trust and confidence in his physician and that this relationship excuses the claimant from challenging the quality of care he is receiving from his physician until his confidential relationship terminates.

. . . .

Once this personal, confidential relationship terminates, the patient must exercise reasonable diligence in seeking a remedy for any suspected wrongdoing on the part of his physician.<sup>211</sup>

Accordingly, even though plaintiff argued he had received "continuous treatment" from the VA since the blue dye treatment, the court found that the "continuous treatment" terminated on August 6, 1963, when treatment ceased by the individual VA doctor who had done the blue dye procedure, especially as plaintiff "had consulted several government and private physicians after the events of July 16, 1963."<sup>212</sup>

Plaintiff also argued that his "blameless ignorance" should toll the statute, but the court found he was aware of some physical problems immediately after the dye procedure, and had discussed the procedure and its aftereffects with legal counsel within two years of July 16, 1963, and therefore was not "blamelessly ignorant."

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<sup>209</sup>*Id.* at 256 (citations omitted).

<sup>210</sup>*Id.* (citing *Quinton v. United States*, 304 F.2d 234 (5th Cir. 1962)).

<sup>211</sup>*Id.* at 256-57.

<sup>212</sup>*Id.* at 257.

The Third Circuit had in dicta gone further than most courts in discussing the essentially fiduciary relationship of "confidence" between doctor and patient, yet never mentioned any concomitant duty to disclose, instead opting for a "continuous treatment" toll. The two concepts, however, are closely intertwined: as long as the relationship lasts, there arguably is a "duty" for the doctor to disclose any acts of malpractice; failure to make such disclosure is arguably a "concealment" that tolls the statute. Once the relationship ends, however, there is no longer a duty to disclose because the patient is theoretically no longer placing special trust and confidence in that particular physician; and so the tolling of the statute is lifted. The analysis leads to a result indistinguishable from "continuous treatment."

The Third Circuit was, of course, the circuit that the Supreme Court reversed in *Kubrick*.<sup>213</sup> Since then, only one FTCA malpractice decision at the court of appeals level for this circuit was found, *Peterson v. United States*.<sup>214</sup> The opinion did not break any new legal ground, and dutifully applied *Kubrick*, but reversed a summary judgment dismissal on a technicality.

Mr. Peterson, a Navy retiree, had lung cancer, and a history taken by a naval doctor in March 1976 indicated Peterson had known of lung lesions since 1973. This doctor certified in an affidavit that from March 8-15, 1976 he explained to Peterson that he probably had cancer, and that tests showed this conclusively on April 17, 1976. Peterson filed a claim on March 28, 1978. The district court examined the doctor's affidavit that he had given a "discharge note" to Peterson explaining the probability of cancer just two years before the claim was filed, and that Peterson had told him on March 15, 1976 that he thought "the Navy physicians had 'messed up' in his treatment."<sup>215</sup> Based on this, the district court dismissed the suit as time barred. The Third Circuit reversed, pointing out that the federal rules require that the discharge note itself be attached to the motion, which was not done. The court also found that the medical records were ambivalent as to whether it could be inferred that Peterson should have known he had cancer. In closing, the Third Circuit suggested that if the district court on remand found the claim timely, it would also have to examine the wrongful death claim under Pennsylvania law (Peterson had died on a date not stated,

<sup>213</sup>The Third Circuit opinion in *Kubrick* is at 581 F.2d 1092 (3rd Cir. 1978). See also *Tyminski v. United States*, 481 F.2d 257 (3d Cir. 1973).

<sup>214</sup>694 F.2d 943 (3d Cir. 1982).

<sup>215</sup>*Id.* at 944.



and his widow had maintained the action based on the claim he had made while alive).

*Grabowski v. Turner & Newall*<sup>216</sup> was an asbestos exposure case decided under Pennsylvania law. The district court held that the reasoning of *Kubrick* applied "[i]n the context of this case, where plaintiff knew or should have known that his injury was caused by exposure to asbestos."<sup>217</sup> In *DeMato v. Turner & Newall, Ltd.*,<sup>218</sup> the Third Circuit in companion cases adopted the district court's reasoning in *Grabowski*, finding that, under Pennsylvania law, the cause accrued when "plaintiffs knew the physical causes and sources of their injuries. . . . [T]heir lack of knowledge about the legal basis for prospective claims will not toll the Pennsylvania statute of limitations."<sup>219</sup> The Third Circuit then suggested that this result should be compared with *Kubrick* "(interpreting two-year limitations period in [FTCA])."<sup>220</sup> The Third Circuit seemed to be suggesting that *Kubrick* applies to all FTCA claims.

This suggestion was made law in the Third Circuit in 1985. *Zelevnik v. United States*<sup>221</sup> was not a medical malpractice case, but its position is certainly applicable to that type of case.

The Zelevnik's son was murdered on December 20, 1974 by one Walford. They investigated Walford's background and discovered he had recently been released from a Massachusetts state psychiatric hospital.<sup>222</sup> They did not, however, discover until 1982 that Walford was also an illegal alien who had attempted to surrender to the Immigration and Naturalization Services (INS) a few days before the murder, but was allowed to leave. The Zelevniks filed their FTCA claim in September 1983, and the district court dismissed the resultant lawsuit as time barred.

The Third Circuit affirmed and contributed this sweeping language:

For tort actions, the general rule is that the cause of action accrues at the time of the last event necessary to complete the tort. Usually, this is at the time the putative plaintiff is injured [citing *Kubrick*]. An injured party, however, cannot make a claim until he has or

<sup>216</sup>516 F. Supp. 114 (E.D. Pa. 1980).

<sup>217</sup>*Id.* at 120.

<sup>218</sup>651 F.2d 908 (3d Cir. 1981).

<sup>219</sup>*Id.* at 909.

<sup>220</sup>*Id.*

<sup>221</sup>770 F.2d 20 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 1513 (1986).

<sup>222</sup>An earlier suit against the Massachusetts hospital and doctors was dismissed on grounds of state sovereign immunity.

should have had notice that he had an action to bring. Thus, the Supreme Court has held that an injured party's cause of action does not accrue until he learns of his injury [citing *Urie v. Thompson*]. In most cases, when a person learns of his injury, he is on notice that there has been an invasion of his legal rights and that he should determine whether another may be liable to him.<sup>223</sup>

In other words, when a person learns he has been injured, he is expected to immediately look around and see who did it to him.

However, in some circumstances, a person may know that he has been injured but not sufficiently apprised by the mere fact of injury to understand its cause . . . . In those circumstances, when the fact of injury alone is insufficient to put an injured party on notice of its cause, the Supreme Court has indicated that the accrual of the claim would be delayed until the injured party learns both of the fact of his injury and its cause [citing *Kubrick*].<sup>224</sup>

The Third Circuit thus has very elegantly stated generalized circumstances when the liberal *Urie* "discovery of injury" rule should take precedence over the "general" rule, and when the more liberal *Kubrick* "discovery of cause of injury" rule should take precedence over the *Urie* rule. Medical malpractice cases frequently fall into the last category for two reasons: first, because a person is usually already to some extent "injured," additional "injury" in the course of medical treatment is often hard to detect, and the "cause" is often difficult to separate from the original condition itself. Second, the medical treatment given is frequently not well understood by the patient, and even injuries that are distinct from the original "injury" (e.g. Mr. Kubrick's hearing loss) often are not obviously connected to medical treatment.

The Zelezniks argued that their claim did not accrue until they learned of the government's involvement through the negligence of the INS, and cited *Barrett* as supporting their position. The Third Circuit distinguished *Barrett*, saying it involved "active concealment by the government of its activities,"<sup>225</sup> and wrote: "When the government actively conceals its own wrongdoing by misrepresentations, there may well be equitable reasons for tolling

<sup>223</sup>770 F.2d at 22.

<sup>224</sup>*Id.* at 22-23.

<sup>225</sup>*Id.* at 23.

the statute of limitations."<sup>226</sup> Because the INS did not conceal its involvement with Walford, the court was "not required to consider what may well be an exception to the general rule."<sup>227</sup> This particular "general rule" apparently includes the *Urie* and *Kubrick* rules.

The Third Circuit found *Kubrick* required the issue to be "whether the injured party had sufficient notice of the invasion of his legal rights to require that he investigate and make a timely claim or risk its loss."<sup>228</sup> Then, once claimant has this "notice," he has the limitations period to decide whether to make a claim because "[a]n injured party with the knowledge of injury and its immediate cause is in no worse position than any other plaintiff who must determine whom to sue in an obscure factual context."<sup>229</sup>

The "immediate cause" language is a significant addition to the standard *Kubrick* analysis, and could lead to conceptual difficulties where the "cause" is a failure to diagnose, treat or warn.<sup>230</sup>

Plaintiffs also "essentially contend[ed] that the statute of limitations does not begin to run so long as a reasonably diligent investigation would not have discovered the government's actions."<sup>231</sup> The Third Circuit rejected this, finding such a position would make every accrual date indefinite as to unknown parties, and that the statute expresses Congress's decision of a reasonable time in which to make a claim, balancing plaintiff and government interests. This admittedly can be harsher on some plaintiffs than others: "For some claims, two years is more than enough time to bring a claim, and for others, it is all too short."<sup>232</sup> One can imagine the Third Circuit saying that this may be sometimes unfair, but "life is unfair." Because the purpose of the *Kubrick* rule was to put malpractice plaintiffs on a similar footing to other tort claimants, "[t]he fact that a reasonably diligent investigation would not have discovered the defendant's involvement is no longer relevant for the purposes of accrual of the statute of limitations."<sup>233</sup>

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<sup>226</sup>*Id.*

<sup>227</sup>*Id.*

<sup>228</sup>*Id.* (emphasis added).

<sup>229</sup>*Id.* (emphasis added).

<sup>230</sup>See *Raddatz v. United States*, 750 F.2d 791 (9th Cir. 1984); *Augustine v. United States*, 704 F.2d 1074 (9th Cir. 1983) (holding that *Kubrick* does not apply to failure to diagnose, treat, or warn cases).

<sup>231</sup>770 F.2d at 24.

<sup>232</sup>*Id.*

<sup>233</sup>*Id.*

This last language is a bit broad and care should be taken not to apply it out of context. Certainly there ought to be some instances that toll the statute when a diligent investigation would not discover the cause of an injury, e.g., as in *Barrett* or the Seventh Circuit's *Stoleson v. United States*.<sup>234</sup>

In *Pangrazzi v. United States*<sup>235</sup> plaintiff was in an auto accident while on active duty in the Army, and was discharged a year later, in March 1962. This accident caused a "seizure disorder," which plaintiff alleged caused him to be in another auto accident in January 1964 that left him a paraplegic. Plaintiff alleged that between his discharge and his second accident, the government failed to properly treat him by "failing to question plaintiff's symptomatology" and by failing "to warn him of the dangers associated with his disorder."<sup>236</sup> He filed a claim on September 26, 1979. The government moved to dismiss the claim as time barred, and plaintiff said he did not become aware of his seizure disorder or the government's negligence until less than two years before filing his claim. The opinion does not elaborate on the facts prior to filing the claim, other than to indicate that "doctors did not diagnose the true cause of plaintiff's medical condition until 1978, but more than a decade earlier plaintiff did know the critical facts—his injury and its service-related origin," pointing to documents from 1965 and 1966 wherein plaintiff said he thought "his passing out" or "blacking out" was caused by the injuries in the first auto accident.<sup>237</sup> Accordingly, "[p]laintiff should have protected himself by seeking advice in the legal and medical communities."<sup>238</sup> In discussing *Kubrick* the district court wrote that the Supreme Court "held that a plaintiff's analysis of his injury and its *probable*, not actual cause, triggered running of the statute of limitations."<sup>239</sup>

*Maulfair v. United States*,<sup>240</sup> was a straightforward medical malpractice FTCA case. Plaintiff had had annual chest x-rays at a VA hospital where he worked, the most recent one in January 1979, and all reports said no abnormalities were observed. He

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<sup>234</sup>629 F.2d 1265 (7th Cir. 1980) (despite plaintiff's diligent investigation, medical knowledge simply had not developed sufficiently for the cause of the injury to be known until years after the injury occurred).

<sup>235</sup>511 F. Supp. 648 (E.D. Pa. 1981).

<sup>236</sup>*Id.* at 649-50.

<sup>237</sup>*Id.* at 650.

<sup>238</sup>*Id.*

<sup>239</sup>*Id.* (emphasis in original). Compare *Pangrazzi* with *Stoleson v. United States*, 629 F.2d 1265 (7th Cir. 1980) (plaintiff's "belief" did not start limitations period running when there was no basis for the belief).

<sup>240</sup>601 F. Supp. 885 (M.D. Pa. 1985).

became ill in March 1979, had an x-ray taken by his family doctor which revealed a spot, and a malignant tumor was removed the next month. He filed his claim in January 1982, claiming misdiagnosis by the VA in the January 1979 x-ray caused him to undergo additional medical treatment. The government's motion for summary judgment included a letter from plaintiff dated November 14, 1979, which said, among other things, that the January 1979 x-ray "showed the tumor (I was never notified by anyone to have this checked out)."<sup>241</sup> Plaintiff relied on his pleadings, in which he alleged his family physician first saw the January 1979 x-ray in April 1980 and found it showed cancer. The district court dismissed, finding the case fell "well within the rule of [*Kubrick*],"<sup>242</sup> noting that plaintiff's allegations did not disprove the material in the government's motion, and "[b]utressed by plaintiff's own words, we [the court] reject his contention that he could not have know about his claim until these x-rays had been examined by a doctor."<sup>243</sup>

There was no discussion of, and it is not clear that plaintiff ever argued that his statement in the November 1979 letter was mere "suspicion" unsupported by any medical opinion. The opinion implies that where "suspicions," if followed up promptly, would reveal the basis for a claim, there is no justification for tolling the period until the "suspicions" are confirmed. There was also no discussion about the knowledge, if any, plaintiff may have had as to whether the two-month delay made any difference to him in terms of being "injured." It seems clear that the district court felt that once a patient knows his condition was misdiagnosed, he should be alert to possible physical debilitations caused by the misdiagnosis.

*Gallick v. United States*<sup>244</sup> was a swine flu vaccination case<sup>245</sup> where Mr. Gallick was injected with the vaccine on November 21, 1976, and had a heart attack and died later that same day. His widow filed a claim on February 8, 1979. The government moved to dismiss the claim as time barred. The court examined

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<sup>241</sup>*Id.* at 886.

<sup>242</sup>*Id.* at 887.

<sup>243</sup>*Id.*

<sup>244</sup>542 F. Supp. 188 (M.D. Pa. 1982).

<sup>245</sup>In 1976, Congress enacted the National Swine Flu Immunization Program Act, former 42 U.S.C. §§ 247b(j)-247b(1) (1976), better known as the "Swine Flu Act." Under the Act, all adults could receive free swine flu vaccination. To ensure that the vaccine would be available and medical personnel would be willing to administer it, the Act provided that liability of program participants would be assumed by the government, with personal injury claims arising out of these vaccinations brought against the United States under the FTCA.

Pennsylvania law as to the substance of the death claim and found that two actions were possible: "wrongful death," and a "survivor" action continuing any action that the deceased could have maintained had he lived. The court gave short shrift to the wrongful death claim, merely saying "[u]nder the FTCA it is well settled that a wrongful death claim accrues on the date of the death."<sup>246</sup> The survival action, the court found, might be viable under *Kubrick*. Although *Kubrick* "dealt solely with the accrual of a personal injury claim, rather than a survival action, nevertheless, it is logical that the same rule should govern both" as the survival action merely continues the decedent's own cause of action.<sup>247</sup> The court found a question of fact as to when decedent's widow gained knowledge of the connection of the vaccination and her husband's death: plaintiff argued she did not know the cause until her attorney received a letter from a doctor in March 1979; the government argued she could have learned the cause merely by asking any doctor.

On a renewed government motion for summary judgment, the court applied a newly decided Pennsylvania case, *Anthony v. Koppers Co., Inc.*,<sup>248</sup> which had held that where the cause of death is not known until after the death, the decedent could not have maintained an action at the time of his death, and so the survival action cannot be maintained. The district court applied this decision as setting the standard for whether the action even came into being under Pennsylvania law, and dismissed the case. The court wrote that *Kubrick* "recognized the propriety of applying the 'discovery rule' in personal injury cases under the FTCA,"<sup>249</sup> but because under Pennsylvania law the action never came into being, the survival action had to be dismissed.

*Ciprut v. Moore*<sup>250</sup> was a typical diversity medical malpractice case, but is useful for its analysis of the statute of limitations issues. Applying Pennsylvania law, as stated in *Ayers v. Morgan*,<sup>251</sup> the general rule is a suit for malpractice must be brought within two years from the date "when the act heralding a possible tort inflicts a damage which is physically objective and ascertainable."<sup>252</sup> In later decisions, an intermediate Pennsylvania appel-

<sup>246</sup>542 F. Supp. at 191.

<sup>247</sup>*Id.* at 192.

<sup>248</sup>496 Pa. 119, 436 A.2d 181 (1981).

<sup>249</sup>*Id.* at 194.

<sup>250</sup>540 F. Supp. 817 (E.D. Pa. 1981), *aff'd without opinion*, 688 F.2d 819 (3d Cir. 1982).

<sup>251</sup>397 Pa. 282, 154 A.2d 788 (1959).

<sup>252</sup>*Ciprut v. Moore*, 540 F. Supp. at 819 (quoting *Ayers*, 397 Pa. at 290).

late court held that three "phases of knowledge" must be discovered or reasonably discoverable: "(1) Knowledge of the injury; (2) Knowledge of the operative cause of the injury; and (3) Knowledge of the causative relationship between the injury and the operative conduct."<sup>253</sup>

The Pennsylvania court held that *Kubrick* stated "the better rule" . . . when it rejected the view that knowledge of a cause of action is necessary."<sup>254</sup> It is clear that the district court, in applying Pennsylvania law, considered this to be the same standard as set in *Kubrick*. The opinion is helpful for highlighting the perhaps obvious, but sometimes overlooked point that the rule of accrual of a claim when one knows of an "injury" and the acts that "caused" it necessarily implies knowledge that the acts caused the injury; it is possible to be aware of an injury, and also be aware of an act, but not to be aware that the act caused the injury.<sup>255</sup>

In *Flickinger v. United States*,<sup>256</sup> plaintiff stepped on a tack, telephoned the Cowardsville Area Health Clinic, and was told by a nurse that "purple was a good color"<sup>257</sup> for a foot; four days later, on March 2, 1979, two toes had to be amputated. Plaintiff sued the state in May 1981, and discovered that the nurse he had spoken to on the telephone was a Public Health Service employee when the U.S. attorney intervened and removed the suit to federal district court. Plaintiff's lack of knowledge of the true identity of the nurse did not toll the statutory period.

*Haefner v. Lancaster County*,<sup>258</sup> a civil rights case for wrongful arrest and imprisonment, held that "[f]ederal law determines when a federal claim 'accrues' and identifies the date as that point in time when the injured party knows or has reason to know of his injury, forming the basis of the action . . . ." <sup>259</sup>

Accordingly, the *Kubrick* standard was extended past even all FTCA cases, apparently to all "federal" claims, even for such

<sup>253</sup>*Id.* (citing *Coyne v. Porter-Hayden Co.*, 428 A.2d 208, 209 (Pa. Super. Ct. 1981); *Anthony v. Koppers Co.*, 428 Pa. Super. 81, 425 A.2d 428, 436 (1980) (emphasis in original).

<sup>254</sup>*Id.*

<sup>255</sup>See, e.g., *Overstreet v. United States*, 517 F. Supp. 1098 (M.D. Ala. 1981).

<sup>256</sup>523 F. Supp. 1372 (W.D. Pa. 1981).

<sup>257</sup>*Id.* at 1373; see also *Pennbank v. United States*, 599 F. Supp. 1573 (W.D. Pa.), *aff'd*, 779 F.2d 175 (3d Cir. 1985); *Place v. Ortho Pharmaceutical Corp.*, 595 F. Supp. 1009 (W.D. Pa. 1984).

<sup>258</sup>520 F. Supp. 131 (E.D. Pa. 1981), *aff'd without opinion*, 681 F.2d 806 (3d Cir.), *cert. denied*, 459 U.S. 874 (1982).

<sup>259</sup>*Id.* at 132-33 (citing *Kubrick* and *Grabowski*).

"federal" (in this case civil rights) claims brought against nonfederal defendants!

*Insurance Co. of North America v. United States*<sup>260</sup> included FTCA claims, in that stolen bearer bonds recovered by the FBI and claimed by plaintiff insurance company were turned over to a third party who also claimed ownership. Citing *Kubrick*, the court wrote that "under the [FTCA] a cause of action accrues and the limitation period begins to run when the claimant discovers, or in exercise of reasonable diligence should have discovered, the existence and cause of his injury."<sup>261</sup>

Finally, *Hauptmann v. Wilentz*<sup>262</sup> was a suit by the widow of the accused kidnapper of the Lindburgh baby, brought under 42 U.S.C. § 1983. The district court held that the statute of limitations had not been tolled:

As to what a plaintiff must know, while not frequently discussed in § 1983 cases, it would seem that plaintiff must be aware of both the fact of injury and its causal connection with defendant's acts, but need not know that a defendant's conduct is tortious or otherwise legally wrong.<sup>263</sup>

*Kubrick* and *Lavelle v. Listi*<sup>264</sup> were cited for this proposition.

It is apparent that *Kubrick's* influence in the Third Circuit has reached far beyond what was probably in the minds of the majority of the Supreme Court when they wrote that opinion.

## VII. FOURTH CIRCUIT

*Bridgford v. United States*<sup>265</sup> was one of the most significant pre-*Kubrick* cases because it set the liberal rule the Supreme Court eventually overturned in *Kubrick*. Nineteen-year-old Bridgford had varicose veins. Navy hospital doctors operated on June 8, 1964 to strip and remove these veins. During the operation, one surgeon severed the main femoral vein, which was then joined to another vein to allow drainage to the leg (a procedure know as an anastomosis). After the operation the doctor told Bridgford and his mother "a vein had been mistakenly severed and that it had been sewn back together . . . [and] that

<sup>260</sup>561 F. Supp. 106 (E.D. Pa. 1983).

<sup>261</sup>*Id.* at 117 (citing *Kubrick*).

<sup>262</sup>570 F. Supp. 351 (D.N.J. 1983).

<sup>263</sup>*Id.* at 397.

<sup>264</sup>611 F.2d 1129 (5th Cir. 1980).

<sup>265</sup>550 F.2d 978 (4th Cir. 1977).



blood was flowing properly through the vein."<sup>266</sup> Bridgford's postoperative pain and swelling was attributed by the doctors to nerve damage, slow healing, or emotional problems. By 1967 his condition had improved, but it worsened in August 1969, and he consulted a private physician who recommended a venogram. This was done in August 1970, and this physician concluded the femoral vein had become blocked within days or weeks of the anastomosis, that the condition could not be corrected by surgery, and that Bridgford would have to wear support stockings for the rest of his life. Bridgford filed his claim in July 1971, alleging the negligent severing of his vein necessitated the properly done anastomosis, which frequently results in the blockage he experienced. The district court held the claim was timely because any delay was due to Bridgford's "blameless ignorance," and at trial found negligence by the government. The Fourth Circuit affirmed.

The Fourth Circuit wrestled a bit with the statute of limitations problem. The then-current rule, having the cause of action accrue upon discovery of "the acts constituting the alleged malpractice" would, if read literally, make the claim in this case accrue when the doctor advised Bridgford he had mistakenly severed the femoral vein. Such a rule, designed to prevent the statute of limitations from running before the patient discovered that a negligent act had been committed, "can result in the equally harsh result of the statute's running before the patient realizes that the negligent acts on the part of the government employee caused him harm."<sup>267</sup>

To avoid this seemingly harsh result, the Fourth Circuit looked to Professor Prosser. To prevail in a suit, a plaintiff must "establish that the government employee had a duty towards him which he breached . . . [and] that this conduct was the proximate cause of an actual loss or damage . . ." <sup>268</sup> Consequently the cause of action should not accrue "until a claimant has had a reasonable opportunity to discover *all* of the essential elements of a possible cause of action—duty, breach, causation, damages . . ." <sup>269</sup>

The above holding was of course rejected in *Kubrick*. If *Kubrick* requires opportunity for knowledge of injury and its (probable) cause, this certainly subsumes the "causation" and "damages" part of the *Bridgford* holding. The "duty" and "breach" parts

<sup>266</sup>*Id.* at 980.

<sup>267</sup>*Id.*

<sup>268</sup>*Id.* at 981; see *Quinton v. United States*, 304 F.2d 284 (5th Cir. 1962).

<sup>269</sup>*Id.* at 981-82 (emphasis in original).

sound as if *Bridgford* requires knowledge of negligence, which *Kubrick* specifically rejected; however, a broader reading of *Bridgford* could also merge the "duty" and "breach" parts into the "causation" part. To do this is particularly appropriate in many medical malpractice cases, where knowledge that an act by a health care provider "caused" an injury is often as a practical matter synonymous with knowledge of negligence, as in, e.g., failure to diagnose, treat, or warn cases.<sup>270</sup> Under *Kubrick*, however, once injury and causation are known, the period begins and claimant then has two years to investigate, discover any negligence, and file his claim. This sounds as if claimant must use this time to discover "duty" and "breach," whereas *Bridgford* would require (opportunity for) knowledge of "breach" and "duty" before the statute even starts to run.

One could argue that if a claimant knows of the negligence, he does not need two years to present his claim. Surely a period of a month or two to retain counsel and draft the claim should suffice. Once the "diligence" or "opportunity for knowledge" language is introduced, however, the differences in the holdings of *Kubrick* and *Bridgford* become less glaring, and the reason for a substantial limitations period becomes evident. Mr. Kubrick had actual knowledge of the act that caused his injury, and it was easy to set the two years running at that point; but, suppose he did not see the doctors who gave him that information, but simply sat home and listened to the ringing in his ears. At what point "should" he have had knowledge of the cause of his injury if he had been reasonably diligent? Might it be at the same time he would have had "reasonable opportunity to discover . . . duty, breach, causation and damages"? Why should these times be any different? Is a court applying *Bridgford* even competent to find that as of "x" date a claimant "should have" known of the cause of his injury and as of "x" date plus a month or a year he "should have" known of duty and breach? Courts have difficulty enough in determining how diligent a claimant should have been to discover facts, such as injury and cause, without requiring them to determine how diligently a claimant should have pursued knowledge of those facts' legal ramifications.

In avoiding the "harsh" result a literal reading of the then current rule could require, the *Bridgford* court went further than it needed to. If the Fourth Circuit had simply opted for

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<sup>270</sup>*Cf.* Raddatz v. United States, 750 F.2d 791 (9th Cir. 1984); Augustine v. United States, 704 F.2d 1074 (9th Cir. 1983) (*Kubrick* does not apply to such cases).

opportunity to discover "causation" and "damages" (i.e., the *Kubrick* rule), Bridgford could still have recovered; he may have had knowledge of an act of malpractice as of June 1964, but he did not then have knowledge of damage or causation.

*Bridgford* also made some observations that should remain untouched by *Kubrick*. The government had argued that when Bridgford became aware of the mistaken act of the surgeon on him he knew he had a claim "even if for no more than nominal damages."<sup>271</sup> The Fourth Circuit soundly rejected this reasoning, quoting Professor Prosser to the effect that nominal damages are not recoverable in negligence where no actual loss has occurred, the threat of harm not yet realized not being enough (unless, of course, it can be accurately predicted, such as lost future earnings).<sup>272</sup> Thus "Bridgford's suit [was] not barred by his possible knowledge in 1964 of some nominal loss . . ."<sup>273</sup> This stands in stark contrast to holdings of other circuits that accrual does not wait upon knowledge of the full extent of injury.<sup>274</sup>

The government also argued the long lapse of time between the 1964 operation and the 1970 discovery of vein blockage was unreasonable. The Fourth Circuit found that Bridgford had been given "credible explanations" for his problems by the government doctors, so it could not be said he had not been reasonably diligent.

*Gilbert v. United States*<sup>275</sup> was the first post-*Kubrick* decision by the Fourth Circuit to address FTCA malpractice limitations issues. Plaintiff was injured in the Korean War in 1953, sustaining a brain injury that left him partly paralyzed. He was discharged in 1954, and in 1957 was admitted to a VA hospital. In August of that year he was found to be mentally incompetent and the VA issued a certificate so stating. On this basis Gilbert's mother obtained a state court order adjudging him incompetent, which, e.g., prohibited him from buying property or entering into contracts. In April 1978, an attorney that had represented Gilbert on other matters had him examined by private doctors, who agreed he was competent and had never been incompetent. On this basis, he was adjudged competent in May 1979. Gilbert filed a claim in July 1980, essentially alleging that misdiagnosis by the VA led to his being wrongly adjudged incompetent for twenty-one

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<sup>271</sup>*Bridgford*, 550 F.2d at 982.

<sup>272</sup>*Id.*

<sup>273</sup>*Id.*

<sup>274</sup>See, e.g., *Ashley v. United States*, 413 F.2d 490 (9th Cir. 1969).

<sup>275</sup>720 F.2d 372 (4th Cir. 1983).

years. The district court granted the government's summary judgment motion, finding the claim time barred.

The Fourth Circuit held that on the record before them, Gilbert knew in 1958 he had been adjudged incompetent and was aware of how this had damaged him. Applying *Kubrick*, the court affirmed the dismissal, finding that once Gilbert was aware of his "injury" and its cause, i.e., the adjudication of incompetency, "he was under a duty to investigate whether or not the VA had negligently caused him to be ruled incompetent . . . Gilbert waited nearly twenty-one years before questioning the propriety of the VA's diagnosis, a delay which cannot be condoned."<sup>276</sup>

One gets the feeling there was more to this case than was reported in the opinion. In any event, the fact that incompetency normally does not toll the FTCA limitation period surely made this case far less complicated than it would otherwise have been.<sup>277</sup> Obviously, if Gilbert was in reality not incompetent in 1958, he ought not to have taken twenty-one years to figure out the VA had wrongly diagnosed him.

Although not a malpractice case, *Wilkinson v. United States*<sup>278</sup> is indicative of the limits the Fourth Circuit would place on *Kubrick*, in contrast with most other circuits. On October 3, 1978, Wilkinson, a civilian pedestrian, was struck by a rented car driven by Gray, a naval NCO, who was delivering ship's mail pursuant to his commanding officer's orders. Wilkinson's attorney learned Gray had rented the car, negotiated with the rental car company's insurance carrier, and finally sued Gray in September 1980, twenty-three months after the accident. Gray's responsive pleading on October 10, 1980 asserted Gray was within the scope of his employment by the Navy at the time of the accident and sought dismissal under the Drivers' Act (part of FTCA) which makes suit against the United States the exclusive remedy in such circumstances. An administrative claim was filed October 24, 1980. The U.S. attorney's office determined that Gray had been within the scope of naval employment, removed the case to federal court in April 1981, and moved for summary judgment. The district court dismissed the case as time barred.

Plaintiff argued that his lack of knowledge that Gray would

<sup>276</sup>*Id.* at 375.

<sup>277</sup>One can imagine arguments that legal incompetency should or should not toll the statute if the person is in fact not incompetent, and whether a person legally, but not actually, incompetent is even able to commence a lawsuit in his own right.

<sup>278</sup>677 F.2d 998 (4th Cir.), cert. denied, 459 U.S. 906 (1982).

contend that he acted within the scope of his employment excused failure to file the claim within two years. Referring to the case as a "hard one,"<sup>279</sup> the Fourth Circuit affirmed the dismissal. The court noted that unlike *Kelley v. United States*,<sup>280</sup> the government could not be accused of misleading plaintiff. Gray and his commanding officer had no duty to inform plaintiff, and were probably not even aware of the "legal intricacies," whereas the government's lawyers were not aware of the accident until more than two years had passed.

An "appealing dissent"<sup>281</sup> was written, suggesting that *Kubrick* should control for purposes of suit under the Drivers' Act. The dissent wrote that, under *Kubrick*, the claim should have accrued when plaintiff knew or should have known "that his injury was caused by a government employee acting within the scope of his employment."<sup>282</sup> This knowledge was an "essential element of a cause of action under the Tort Claims Act."<sup>283</sup> The majority rejected this reasoning, saying:

In medical malpractice, a patient customarily does not know, from the time of the injury, (a) that he has in fact been injured, or (b) that he has a basis for suing the doctor. Deferring accrual to a later date than the one on which the injury, unbeknownst to the plaintiff, actually occurred is realistic and accords with the meaning of accrual. However, as [the dissent acknowledged] ordinarily a claim accrues on the date of injury.<sup>284</sup>

The Fourth Circuit seemed reluctant to extend *Kubrick* beyond medical malpractice cases. The court could have nominally applied *Kubrick* and then simply found that plaintiff had not been "reasonably diligent" in learning the true identity of who had caused his injuries; or, it could have taken the Eighth Circuit's approach in *Wollman v. Gross*<sup>285</sup> and found that if *Kubrick* applied, the government's involvement was a legal issue, knowledge of which was not necessary for the claim to accrue. The court, however, opted for the more traditional view of statutes of limitations, and refused to read *Kubrick* expansively.

A number of district court decisions have also applied *Kubrick*.

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<sup>279</sup>*Id.* at 998.

<sup>280</sup>568 F.2d 259 (2d Cir. 1978).

<sup>281</sup>*Wilkinson*, 677 F.2d at 1001.

<sup>282</sup>*Id.* at 1004.

<sup>283</sup>*Id.* at 1005.

<sup>284</sup>*Id.* at 1002.

<sup>285</sup>637 F.2d 544 (8th Cir. 1980), *cert. denied*, 454 U.S. 893 (1981).

In *Dessi v. United States*,<sup>286</sup> plaintiff, a retired navy chief petty officer, alleged he was rendered impotent by an operation known as a TUR (transurethral resection of the prostate), performed by a PHS hospital in Norfolk, Virginia. He did not say the operation was negligently performed, but he did claim that he was not (and should have been) informed of the risks of the operation, and that the operation was not necessary. The operation was performed in April 1972, he filed his claim in April 1977, and for the claim to be timely, it must have accrued no earlier than April 1975. After a trial, the court found "that plaintiff knew or reasonably should have known before April 1975 that his impotence was related to the TUR."<sup>287</sup> Plaintiff had testified that he had had frequent sex before the TUR, and nothing at all afterward, and the court found that even if plaintiff initially thought he simply was taking longer to recuperate than normal, certainly at some time during the three years after the operation he must have "associated his impotence with the 1972 operation."<sup>288</sup>

Analyzing *Kubrick*, the district court wrote

[k]nowledge of an injury and its cause should trigger an inquiry into whether the claimant's legal rights were violated . . . The action accrues even if the claimant believes that his injury was unavoidable and did not indicate negligent treatment. It is the plaintiff's burden, once he knows of his injury and its cause, to determine within the limitations period whether or not to file suit.<sup>289</sup>

Plaintiff argued he "at most . . . knew there was a 'distinct possibility' that his impotence was caused by the operation,"<sup>290</sup> and unsuccessfully argued the holding of *Portis v. United States*,<sup>291</sup> a Fourth Circuit decision that pre-dated *Kubrick* and *Bridgford*. Rather than simply holding that *Kubrick* overruled *Portis*, the district court distinguished *Portis*.

In *Portis*, plaintiff, as in *Kubrick*, suffered hearing damage from treatment with neomycin. Plaintiff was only an infant, and she was examined by numerous doctors, who never diagnosed the hearing loss as caused by the neomycin, merely mentioning this as one of several possibilities. The district court in *Portis* found that although a doctor for the first time in 1969 made a definite

<sup>286</sup>489 F. Supp. 722 (E.D. Va. 1980).

<sup>287</sup>Id. at 725.

<sup>288</sup>Id.

<sup>289</sup>Id.

<sup>290</sup>Id.

<sup>291</sup>483 F.2d 670 (4th Cir. 1973).

diagnosis connecting the neomycin to the hearing loss, plaintiff's mother knew in 1963 there was a "distinct possibility" of hearing loss because of malpractice, and dismissed the case. The Fourth Circuit reversed, saying "What is important here is no one, neither layman nor doctor, diagnosed the hearing difficulty as being caused, or even probably caused, by the 1963 malpractice until 1969."<sup>292</sup>

The district court in *Dessi* specifically noted that Mrs. Portis had been reasonably diligent. *Dessi* argued that he, like Mrs. Portis, "had only incomplete knowledge of what caused his injury."<sup>293</sup> The court found, however, that "[h]ere the cause of the injury was reasonably detectable and only plaintiff's failure to make diligent inquiry of his doctors prevented him from obtaining this knowledge. This is not the sort of 'blameless ignorance' the relaxed rules of accrual in [FTCA] claims are designed to excuse."<sup>294</sup>

In an unusual move, the district court then went on to examine the merits of the case, even though it was time barred. One of plaintiff's claims of malpractice was that he had not been adequately warned of the possible consequences of the operation, and so he had not given "informed consent." Despite conflicting testimony, the court found that plaintiff had not been adequately informed, but then examined whether this lack of advice was truly a "proximate cause" of *Dessi's* injuries. Interpreting Virginia law, the court found that an objective rather than subjective standard applied, and found a "reasonable person in plaintiff's position would have had the operation despite [knowledge of] the risks involved."<sup>295</sup> Ultimately, the court found that even if the suit had not been time barred, the operation was reasonably necessary "and was, therefore, not a proximate cause [of plaintiff's injuries]."<sup>296</sup>

Interesting philosophical questions arise when it becomes necessary to examine "proximate cause" in this area of failure to warn of consequences: If the medical treatment really is necessary anyway, and so is not a "cause" of the injury can the claim even be said to have accrued at all? If the issue of whether "failure to

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<sup>292</sup>*Portis* at 673.

<sup>293</sup>*Dessi*, 489 F. Supp. at 726.

<sup>294</sup>*Id.*

<sup>295</sup>*Id.* at 729.

<sup>296</sup>*Id.* at 731. For a general discussion of informed consent, see Deardorff, *Informed Consent, Termination of Medical Treatment, and the Federal Tort Claims Act—A New Proposal for the Military Health Care System*, 115 Mil. L. Rev. 1 (1987).

warn" is a "cause" must be left to a trial on the merits, can the time limitations issue ever be resolved short of a trial? More to the point, assuming a contrary result, and the "failure to warn" is found to have been a "proximate cause" of the injury, when can it be said that the claim accrues? When claimant learned of this cause? If a contrary finding on the merits in this case had been made, when would the court have found that Dessi had or should have had knowledge that he should have been warned but was not? Is this necessarily at the same time as when he had or should have had knowledge that his impotence was caused by the operation? Is "knowledge" that the operation caused the injury equivalent to knowledge that he should have been warned that the operation could cause the injury? Or, where the court is reluctant to place any specific date on accrual, merely finding that plaintiff must have realized sometime within three years that the TUR caused his impotence, is it not more likely that plaintiff's awareness grew over time? And if so, when did it (or should it!) have finally occurred to him that he should have received better advice than he got? The court perceptively focused on the issue of what "proximate cause" was in its discussion of the merits; in its discussion of the statute of limitations, however, the unstated assumption was that the "cause" was the TUR, and all the analysis was toward when he should have realized that was what caused his impotence. An opportunity to analyze accrual in "failure to warn of consequences" cases was passed up.

In *Todd v. United States*<sup>297</sup> Mr. Todd alleged malpractice in a VA hospital during decompressive cervical laminectomy surgery, resulting in paralysis. After a trial on the merits, the district court found that no malpractice had been committed in the operation. The court had also carefully considered the government's argument that the suit was time barred, and concluded that it was not. The operation was performed on October 1, 1975. The court found that although Todd learned of his "injury" when he regained consciousness on October 4, 1975, "he did not know his condition [paralysis] was permanent until he was so informed by a VA doctor in 1979" and he "did not discover the cause of his injury until June 1980, when he was examined by Dr. Exum Walker . . . Mr. Todd's attorneys shortly thereafter informed him that the cause of his injury was the surgical procedure."<sup>298</sup>

The court said it found the action was timely for reasons given

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<sup>297</sup>570 F. Supp. 670 (D.S.C. 1983).

<sup>298</sup>*Id.* at 675 (emphasis by the court).



in a previous, unreported order<sup>299</sup> and, additionally on the grounds that plaintiff was "continuously treated" by the same doctors at the same VA hospital through late 1979, except "perhaps" for a gap of three months in 1975-76 when he was in a spinal rehabilitation program at another VA facility. The court said it did not need to decide whether the statute ran for those three months, because even if it did, this three months added to the nine months between the end of his treatment and his filing the claim was less than the two-year period.<sup>300</sup>

Instead of leaving things at that, the court went on to cite *Tyminski v. United States*<sup>301</sup> as supporting the continuing treatment rule in these circumstances. In *Tyminski*, which had "facts almost identical to those in the instant case,"<sup>302</sup> a claim was filed almost ten years after the surgery in 1957, but as plaintiff had been treated continuously by the VA until 1969 (even after filing the claim), he was excused from sooner discovering the negligent acts; the VA doctors had also told him something other than the surgery caused his paralysis.

In reviewing *Tyminski*, however, one finds that the Third Circuit specifically rejected the "continuous treatment" approach, finding "no value in the contention that a person who knows of the existence of the acts upon which his claim for negligence in a medical malpractice case is based may nevertheless forestall bringing suit until the treatment for his injuries is complete."<sup>303</sup> The Third Circuit nevertheless did find the continuing treatment was "persuasive" in determining the diligence issue:

Reasonable diligence does not require that a person who does not know of the acts constituting malpractice and who has little reason to doubt that his injury resulted from the natural progression of a pre-operative disorder interrupt the care he is receiving to cure his injuries in order to ascertain whether the persons providing the care negligently caused his injuries.<sup>304</sup>

The *Todd* court noted that *Kubrick* had cited *Tyminski* with

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<sup>299</sup>*Id.* at 675. It is presumed the court considered whether Todd should have known of his injury and the cause earlier. The court found that the VA doctors who were continuously treating Todd never suggested the surgery caused his paralysis, and that Todd erroneously thought he might have been injured in a fall following the surgery.

<sup>300</sup>*Id.* at 676.

<sup>301</sup>481 F.2d 257 (3d Cir. 1973).

<sup>302</sup>*Todd*, 570 F. Supp. at 676.

<sup>303</sup>*Tyminski*, 481 F.2d at 264 n.5.

<sup>304</sup>*Id.* at 264.

implied approval at footnote 7 (which discussed the evolution of the discovery doctrine and also the Restatement of Torts). As the *Todd* court read *Kubrick*, "the cases in that footnote were properly decided, since they applied the rule that a cause of action accrued when the plaintiff knows, or in the exercise of reasonable diligence, should know, the specific acts upon which his claim is based, i.e., his injury and its cause."<sup>305</sup>

In any event, the district court rightly found that *Tyminski*, and also *Portis*, remained controlling, and were not inconsistent with, but rather were impliedly approved in *Kubrick*.

In *Schnurman v. United States*<sup>306</sup> plaintiff had participated in Navy experiments with chemical protective clothing in 1944, and during a test, his gas mask failed and he breathed "the noxious vapor being tested."<sup>307</sup> Over the next three decades plaintiff suffered a large variety of ailments, including severe chest pains and shortness of breath. Finally, in 1975, he first mentioned to an examining doctor that he had been exposed to what he had been told was mustard and lewisite gas, and this doctor said his ailments could have been related to this exposure and suggested filing a claim with the VA (for the service-connected disability). Plaintiff wrote to the Federal Records Center asking specifically what he had been exposed to, and was told "Agent H." He filed the VA claim in September 1975. He then wrote to the Navy, and finally was told in July 1976 that Agent H was "sulphur mustard gas." He told this to his doctor on September 9, 1976, who the following day confirmed his opinion that plaintiff's condition was from exposure to this gas. Plaintiff finally filed an FTCA claim with the Navy on September 13, 1978.

After trial, the government renewed its motion to dismiss the claim as time barred, and also barred by the *Feres* doctrine. Ultimately, the district court dismissed on both these grounds. It found that at least as of September 1975, when Schnurman filed the VA claim, his FTCA cause of action accrued. It was "obvious" that plaintiff had "in his own mind" connected the exposure to his ailments before September 1975,<sup>308</sup> and

[t]he only piece missing to plaintiff's puzzle was the link between his maladies and the 1944 experiment, which plaintiff suspected was the genesis of his ailments. That

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<sup>305</sup>*Todd*, 570 F. Supp. at 676.

<sup>306</sup>490 F. Supp. 429 (E.D. Va. 1980).

<sup>307</sup>*Id.* at 431.

<sup>308</sup>*Id.* at 434.

piece was supplied in September 1975 by Dr. Smith who . . . diagnosed plaintiff's problems as the direct result of exposure to the toxic war gas. It was at this time that plaintiff possessed the critical facts of injury and causation which would prompt a reasonable man to seek legal advice.<sup>309</sup>

This holding is interesting for what the court could have done, and did not. Strangely, plaintiff argued his claim did not accrue until "mid-September 1976," that the diagnosis was "confirmed" when Dr. Smith first learned that Agent H was sulphur mustard gas, which for the first time gave plaintiff "reasonable opportunity" to learn the elements of his cause of action, i.e., duty, branch, causation and damages. Not only must this argument fail in light of *Kubrick*, but the "mid-September" date was September 10, 1976, still slightly *more* than two years before the claim was filed. The court did find that *Kubrick* disposed of the arguments about the elements of the claim, but ignored the actual dates, possibly not wanting to seem to hold plaintiff cut off by a mere three days. If this was an unstated concern, however, it seems a bit strange that the court did not find during the thirty years preceding that plaintiff had not acted with reasonable diligence in failing to make inquiry about his "suspicions." Although the limitations bar would have remained, it is unlikely that the court that wrote, e.g., *Dessi*, would have held that the cause only accrued when plaintiff obtained the missing "link" in 1975.<sup>310</sup>

*Pauley v. Combustion Engineering, Inc.*<sup>311</sup> was a diversity asbestos case where the district court predicted how the West Virginia Supreme Court of Appeals would interpret the discovery rule, with plaintiff essentially urging accrual only when negligence is realized. The district court was persuaded by *Kubrick's* reasoning, and held that the West Virginia court would adopt the rule of accrual when plaintiff obtains "knowledge of the existence of his injury and its cause."<sup>312</sup> In a civil diversity case, this is a "question of fact to be determined by the jury."<sup>313</sup>

The most recent district court decision out of the Fourth Circuit in this area is *Otto v. United States*.<sup>314</sup> A National Institute of

<sup>309</sup>*Id.* at 435 (emphasis added).

<sup>310</sup>Compare *Schnurman with Harrison v. United States*, 708 F.2d 1023 (5th Cir. 1983) (plaintiff's "suspicions" for years were not enough to cause accrual because she had diligently inquired but information had been withheld).

<sup>311</sup>528 F. Supp. 759 (W.D. W.Va. 1981).

<sup>312</sup>*Id.* at 765.

<sup>313</sup>*Id.*

<sup>314</sup>634 F. Supp. 381 (D. Md. 1986).

Health (NIH) physician contacted Mrs. Otto and offered to fly her to NIH for an evaluation of her hyperparathyroidism as part of a study tracing family history of this disease, which causes abnormally high calcium levels in the blood. After evaluation, this doctor advised Mrs. Otto they would remove her "bad" parathyroid glands (there are four parathyroid glands in the neck), that the remaining glands should begin functioning within six months and that she then would no longer suffer from the disease or require medication. She was not told that hypoparathyroidism (low calcium level) could result. The operation was performed on November 14, 1979, and when she regained consciousness she was told "that most of her 'good' parathyroids were removed . . . and that only one half of a parathyroid gland remained. Mrs. Otto was 'shocked and concerned' that they had removed more parathyroid tissue than she had expected."<sup>315</sup> She was also then told that one removed gland would be frozen and implanted later if the remaining one-half gland did not function properly. Asked why "good" glands had been removed, the doctor said "that he decided to take the 'good' glands to see if the human body could function without them."<sup>316</sup> Later that month, after discharge, Mrs. Otto developed a staph infection in her neck, became weak and ill, and in March 1980, was told that her thymus gland had also been removed. In August 1980 she went back to NIH and autograft surgery was performed implanting the frozen gland tissue into her arm, and she was told by a different NIH doctor (the first having left NIH employment) "that she should have tried to control her calcium level through her diet rather than through surgery."<sup>317</sup> She developed a staph infection in the arm after a fall and her private physician could not stabilize her calcium level, so she returned to NIH in April 1981 for a second autograft operation. She was told then that if the second operation did not work nothing further could be done, and she would have permanent hypocalcemia (low calcium level). She filed a claim on January 14, 1983, claiming negligence in the 1979 operation, failure to inform of options and failure to obtain consent for all that was done.

The government moved to dismiss the case as time barred. Plaintiff argued that the initial surgery, and the first and second autografts "were merely part of a single plan of overall treatment,"<sup>318</sup> and also that she was told by NIH that it would take

<sup>315</sup>*Id.* at 383.

<sup>316</sup>*Id.* at 384.

<sup>317</sup>*Id.*

<sup>318</sup>*Id.* at 385.

six months after the first autograft (i.e., until February 1981, within two years of the filing of the claim) for her calcium level to stabilize, so she did not have 'knowledge' of her injury until that time."<sup>319</sup>

The district court analyzed *Kubrick*, found the case "factually indistinguishable from *Kubrick*,"<sup>320</sup> and that Mrs. Otto knew of her injury and its cause immediately after the initial surgery, when the doctors told her they had removed "good" parathyroids. "At that moment she was in possession of the critical fact that she had been injured and she knew who had inflicted the injury, so the statute of limitations began to run."<sup>321</sup>

The court went on to find that "even if" the above knowledge "would not have alerted a reasonable person that he or she had been harmed, there were several other incidents which occurred before [the two year period prior to the filing of the claim],"<sup>322</sup> i.e., the comment about removing the "good" glands to see if the body could function without them; the neck staph infection complication; learning the thymus gland had also been removed without her knowledge; and the NIH doctor telling her she should have used diet, rather than surgery, to control her calcium level.

The court rejected the notion that the three operations were all part of a larger plan, and that plaintiff could not know of her injury at least until the first autograft had failed:

plaintiff may not in effect, hide [her] head in the sand, ignoring the accrual of a cause of action . . . and then attempt to circumvent the limitations by alleging a combination of torts or a continuing tort [because] . . . the running of a statute of limitation does not await determination of the full extent of injury.<sup>323</sup>

The court also rejected a "continuous treatment" theory. It recognized that the doctrine might exist under *Kossick*,<sup>324</sup> but that the doctrine really is a factor in determining if reasonable diligence has been exercised, citing the Second Circuit's district court case, *Kelly*.<sup>325</sup> It then found that "continuous treatment" in this case would not be applicable even for that purpose as: [t]he

<sup>319</sup>*Id.*

<sup>320</sup>*Id.* at 387.

<sup>321</sup>*Id.*

<sup>322</sup>*Id.*

<sup>323</sup>*Id.* at 387-88.

<sup>324</sup>330 F.2d 933 (2d Cir.), cert. denied, 379 U.S. 837 (1964).

<sup>325</sup>*Kelly v. United States*, 554 F. Supp. 1001 (E.D.N.Y. 1983).

doctrine of continuous treatment is premised on the notion that a person is entitled to place confidence in his physician and that this relationship excuses the claimant from challenging the quality of care he is receiving until this confidential relationship terminates.<sup>326</sup>

This doctrine "will not apply if the plaintiff has received treatment from other physicians during the period he or she seeks to delay the operation [accrual]."<sup>327</sup> Mrs. Otto's consultations with other doctors "effectively terminated the intimate relationship that the doctrine of continued treatment seeks to protect."<sup>328</sup>

The court also cited *Reilly v. United States*, a pre-*Kubrick* case by the Eighth Circuit for the proposition that the "'blameless ignorance' doctrine has no merit when a person knows of the acts constituting negligence,"<sup>329</sup> and that "[s]erious and unexpected consequences of treatment are sufficient to put a person on notice that he may have been legally wronged."<sup>330</sup>

While the district court's holding may be correct on the facts and in light of *Kubrick*, one still has difficulty with accepting the proposition that Mrs. Otto's knowledge in 1980 that the NIH doctors had done things to her she had not consented to and that she was not even made aware of immediately is equivalent to knowledge that she had been "injured" for the purposes of filing an administrative claim. As of 1980, any damages she might have made claim for would surely have been speculative, especially as procedures still existed that might have corrected her hypocalcemic condition (if she actually had that condition). Also, it would not be unreasonable to hesitate to make a claim alleging negligence against the agency that is maintaining one's frozen tissue for the very purpose of subsequent corrective operations should they prove necessary. This would seem to be a case uniquely suited to *Kossick's* observation that "[i]t would be absurd to require a wronged patient to interrupt corrective efforts by serving a summons" on the health care provider.<sup>331</sup>

Also, presumably NIH was providing all care without cost to Mrs. Otto; if a nongovernment private institution performing a study on hyperparathyroidism had offered free treatment to a patient under similar circumstances, it is doubted that the patient

<sup>326</sup>634 F. Supp. at 388.

<sup>327</sup>*Id.*

<sup>328</sup>*Id.*

<sup>329</sup>*Id.*

<sup>330</sup>*Id.* at 385.

<sup>331</sup>*Kossick v. United States*, 330 F.2d at 936.

would wish to jeopardize further (free) treatment by filing a lawsuit. In circumstances such as these, there should be a basis for "continuous treatment" tolling the period apart from the "confidential" doctor-patient relationship that was central to *Ciccarone*, and even apart from the other possible factors in the doctrine that were not discussed by the district court.<sup>332</sup>

### VIII. FIFTH CIRCUIT

In the FTCA medical malpractice area, the seminal case prior to *Kubrick* was *Quinton v. United States*.<sup>333</sup> In May 1956 at an Air Force hospital, Mrs. Quinton was given transfusions of RH positive blood even though her blood type was RH negative. "It appears that [plaintiffs] did not learn of and, in the exercise of reasonable care, could not have learned of, this error until June 1959, during the wife's pregnancy."<sup>334</sup> A claim was filed on August 29, 1960, alleging that the transfusion caused the birth of a stillborn child on December 17, 1959, and that Mrs. Quinton could not safely bear further children. The district court followed the law of the state where the transfusion occurred, held the claim accrued at the time of negligence, and was time barred.

At that time, it was not settled that federal, rather than state law determined when the cause of action accrued and the Fifth Circuit devoted well over half the opinion declaring that federal law would prevail. The court pointed out that to look to the state in such instances would effectively allow the state to amend the FTCA despite Congress's wishes. Also, different states may have effectuated their own policies in different ways, e.g. by adopting a *Urie*-type discovery rule, or by keeping the general rule but greatly extending the time period for medical malpractice claims. Thus, to borrow such a latter state's accrual rule but then apply the FTCA two-year period would frustrate even that state's policy. "Either the *entire* state scheme of limitations must be applied under Section 2401(b) or the state scheme must be ignored completely."<sup>335</sup> The court found that state law still determined what was required for the cause of action to exist, so "we look to state law to determine whether the plaintiff's action is premature, but to federal law to determine whether the action is stale."<sup>336</sup> A concurring opinion made the point even more forcefully that federal law should apply: "Section 2401(b) is not a statute of

<sup>332</sup>See, e.g., *id.*

<sup>333</sup>304 F.2d 234 (5th Cir. 1962).

<sup>334</sup>*Id.* at 235.

<sup>335</sup>*Id.* at 238.

<sup>336</sup>*Id.* at 239-40.

limitations, within the legal definition of that term [citations omitted]; . . . it imposes a jurisdictional prerequisite to recovery."<sup>337</sup> It would seem strange to leave purely to state law a question that determines whether federal courts had jurisdiction of a case.

The Fifth Circuit also examined the (then) "majority rule that a cause of action for malpractice accrues on the date of the negligent act, even though the injured patient is unaware of his plight," finding it has been "almost uniformly construed as an unnecessarily harsh and unjust rule of law."<sup>338</sup> Finding "no significant redeeming virtue" to the "majority rule,"<sup>339</sup> the Fifth Circuit declined to apply it to 28 U.S.C. 2401(b), and instead, relying on *Urie v. Thompson*, fashioned the rule that "a claim for malpractice accrues against the Government when the claimant discovered, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice."<sup>340</sup>

There being no contention that plaintiff knew or could have known of the negligent transfusion before the 1959 pregnancy, the action accrued no earlier than then and so was timely.

If one applies the later *Kubrick* rule to the *Quinton* facts, one probably gets the same result, as there was no reason for *Quinton* to have known the injury until the wife's pregnancy. Presumably the cause of this rather unique injury was known immediately when the injury was discovered, but the action would still have been timely filed. Here, there was no question raised about knowledge of negligence, and negligence does seem rather apparent. If the Quintons had known the RH positive blood transfusion had caused the stillbirth of their child in 1959, they would have been hard-pressed to argue that their claim accrued later, for example in 1961 when some doctor specifically told them that the transfusion was a mistake. The decision in *Quinton* was a step forward from the harsh general rule, and *Kubrick* can be regarded as a further refinement, not at all inconsistent with *Quinton*.

Since *Kubrick*, a number of highly significant decisions in this area have been made in the Fifth Circuit.

In *Waits v. United States*<sup>341</sup> plaintiff was treated at a VA hospital for a leg fracture sustained in a motorcycle accident,

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<sup>337</sup>*Id.* at 242.

<sup>338</sup>*Id.* at 240.

<sup>339</sup>*Id.*

<sup>340</sup>*Id.*

<sup>341</sup>611 F.2d 550 (5th Cir. 1980).



including insertion of Steinmann pins. The leg became infected at the site of a pin, and eventually the leg had to be amputated (this at a civilian hospital). Waits sued the adverse driver, and his counsel, after four months of delay by the VA, obtained Waits's hospital records. These records revealed the following three things that the District Court found as negligence: failure to order a C&S test until 10 days after the infection was first detected (this test would have indicated a different drug should have been given); failure to treat with a different drug after the first drug had apparently failed; and failure of the lab to report the test results within a reasonable time (there was an apparent fourth act of negligence; the doctors proceeded with treatment without the benefit of the test they had ordered).

The Fifth Circuit said "[t]he question of what knowledge should put a claimant on notice of the existence of a viable claim is not soluble by any precise formula."<sup>342</sup> The court found "[i]t is not enough to trigger the statute of limitations that the claimant is aware of his injury if he is unaware of the act or omissions which caused the injury."<sup>343</sup> The Fifth Circuit found that the Supreme Court in *Kubrick* simply "could not condone an extension of the [blameless ignorance] doctrine to protect a plaintiff ignorant only of the legal or medical significance of a known injury."<sup>344</sup> As the basis of the action was not the VA causing the infection (which Waits arguably knew about early on), but negligence in the treatment of the infection, the Fifth Circuit dealt "only with ignorance of the underlying facts of the hospital malpractice."<sup>345</sup> Prior to obtaining the medical records in October 1974, Waits only knew that the VA treatment had been unsuccessful, and the Court held "[m]ere dissatisfaction with the results of medical treatment . . . is not to be equated with knowledge of negligence."<sup>346</sup> This may have been a misstatement by the Court, since under *Kubrick* "knowledge of negligence" is not required. The underlying thrust of the Fifth Circuit's argument is really that Waits needed knowledge of the *injurious acts*: of ordering the test (late), proceeding without the test results, the test results being tendered (late), and the failure to try different treatment with or without the test results. The court also noted that the VA's delay

<sup>342</sup>*Id.* at 552.

<sup>343</sup>*Id.* (citing pre-*Kubrick* decisions *Dewitt v. United States*, 593 F.2d 276 (7th Cir. 1978) and *Jordan v. United States*, 503 F.2d 620 (6th Cir. 1974). Both these cases were cited with disapproval in *Kubrick*, 444 U.S. at 121 n.8).

<sup>344</sup>*Id.*

<sup>345</sup>*Id.*

<sup>346</sup>*Id.*

in producing records was to "blame for [Waits's] failure to discover the specific acts of negligence causing his injury"<sup>347</sup> and noted that until the records were produced, "[n]o doctor or attorney could advise him of the merits of his claim."<sup>348</sup>

The Fifth Circuit was dealing with a factual situation far different from that in *Kubrick*. Where the facts are clear, such as in *Kubrick*, that a specific act caused a physical disability, then the statute of limitations need not wait upon a belated realization that the act was negligent. Where a person is receiving treatment for an existing physical disability, however, and the disability does not get better, or gets worse, the "act" causing the "injury" cannot be known until it is realized that negligence has been committed. As the disability already exists and may be expected to get worse, a claimant cannot know he has received an additional (actionable) "injury" until he discovers that he need not have received this additional injury, i.e., until he discovers he should have gotten better, or at least not gotten worse, with nonnegligent treatment. This logical proposition could seem to go contrary to the letter of *Kubrick*, which talks about not needing to know that acts were "negligent" for the limitation period to start to run. The rest of *Kubrick*, however, clearly supports the holding in *Waits*, such as its language excusing a plaintiff where "facts about causation may be in the control of the putative defendant"<sup>349</sup> and not excusing a plaintiff who is "in possession of the critical facts that he has been hurt and who has inflicted the injury,"<sup>350</sup> and who "can protect himself by seeking advice in the medical and legal community."<sup>351</sup> If knowledge of the fact of "injury" must wait for knowledge that acts were negligent, the Fifth Circuit at least has no problem with allowing suit.

Possibly a simpler way to view the issue is to accept that a prospective claimant knows he is "injured," whether to the extent of his original disability, or not, but does not know *who* "injured" him. In *Waits*, plaintiff knew the adverse driver had "injured" him; it was not until his medical records were produced that he discovered that the VA had also "injured" him. The problem with this viewpoint is that knowledge of who "injured" him in this instance is necessarily synonymous with knowledge of negligence; without negligence, the VA cannot be said to have "injured"

<sup>347</sup>*Id.*

<sup>348</sup>*Id.*

<sup>349</sup>*Kubrick*, 444 U.S. at 122.

<sup>350</sup>*Id.*

<sup>351</sup>*Id.* at 123.

Waits. In view of *Kubrick's* proscription on the requirement for knowledge of negligence, the former analysis may be more helpful in reconciling the holdings.

The Fifth Circuit felt it necessary to correct a district court's analysis in *Harrison v. United States*.<sup>352</sup> "Sibyl Harrison's headaches began in 1962. They continue to this day—the pain amplified by the dismissal of her suit under the [FTCA] as barred by the statute of limitations."<sup>353</sup>

After this poignant beginning, the Fifth Circuit explained that Harrison had sought treatment for the headaches, and as part of the initial evaluation, Air Force doctors used a needle to introduce an air bubble into her brain and spine. The doctors also negligently allowed the needle to plunge into the center of her brain. They did not tell her about this, but it was mentioned in her records, and was clearly visible in x-rays taken at that time. She continued to have headaches, and was evaluated by numerous other doctors who did not have access to her records or x-rays. She also consulted an attorney who, after a number of years, finally obtained her records (they had been either misplaced or deliberately concealed, and a letter to the President of the United States and his reply eventually shook them loose). The records disclosed the malpractice, and she promptly made her claim after receiving them. However, Harrison had had earlier "beliefs" or suspicions that the Air Force doctors had somehow injured her (she also at various times believed she had a brain tumor—she had had a tumor surgically removed earlier; and she later believed that the doctor who removed the tumor had caused the injury). The District Court simply held that plaintiff was aware of the facts of her injury and its cause more than two years before she filed her claim.

The Fifth Circuit found that *Kubrick* at least required that plaintiff needed "knowledge of facts that would lead a reasonable person (a) to conclude that there was a causal connection between the treatment and injury or (b) to seek professional advice, and then, with that advice, to conclude that there was a causal connection between the treatment and injury."<sup>354</sup>

Obviously, Harrison had had at some time a correct "belief" that the Air Force doctors had caused her injury. The Fifth Court drew the logical distinction between "belief" and "knowledge,"

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<sup>352</sup>708 F.2d 1023 (5th Cir. 1983).

<sup>353</sup>*Id.* at 1024.

<sup>354</sup>*Id.* at 1027.

noting that she had indeed sought professional advice and they were singularly unable to help her, let alone identify the source of her pain. Harrison's "privately conceived notions did not become knowledge" until she received her medical records.<sup>355</sup>

In a footnote, the Fifth Circuit observed they were not deciding the possible "fraudulent concealment" issue, but noted that the defendant bears a heavier burden of showing plaintiff's level of knowledge where it concealed information. The Court also suggested that "[s]ilence may constitute fraudulent concealment in the instance of a fiduciary relationship such as that which exists between doctor and patient."<sup>356</sup> The Fifth Circuit clearly was anticipating future cases where a patient's treating doctor does not disclose an obvious error in treatment. This issue did not arise in *Kubrick*, where plaintiff gained knowledge of his injury's cause from a third party and simply did not inquire further whether this was negligence. Kubrick's treating doctor arguably "fraudulently concealed" (as per the dissent in *Kubrick*) his misdeed under the Fifth Circuit's analysis, but the limitation period dated from Kubrick's knowledge imparted by the third party. Where there is a genuine dispute over liability, as there was (according to the majority) in *Kubrick*, the "silence equals concealment" issue ought not to arise. Obviously, far different results can occur depending upon how one chooses to characterize the facts.

*Lavellee v. Listi*,<sup>357</sup> although not a FTCA medical malpractice case, has a penetrating analysis of the issues of interest. Lavellee was an inmate who claimed abuse at the hands of certain Louisiana law enforcement officials. He was arrested on September 8, 1976, had some of his spinal fluid extracted against his will, was chained to a pipe in an unsanitary cell, and his pleas for medical attention were ignored until February 3, 1977, at which time he learned his back had been permanently damaged. His pro se civil rights complaint was filed January 10, 1978, alleging assault, failure to provide medical attention until February 3, 1977, and medical malpractice in the spinal fluid extraction. The district court, applying the Louisiana one-year statute of limitations, dismissed as time barred all claims for incidents that occurred after January 10, 1977. The Fifth Circuit eventually remanded for further findings.

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<sup>355</sup>*Id.* at 1028; see also *Allen v. United States*, 588 F. Supp. 247, 343-45 (D. Utah 1984).

<sup>356</sup>708 F.2d at 1028 n.1.

<sup>357</sup>611 F.2d 1129 (5th Cir. 1980).

The Fifth Circuit perceived

at least four possible times at which a cause of action for medical malpractice could accrue. Probably the simplest standard to administer, at least in most situations, is one which deems the cause of action to accrue at the moment of physical injury . . . Although the 'moment of injury' standard has the significant advantage of often avoiding factual controversy, it has the even more significant disadvantage of often unfairly foreclosing legitimate claims which, through no fault of the plaintiff, are not discovered until after the statute of limitations has expired.

At the other extreme is a standard which would start the statute running only when the plaintiff was aware or should have been aware that his legal rights had been invaded. This requires not only a knowledge of the fact of and extent of the injury, but also an awareness of the causal connection between the defendants' acts and the injury, and of the applicable legal standard. This standard is also foreclosed by precedent.

. . .

Between these extremes are two other standards, and possible variants. One would hold that a cause of action accrues when the plaintiff becomes aware or should become aware of his injury; the other, when the plaintiff is, or should be, aware of both the injury and its connection with the acts of defendants.<sup>358</sup>

The Fifth Circuit believed *Kubrick* required the latter standard. The court in a footnote found that the same accrual standard applied to FTCA claims, Federal Employers' Liability Act claims (purely dicta since no FELA claims were asserted) and Section 1983 civil rights actions.<sup>359</sup>

The court found it did not have a sufficient record to apply the *Kubrick* rule to the alleged spinal tap malpractice:

If plaintiff was unaware of the permanence of his injury, and reasonably thought that the pains in his back were the normal result of a spinal tap or were caused by the alleged assaults, he cannot be deemed to have knowledge of the factual predicate of his claim or its connection with

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<sup>358</sup>*Id.* at 1131.

<sup>359</sup>*Id.* at 1131 n.4.

possible malpractice by the defendants. Until he suspected, or should have suspected, that his pain was not the result of a properly-conducted spinal tap or of the alleged assaults, he lacked any factual basis on which to suspect an invasion of his legal rights."<sup>360</sup>

The court noted that in *Kubrick* the plaintiff was well aware of the extent of his injury, but that in this case, the knowledge plaintiff lacked was not of legal ramifications, but of "permanence of the injury, a factual matter. Until the plaintiff has reason to believe that the effects of a surgical procedure are different from those anticipated, it cannot be said that the plaintiff is aware of the injury which is the basis of his action."<sup>361</sup>

The Fifth Circuit relied heavily on the Fourth Circuit's *Cox v. Stanton*<sup>362</sup> for this position. *Cox*, a pre-*Kubrick* civil rights case, involved a North Carolina black woman who was coerced into undergoing sterilization under threat of suspension of welfare payments. The decision reflected she gave consent, and a government "Eugenics Board" ordered that she undergo a procedure that is usually reversible. It was not until five years later, when she consulted a gynecologist, that she learned she had undergone a different procedure and been permanently sterilized. The Fourth Circuit wrote, "Federal law holds that [for civil rights actions] the time of accrual is when the plaintiff knows or has reason to know of the injury which is the basis of the action."<sup>363</sup>

Applying this standard, the Fourth Circuit held plaintiff's claim did not accrue until she knew of the permanence of her sterilization.

The *Cox* situation, where a woman gave "consent" to a specific procedure, and found out only later that a different, more damaging procedure was actually performed is a far different situation than someone who, e.g., has been hit by a car, but does not know the ultimate extent or permanence of his injury. There are obvious elements of concealment and deceit in *Cox*, as well as a situation where claimant would have no reason to learn of her true injury. Nevertheless, the *Lavallee* court seized upon the "permanence" language of *Cox* and applied it to another "civil rights" case that eventually made malpractice allegations. It is but a small further step to read the "knowledge of permanence" requirement into FTCA medical malpractice cases.

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<sup>360</sup>*Id.* at 1131-32.

<sup>361</sup>*Id.* at 1132 n.7.

<sup>362</sup>529 F.2d 47 (4th Cir. 1975).

<sup>363</sup>*Id.* at 50.

The Fifth Circuit has so avowedly embraced *Kubrick* that it extended *Kubrick's* reasoning in *Dubose v. Kansas City Southern Ry. Co.*:<sup>364</sup>

We . . . hold that *Kubrick* is not limited to the FTCA or to medical malpractice cases. . . . The *Kubrick* rule, we think, represents the [Supreme] Court's latest definition of the discovery rule and should be applied in federal cases whenever a plaintiff is not aware of and has no reasonable opportunity to discover the critical facts of his injury and its cause. *Urie* signalled the inception of the discovery rule and *Kubrick* merely restated the rule while defining its outer limit. Both cases, however, reflect the same rationale.<sup>365</sup>

At the same time, the Fifth Circuit clings to its own past, writing, "we also think that the *Kubrick* test was encompassed in the accrual standard set out in [*Quinton*], which relied heavily on *Urie* . . . The word 'acts,' as used by the *Quinton* court, implies the fact of injury as well as the connection between that injury and its cause."<sup>366</sup>

*Dubose* also illustrates how the Fifth Circuit views *Kubrick* (*Dubose* was a wrongful death action brought under FELA): "we do not read *Kubrick* as setting an inflexible rule. Instead, we think the Court intended the discovery rule to be applied in differing fact situations to effectuate the rationale behind the rule."<sup>367</sup>

The above is clear from a review of *Waits* and *Harrison*. The Fifth Circuit went on to make a useful distinction between "actual knowledge" of an injury, as Mr. *Kubrick* had, and "constructive knowledge of the fact of causation": "When a plaintiff may be charged with awareness that his injury is connected to some cause should depend on factors including how many possible causes exist and whether medical advice suggests an erroneous causal connection or otherwise lays to rest a plaintiff's suspicions regarding what caused his injury."<sup>368</sup>

*Dubose* represents a clear extension beyond the Fifth Circuit's previous position, enunciated in *Ware v. United States*,<sup>369</sup> where

<sup>364</sup>729 F.2d 1026 (5th Cir. 1984).

<sup>365</sup>*Id.* at 1030.

<sup>366</sup>*Id.*

<sup>367</sup>*Id.* at 1031.

<sup>368</sup>*Id.*

<sup>369</sup>626 F.2d 1278 (5th Cir. 1980).

the court declined to rely on the reasoning in *Kubrick* in a case where a farmer sued the government under the FTCA for misdiagnosing his cattle and wrongfully ordering healthy cattle destroyed. There the court applied a standard set out in *Mendiola v. United States*,<sup>370</sup> where the claim accrues "where the injury coincides with the negligent act and some damage is discernible at the time."<sup>371</sup> The court said:

[b]y applying the accrual test [stated in *Mendiola*] we avoid the interpretive problems that could occur if we apply to these facts the medical malpractice test articulated in *United States v. Kubrick* [citation omitted] . . . Courts created the medical malpractice test to protect those who suffered damage arising out of both a specialized area, medicine, and a unique relationship, doctor-patient . . .<sup>372</sup>

It would seem that the Fifth Circuit will be much more reluctant to hold time-barred an action where a claimant arguably "should have" had knowledge than where he indisputedly had the knowledge, especially where the slightest misdirection or even silence from the defendant is noted. Possibly an unstated feeling is that if government agents commit malpractice, they should own up to it. This position would be in marked contrast to holdings in other circuits that there is no duty of disclosure on the doctor's part.<sup>373</sup>

Several district court cases also have applied *Kubrick*.

*Sheehan v. United States*<sup>374</sup> involved a complaint that "Sheehan had been exposed to radiation in atomic experiments while he was in the Army in 1952 and 1953. On March 20, 1979 Sheehan had applied to the VA for compensation or pension on the basis of the radiation causing his injuries. He did not file a standard FTCA claim form alleging negligent exposure to radiation until March 24, 1981.

The district court first held that *Feres* barred all claims, even those alleged to be violations of a duty to warn about the danger of radiation after Sheehan was discharged. The court found that because plaintiff maintained the government knew of the radiation's effects before he left the service, any duty to warn

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<sup>370</sup>401 F.2d 695 (5th Cir. 1968).

<sup>371</sup>*Ware*, 826 F.2d at 1284.

<sup>372</sup>*Id.* at 1284 n.4.

<sup>373</sup>*See, e.g., Arvayo v. United States*, 766 F.2d 1416 (10th Cir. 1985).

<sup>374</sup>542 F. Supp. 18 (S.D. Miss. 1982), *aff'd*, 713 F.2d 1097 (5th Cir. 1983).



arose before his discharge, and so was barred by *Feres*.<sup>375</sup>

The district court applied the *Urie* rule and also found the suit time barred: "The general rule under the [FTCA] is that plaintiff's claim accrues at the time of his injury. Where, as here, the injury is not immediately apparent, the claim accrues when plaintiff's injury manifests itself."<sup>376</sup>

Because Sheehan's injuries became apparent before he applied to the VA in 1979, his claim accrued more than two years before he filed his claim. The court observed in a footnote "Even under the more liberal accrual standards for medical malpractice cases, plaintiffs' suit would be barred,"<sup>377</sup> as Sheehan admittedly knew of the injury and cause when he filed for VA benefits on March 20, 1979, two years and four days before he filed his FTCA claim.

From the above it is inferred that this district court would not extend the *Kubrick* rule to all FTCA cases or even to all "discovery" insidious disease-type cases, but still felt moved to comment that even under the "liberal" *Kubrick* standard the suit would still be time barred. This approach in the Fifth Circuit was already questionable in light of *Lavellee v. Listi* (which preceded *Sheehan*) and became untenable after *Dubose*.

Finally, it would indeed be unfortunate if the holdings of the following case were not of deep legal significance. *Touchstone v. Land & Marine Applicators, Inc.*<sup>378</sup> was a silicosis case brought by a number of sandblasters on offshore oil drilling platforms against a host of defendants. Focusing on when plaintiffs' causes of action accrued, the district court noted that defendants argued accrual once the injured employee was "or should have been aware of his condition under the circumstances"<sup>379</sup> (a "discovery rule" supported by "the teachings of [*Kubrick*] and [*Urie*]"<sup>380</sup>); plaintiffs argued accrual only after they had "actual knowledge of [their] injury and its cause" and also that under a "continuing tort theory . . . each exposure to the harmful irritant is a new cause of action."<sup>381</sup> The district court opted for the more conservative rule, finding that under *Dubose*, the "latest defini-

<sup>375</sup>Compare *Sheehan* with *Targett v. United States*, 551 F. Supp. 1231 (N.D. Cal. 1982) (where duty to warn arises after discharge of soldier, *Feres* does not bar claim).

<sup>376</sup>542 F. Supp. at 21.

<sup>377</sup>*Id.* at 21 n.3.

<sup>378</sup>628 F. Supp. 1202 (E.D. La. 1986).

<sup>379</sup>*Id.* at 1213.

<sup>380</sup>*Id.*

<sup>381</sup>*Id.*

tion of the discovery rule" is "when the employee knows, or reasonably should know, that his condition is a disease which arose out of his employment."<sup>382</sup> The court found that *Dubose's* language that "[w]hen a plaintiff may be charged with awareness that his injury is connected to some cause should depend on such factors including how many possible causes exist and whether medical advice suggests an erroneous causal connection or otherwise lays to rest a plaintiff's suspicions regarding what caused his injury,"<sup>383</sup> meant that "[t]he critical issue . . . is when symptoms are manifested, not necessarily when the disease is diagnosed."<sup>384</sup> Based upon this language of the Fifth Circuit, the district court said "any argument that an injured employee's condition could have many complicated medical causes of which the employee might not be aware begs the question and must be rejected."<sup>385</sup>

Accordingly, in an occupational disease setting, this district court felt that, once an employee is aware of his disease, actual knowledge of the cause is not required to start the period running; when the employee would be charged with constructive knowledge depends upon the factors recited in *Dubose* (and, if a doctor tells him his injury was not caused at his job, his suspicions might be laid to rest). As diagnosing of a disease implies examination by a doctor, the court in finding the "critical issue" to be "when symptoms are manifested" seems to be saying that constructive knowledge can be charged even if no doctor ever actually told plaintiff what his disease was, much less what caused it, or even if no doctor ever examined plaintiff at all. It would seem logical that similar reasoning in a medical malpractice context would be applied by this court. The lasting significance of this "touchstone" case remains to be seen.

## IX. SIXTH CIRCUIT

*Jordan v. United States*<sup>386</sup> was the Sixth Circuit's leading case in the FTCA medical malpractice area prior to *Kubrick*, and on its facts *Kubrick* might have forced a contrary decision. *Jordan* was a one-eyed veteran who had a sinus operation at a VA hospital in November 1968; following surgery he had problems with his remaining good eye. A doctor advised him these problems were from muscle damage caused by procedures required to deal with the unanticipated "severity" of his sinus condition. Corrective

<sup>382</sup>*Id.* at 1214.

<sup>383</sup>*Id.* (quoting *Dubose*, 729 F.2d at 1032) (emphasis added by the district court).

<sup>384</sup>*Id.* (emphasis added).

<sup>385</sup>*Id.*

<sup>386</sup>503 F.2d 620 (6th Cir. 1974).

surgery was performed in January and again in February 1969, but was not successful. During this time he had the Veterans of Foreign Wars (VFW) try to get his disability rating increased on the ground that his vision loss was due to the sinus surgery. He was examined regularly at the VA hospital, until in June 1971 an examining doctor told him there was nothing more that could be done for him, and "it was too bad they screwed up your eye when they operated on your nose."<sup>387</sup> He filed a claim June 1, 1972.

The district court found the claim had accrued in early 1969 when "there came knowledge of facts sufficient to alert a reasonable person that there may have been negligence."<sup>388</sup>

The Sixth Circuit reversed, holding that the district court had used an unduly restrictive interpretation of the rule then current, as expressed in *Quinton*. They wrote:

Important in the federal cases applying the 'discovery' rule is the requirement that the claimant must have received some information, either by virtue of acts he has witnessed or something he has heard, or a combination of both, which should indicate to him, when reasonably interpreted in light of all the circumstances, that his injury was the result of an act which could constitute malpractice.<sup>389</sup>

In other words, the Sixth Circuit felt that the *Quinton* rule, requiring opportunity to discover "the acts constituting the alleged malpractice" also required knowledge that the acts amounted to malpractice, i.e., negligence. Arguments for or against this proposition could be made, but are mooted by *Kubrick*, which did not in any way purport to overrule or disapprove *Quinton*. The Supreme Court clearly felt that the *Quinton* rule did not require knowledge that the acts were "malpractice."

The Sixth Circuit went on to hold that although Jordan

was aware [i.e., had actual knowledge as opposed to the more fuzzy situation of 'should have been aware'] that muscle damage sustained during his 1968 sinus operation led to this loss of sight, [the record] . . . failed to show that [Jordan] in the exercise of reasonable diligence should have been aware that the muscle damage may

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<sup>387</sup>*Id.* at 621.

<sup>388</sup>*Id.* at 623 (quoting the district court).

<sup>389</sup>*Id.* at 622.

have been the result of the improper performance of his sinus operation.<sup>390</sup>

This holding as stated is clearly inconsistent with *Kubrick*. Even after *Kubrick*, however, it is possible that a court could have found that Jordan had no reason to believe he had been "injured" above and beyond his "severe" sinus condition until the June 1971 examination.<sup>391</sup>

Possibly of some remaining force even after *Kubrick* was the court's dicta that, even though the eye injury following the surgery was not an expected result, and so would require "some investigation," Jordan received a "credible explanation" from a doctor, and so it could not "be said that appellant failed to exercise reasonable diligence."<sup>392</sup> Accordingly, *Jordan* should still be good authority for the "credible explanation satisfies due diligence" rule some circuits have developed ever after *Kubrick*.

*Wolfenbarger v. United States*<sup>393</sup> was a district court case that pre-dated *Kubrick*. Plaintiff's decedent was admitted to a VA hospital on March 4, 1975, and he died on May 17, 1975. Plaintiff filed her claim on May 14, 1977 alleging wrongful death as a result of medical malpractice. The government moved to dismiss as time barred. Although the defense argument is not stated, it is presumed that it was argued that the alleged malpractice was committed more than two years before filing the claim and so the claim should have accrued then. The court simply wrote "A wrongful death claim accrues under the Federal Tort Claims Act on the date of death,"<sup>394</sup> and so plaintiff's claim was timely.

In a footnote, the court said that the government's reliance on the medical malpractice accrual as in *Jordan* was misplaced, because the claim was for wrongful death, "not mere medical malpractice."<sup>395</sup> If decedent survived and made a claim, then malpractice rules would have applied. This tidbit is more tantalizing because *Jordan* should generally have served to delay accrual rather than advance it. It is, however, conceivable that malpractice was committed on decedent in March 1975, he knew it then and his wife knew it then, and yet claim was not made for more than two years after that. The counterargument is that the damage (death) had not yet occurred and so the claim could not

<sup>390</sup>*Id.* at 623-24.

<sup>391</sup>See *Waits v. United States*, 611 F.2d 550 (5th Cir. 1980).

<sup>392</sup>503 F.2d at 624.

<sup>393</sup>470 F. Supp. 943 (E.D. Tenn. 1979).

<sup>394</sup>*Id.* at 944.

<sup>395</sup>*Id.* at 944 n.2.

have accrued. This was the situation in the Seventh Circuit's *Fisk v. United States*.<sup>396</sup>

It is possible that the court was a bit hasty in its decision, as it ignored the provisions of 28 U.S.C. § 1346(b), the wrongful death portion of the FTCA<sup>397</sup> which allows a claim if the claim would be maintainable under applicable state law. As was argued by the government in *Fisk* (but not accepted by the Seventh Circuit on those facts), one point of view would make it possible for the claim to be untimely even if made within two years of death.<sup>398</sup> If the state's wrongful death statute would have precluded suit by decedent had he survived, is the holding that an FTCA wrongful death claim can never accrue prior to death supportable?

The Sixth Circuit gave fairly short shrift to plaintiff's arguments in *Garrett v. United States*.<sup>399</sup> Plaintiff's decedent died in a federal prison, and plaintiff filed suit twenty-one months after the death, alleging negligent medical treatment. The assistant U.S. attorney reminded plaintiff that an administrative claim had not been filed. Forms were provided to plaintiff twenty-three months after the decedent's death, but were not filled out and returned to the federal agency until twenty-five months after the death. Plaintiff argued that the two-year period should have run from the release of the autopsy report, not the death (which would bring the belated filing within the two-year requirement). The Sixth Circuit did not discuss whether a "discovery" rule should apply, or if plaintiff had been "diligent," but merely said: "Appellant's [plaintiff's] contentions that the statute of limitations did not begin to run until the autopsy report was released is contrary to the decisions in [*Kubrick*] and [*Kington v. United States* . . .]"<sup>400</sup>

One may search high and low in *Kubrick* and find no reference to wrongful death actions at all, and in view of that case's requirement of an opportunity for knowledge of "cause of injury,"

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<sup>396</sup>657 F.2d 167 (7th Cir. 1981).

<sup>397</sup>28 U.S.C. § 1346(b) (1982) (stating in part that an FTCA action is provided for "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." (emphasis added)).

<sup>398</sup>See *infra* text accompanying notes 439-41. But see *supra* text accompanying notes 182-90 (discussing *Dundon v. United States*, 559 F. Supp. 469 (E.D.N.Y. 1983)).

<sup>399</sup>640 F.2d 24 (6th Cir. 1981).

<sup>400</sup>*Id.* at 26.

the Sixth Circuit's reliance on *Kubrick* as support in *Garrett* seems misplaced.

*Kington v. United States*<sup>401</sup> involved a wrongful death claim where decedent died after exposure to beryllium in a government facility. A claim was made twenty-five months after death and twenty-one months after decedent's widow received the autopsy report, which for the first time disclosed the cause of death. The court merely relied on the general rule of a wrongful death claim accruing upon death, and thought that twenty-two months was plenty of time for plaintiff to have made her claim. A dissent urged adoption of a "discovery" rule as in *Urie*, and to the extent *Kubrick* relies upon *Urie* it could be argued that *Kubrick* is in conflict with *Kington*.

*Diminne v. United States*<sup>402</sup> was not a malpractice case, but is useful for its interpretation of *Kubrick*, and it also analyzes a situation that many circuits have apparently not yet confronted.

In *Diminne*, plaintiff was convicted of extortion, but before sentencing, a government agent confessed to being the party who had actually sent the extortion letters. The agent's identity was later confirmed by handwriting analysis, and plaintiff's conviction was dismissed. Plaintiff later sued the United States under the FTCA on various theories. Some of the theories were dismissed by the district court as being barred by sovereign immunity (e.g., claims for malicious prosecution), and others were dismissed as time barred (e.g., claims of negligence in investigation of the crime, and in the presentation of falsified evidence). The District Court held that under *Kubrick*, the "critical facts" of the injury and *who* caused it were known at least as of the last day of Diminne's trial, more than two years before he made a claim. Diminne argued that under *Kubrick* his cause of action had not accrued until the identity of the agent was confirmed. He argued that *Kubrick* postponed accrual of the cause of action until he knew for sure "who" (i.e., the agent) had caused his injury. The District and Circuit Courts probably could have held the action time barred simply because Diminne in fact "knew" the agent's identity when he confessed, before the last day of trial. Instead, however, the Sixth Circuit wrote: "[I]t is also important to note that *Kubrick* did not flatly state that accrual of a cause of action is always deferred until such time as the plaintiff is aware of the

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<sup>401</sup>396 F.2d 9 (6th Cir.), cert. denied, 393 U.S. 960 (1968).

<sup>402</sup>728 F.2d 301 (6th Cir. 1984).

identity of the *particular individual* who may have caused his injury."<sup>403</sup>

The Sixth Circuit pointed out that in *Kubrick* the identity of the particular doctor was known and was never an issue, and wrote: "We are unable to accord *Kubrick* the expansive interpretation urged upon us by the plaintiff."<sup>404</sup> The court went on to hold: "[B]efore the accrual of a cause of action against the United States under the FTCA may be deferred because of the plaintiff's inability to identify the injury, it must be shown that the United States itself played a wrongful role in concealing the culprit's identity."<sup>405</sup>

*Barrett v. United States*<sup>406</sup> was cited with approval. The court later held that the "culprit's" conduct was not chargeable to the United States since it was outside the course of his employment.<sup>407</sup>

The Court did not directly address the situation that could commonly occur in medical malpractice cases: the prospective plaintiff simply does not know the identity of the particular doctor who committed the alleged malpractice. From the above reasoning, however, the Sixth Circuit would hold that absent active concealment by the government of the doctor's identity, accrual would not be delayed, and plaintiff need not be aware of the specific doctor's identity as long as he knew that the cause of his injury was some treatment given by a government facility.

*Liuzzo v. United States*<sup>408</sup> was a suit by the children of a slain civil rights worker under the FTCA that alleged an FBI informer participated in their mother's death. On the government's motion to dismiss as time barred, the district court looked to *Kubrick* for "guidance [from the Supreme Court] on the issue of when a cause of action accrues in the context of federal tort claims."<sup>409</sup> The court examined whether *Kubrick* should apply outside of the medical malpractice area:

*Kubrick*, this court believes, signals an end to the categorical approach to the statute of limitations, and teaches that the facts in each case must be thoroughly examined to determine when the plaintiff had knowledge of the

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<sup>403</sup>*Id.* at 304 (emphasis added).

<sup>404</sup>*Id.* at 305.

<sup>405</sup>*Id.*

<sup>406</sup>689 F.2d 324 (2d Cir. 1982), cert. denied, 462 U.S. 1131 (1983).

<sup>407</sup>728 F.2d at 306.

<sup>408</sup>485 F. Supp. 1274 (E.D. Mich. 1980).

<sup>409</sup>*Id.* at 1280.

'critical facts' regarding his injury. On this date, his claim accrues, and the plaintiff is charged with the duty of promptly investigating and presenting his claim . . . the rationale of *Kubrick* is broad enough to warrant, indeed compel, its application to a nonmalpractice case if the plaintiff in that case is ignorant of the critical facts concerning his injury.<sup>410</sup>

The court found that *Kubrick* fixed the date of accrual at that "time when the plaintiff can realistically be expected to undertake an investigation into the possibility of pressing a claim against the government."<sup>411</sup> The court also noted that, at least in *Liuzzo*,

ignorance of the identity of the tortfeasor can be as critical an element to accrual as ignorance of what the tortfeasor did to cause the injury. Without knowledge of the identity of the tortfeasor, an injured party may be helpless to discover the relevant information about his injury, including whether the tortfeasor's conduct conformed to the standard required by law.<sup>412</sup>

The district court perceptively found that for limitations purposes, an action does not necessarily accrue once a plaintiff knows everything he needs to be aware he should have a valid claim (or a lawsuit) against someone, although this may be the case in general. Investigation to some extent is almost always needed before a proper claim can be made, and this indeed is why a period of years, rather than days, is customarily allowed to make a claim after accrual. Looked at in this light, the dissent in *Kubrick*, insisting the period should be tolled until the claimant realized that acts were negligent, actually would put malpractice claimants in a favored position over all other tort claimants against the government. The *Kubrick* majority did not find that when his cause of action accrued Mr. Kubrick had all the knowledge he needed to go out and make his claim, merely that he now had two years and no more to find out the additional information he needed to make the claim.

*Bergman v. United States*<sup>413</sup> was an action brought against FBI agents alleging, among other things, FTCA claims. The district court discussed *Kubrick* and *Liuzzo* at length, and also determined "that *Kubrick* has application to nonmalpractice cases and

<sup>410</sup>*Id.* at 1281.

<sup>411</sup>*Id.* at 1282.

<sup>412</sup>*Id.*

<sup>413</sup>551 F. Supp. 407 (N.D. Mich. 1982).



especially to this case."<sup>414</sup> The court found that, as in *Liuzzo*, plaintiff had no reason to investigate earlier, because "knowledge of the identity of the tortfeasor or tortfeasors is a critical element to the accrual of a claim."<sup>415</sup>

In *Yustick v. Eli Lilly and Co.*,<sup>416</sup> a DES product liability case, the district court cited *Kubrick*, *Liuzzo*, and *Bergman* as support for the "general rule [that] the defendant must be identified as responsible for the product which caused the injury before a cause of action accrues [cites omitted]. This is because of the requirement that the defendant be the cause in fact of plaintiff's injury."<sup>417</sup>

Although *Kubrick* and its Michigan progeny were FTCA, not product liability, cases, the court in *Yustick* found their reasoning "persuasive."<sup>418</sup>

Finally, *Cox v. United States*<sup>419</sup> was an LSD experiment case. Cox, on active duty in 1964, participated in an LSD experiment. On April 26, 1976 (eight years after his discharge) he received a letter telling him he had been a participant and that a follow-up study for possible long term effects of LSD was being conducted. Cox says he wrote requesting more information, and also wrote on May 18, 1977 that he was "experiencing unexplained medical problems,"<sup>420</sup> but heard nothing until a letter August 25, 1978 again told him he had been a participant and that some participants had had long-term adverse effects. Cox filed a claim on August 27, 1979.

The court did not reach the government's *Feres* argument, holding instead that the claim was time barred. The April 1976 letter conclusively identified the drug as LSD, and "at least as early as May 18, 1977, plaintiff was in possession of all information necessary"<sup>421</sup> to start the period running.

The court never cited *Kubrick*, but its influence may have been felt. It rejected plaintiff's argument that the period did not start until the government fully discharged a duty to advise him of LSD's dangerous effects and to give medical assistance, saying it was "unable to find any authoritative support for such a

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<sup>414</sup>*Id.* at 420.

<sup>415</sup>*Id.* at 422.

<sup>416</sup>573 F. Supp. 1558 (E.D. Mich. 1983).

<sup>417</sup>*Id.* at 1562-63.

<sup>418</sup>*Id.* at 1563.

<sup>419</sup>513 F. Supp. 564 (W.D. Ken. 1981).

<sup>420</sup>*Id.* at 565.

<sup>421</sup>*Id.*

theory."<sup>422</sup> In the early post-*Kubrick* era, any "authoritative support" would have been hard to find.

## X. SEVENTH CIRCUIT

*DeWitt v. United States*<sup>423</sup> was the Seventh Circuit's principal case in this area prior to *Kubrick*. Curiously, the Seventh Circuit's opinion in this case was written by Judge Wisdom, Senior Circuit Judge for the Fifth Circuit sitting by designation. Judge Wisdom had participated, although had not written the opinion, in *Quinton* some seventeen years earlier.

Mrs. DeWitt had surgery at VA hospitals for rheumatoid arthritis in 1971 and 1972. She filed a claim alleging negligent treatment of her hands in August 1975. The district court dismissed the case on summary judgment as time barred.

The Seventh Circuit, under the Fifth Circuit judge's fine hand, adopted the reasoning of *Bridgford* and the Third Circuit decision in *Kubrick*, and found that the statute of limitations did not begin to run "until the claimant has discovered, or has had a reasonable opportunity to discover, all the essential elements of a possible cause of action."<sup>424</sup>

The court found that summary judgment would have been proper only if there were no genuine issue of material fact, and on the record found that the lower court could not as a matter of law have found that plaintiff "knew or should have known that her cause of action accrued prior to August 19, 1973 [two years before she filed]."<sup>425</sup> The government argued that plaintiff had actual knowledge (i.e., "knew," rather than "should have known") based on her deposition testimony. The court found that plaintiff's testimony was not an "unequivocal admission" of knowledge of all the elements of a cause of action. The testimony simply could have been critical of a doctor's "bedside manner," not necessarily indicating knowledge of malpractice.

The court wrote that "[t]he date when a cause of action accrues is, of course, a question of fact. [citation omitted] Summary judgment then, is usually inappropriate on that question."<sup>426</sup> Thus, the Seventh Circuit seemed to feel that the limitations question usually should not be resolved short of a trial on the

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<sup>422</sup>*Id.*

<sup>423</sup>593 F.2d 276 (7th Cir. 1979), *rev'd on rehearing*, 618 F.2d 114 (7th Cir. 1980).

<sup>424</sup>*Id.* at 279.

<sup>425</sup>*Id.*

<sup>426</sup>*Id.*

merits. This is certainly contrary to one of the grounds commonly offered as support for limitations periods—the right of defendants not to have to defend stale claims.

A dissent thought the *Bridgford* rule was “unrealistically subjective,”<sup>427</sup> insofar as it involved opportunity to discover legal as well as factual issues. It also included parts of plaintiff’s deposition transcript, which clearly implied plaintiff thought the doctor’s rough manner in removing casts directly caused her injury.

On rehearing, *DeWitt* was reversed without opinion and the district court opinion affirmed, doubtless in light of *Kubrick*.<sup>428</sup>

The first important post-*Kubrick* decision from the Seventh Circuit was not, strictly speaking, a medical malpractice case. In *Stoleson v. United States*,<sup>429</sup> Mrs. Stoleson, a worker in a munitions factory, was exposed to nitroglycerine and subsequently developed heart problems. The district court dismissed her claim as time barred because it found she had sustained her injury more than two years before filing an administrative claim. The Seventh Circuit reversed, applying the “discovery” rule. They noted the “reason for the [discovery] exception is essentially the same as for the general rule, i.e., a patient often has little or no reason to believe his legal rights have been invaded simply because some misfortune followed medical treatment.”<sup>430</sup> They held that this “more liberal rule” is not limited to medical malpractice cases, but applied in this occupational safety case. The Seventh Circuit noted its holding in *DeWitt* had been overruled by the Supreme Court, which only required knowledge of the “‘critical facts’ of injury and cause.”<sup>431</sup> In *Kubrick*, said the Seventh Circuit, it was recognized that “a plaintiff armed with knowledge of his injury and its cause is no longer at the mercy of a defendant’s specialized knowledge. A plaintiff in that position need only inquire of other professionals, including lawyers, whether he has been legally wronged.”<sup>432</sup>

The Seventh Circuit then applied the *Kubrick* rule to the facts, and found that Mrs. Stoleson had suspected nitroglycerine was the cause of her physical problems, had diligently inquired of many professionals and been told there was no medical evidence

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<sup>427</sup>*Id.* at 281.

<sup>428</sup>618 F.2d 114 (7th Cir. 1980).

<sup>429</sup>629 F.2d 1265 (7th Cir. 1980).

<sup>430</sup>*Id.* at 1268.

<sup>431</sup>*Id.* at 1269.

<sup>432</sup>*Id.* at 1269-1270.

of such a connection. Eventually, one specialist doctor she consulted published a "seminal article" (which included Mrs. Stoleson as a case in point), that "marked the first medical identification of the causal relation."<sup>433</sup> The court distinguished the *Kubrick* facts, finding that while Kubrick "lacked the presence of mind to seek the advice of those who could competently advise him that his claim was valid[,] Mrs. Stoleson . . . did have the presence of mind to seek professional advice."<sup>434</sup>

The court recognized that this holding appeared to "burden defendants indefinitely with the risk that they may be called upon to answer for some long-forgotten conduct that medical science recognized only years later to be harmful."<sup>435</sup> The court simply pointed out that in this case, however, the government had had a duty under existing regulations to take certain precautions in the work place, which they had not done; since there was clearly duty and breach, only knowledge of the cause of injury was still needed for an actionable claim. The court then held that where "there exists no standard of care until discovery of the causal relation . . . there is no breach and no actionable wrong."<sup>436</sup>

The Seventh Circuit thus recognized that *Stoleson* situations are rare, where there exists a duty, and yet there is at the time of the duty no knowledge of the likelihood of breach of the duty causing the injury. Despite the rarity of situations on all fours with *Stoleson*, however, the Seventh Circuit was not reluctant to rely on its authority in later close cases.

*Jastremski v. United States*<sup>437</sup> affirmed a district court decision in favor of plaintiff. Plaintiff father, himself a pediatrician, sued on behalf of his infant son, alleging that malpractice at a U.S. Army hospital at the time of birth caused cerebral palsy. The government appealed, pointing out that the facts of the alleged malpractice were known to the parents near the time of the child's birth, and the injuries at least by the time the child was two. Plaintiffs maintained they first discovered the link between the medical treatment and the child's condition when the child was four, during a social visit with a neurologist doctor, who observed the child, and who shortly thereafter examined him and diagnosed cerebral palsy.

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<sup>433</sup>*Id.* at 1267.

<sup>434</sup>*Id.* at 1270.

<sup>435</sup>*Id.* at 1271.

<sup>436</sup>*Id.*

<sup>437</sup>737 F.2d 666 (7th Cir. 1984).

The Seventh Circuit cited *Kubrick* and *Stoleson* for starting the limitations period once the injury and its cause were known or should have been known. The court then applied the "clearly erroneous" standard to the district court's findings of fact and declined to disturb the findings that Dr. Jastremski did not know, nor in the exercise of due diligence should he have known, that his son had sustained brain damage at birth. The former is doubtless correct, since it seems unlikely that Dr. Jastremski would have delayed suit so long if he in fact had had this knowledge. The latter is less obvious, but the court pointed out that the child's problems could have been orthopedic, rather than neurological (although orthopedic treatment at age two was ineffective), and that Dr. Jastremski had testified uncontradicted that he did not know of the cerebral palsy until the neurologist's social visit.

It is certainly possible that a district court could have found on the same facts that Jastremski had not exercised due diligence and that the suit was time barred. In view of minority not tolling the statute in FTCA cases, this case (at least at the district court level) could simply be a refusal to visit the "sins" (or omissions) of the father upon the son. Compare this situation to *Camire v. United States*,<sup>438</sup> where a lay parent, aware of a misdiagnosis of her child, was held not to have been reasonably diligent in failing to connect the malpractice to her child's brain damage.

In *Fisk v. United States*,<sup>439</sup> VA doctors negligently injected radiopaque dye into Mr. Fisk's neck in 1950, and in 1972, he developed hoarseness. In early 1973, he was told by a doctor that this was related to the dye injection, but that he need not worry about it. Two years later (1975) he developed further symptoms, and was diagnosed as having carotid artery disease caused by the dye. In 1976, Fisk submitted an administrative claim, which was rejected, and he filed suit. In 1979, he was hospitalized again, and died a month later from complications traced to the dye. His widow then amended the complaint to assert wrongful death, and filed an administrative claim (also denied). The district court found for the plaintiff widow.

On appeal, the government argued that *Kubrick* required that, where the elements giving rise to a malpractice claim later result in wrongful death, the date the malpractice claim accrued should be the date the wrongful death claim accrued also. According to

<sup>438</sup>485 F. Supp. 883 (E.D.N.Y. 1980).

<sup>439</sup>657 F.2d 167 (7th Cir. 1981).

the government, this date was in 1973, thus causing both the personal injury malpractice and the wrongful death claims to be barred. The Seventh Circuit probably could have held that the personal injury claim did not accrue until 1975, when the artery disease was first diagnosed, and so any later wrongful death claim would have related back to the earlier timely claim. Instead, the court held that a claim for wrongful death, under state law totally separate from the personal injury claim, simply did and could not accrue until the decedent died. Accordingly, the government can remain liable for wrongful death claims long after the decedent discovered or should have discovered his injury and its cause; in fact, the decedent need not have ever filed a claim or suit for personal injury at all, as long as his survivor files the wrongful death claim within two years of death. The court specifically held that "the federal rule in wrongful death actions brought under the [FTCA] is that the cause of action *cannot* accrue until the wrongful death occurs."<sup>40</sup> The action might accrue even more than two years after the death if the survivors should not have reasonably known the death was due to "injury" that was "caused" by the government; this is precisely what the Seventh Circuit later held in *Drazan v. United States*.<sup>41</sup>

Mr. Drazan was having annual chest x-rays done by the VA to monitor tuberculosis in remission. A radiology report in November 1979 noted a small lung tumor and suggested follow-up, which was never done. The next x-ray, in January 1981, revealed a large cancerous tumor that killed Mr. Drazan the next month. His widow requested his medical records in November 1981, received them the next month, and discovered the failure to follow-up. The district court held the cause of action accrued in February 1981, when her husband died, although plaintiff argued it did not accrue until the medical records were received and the government's negligence discovered.

The Seventh Circuit held that the district court had misinterpreted *Kubrick* in holding that the wife's knowledge of her husband's injury (death) and its cause (cancer) at the time of his death had started the limitations period running. The court found that the facts in *Kubrick* were nothing like in *Drazan*: here, Mrs. Drazan had "no reason [shown in the record] to think that the government had killed him by neglecting to follow up the x-ray

<sup>40</sup>*Id.* at 173 (emphasis added). Compare *Fisk with Dundon v. United States*, 559 F. Supp. 469 (E.D.N.Y. 1983).

<sup>41</sup>762 F.2d 56 (7th Cir. 1985).

examination of 16 months earlier."<sup>442</sup> The district court's approach could lead to "ghoulish consequence[s];"<sup>443</sup> potential plaintiffs would request hospital records every time someone suffered or died in a government hospital to see if treatment played a role in the victim's distress, because they could not wait until they had reason to think the treatment played a role. The court did not think that *Kubrick* intended to encourage such behavior.

For the Seventh Circuit's reasoning to apply, the information needed to provide "notice" that a doctor may have caused harm should be in the government's control. "The notice must not be of harm [in this case cancer] but of iatrogenic [doctor-caused] harm, though, as *Kubrick* holds, not necessarily of *negligent* iatrogenic harm."<sup>444</sup>

Having doubtless gladdened the plaintiff's bar thus far in the opinion, the Seventh Circuit proceeded to raise troubling concerns, by holding that the period does not simply run once the government cause of harm is known, but rather "either when the government cause is known or when a reasonably diligent person (in the tort claimant's position) reacting to any *suspicious circumstances* of which he might have been aware would have discovered the government cause—whatever comes first."<sup>445</sup>

The court proceeded to remand for an inquiry as to why Mrs. Drazan had asked for the medical records, and for the district court "to determine when Mrs. Drazan should have *suspected* government causality in the death of her husband."<sup>446</sup>

The above language is difficult to reconcile with cases like *Stoleson*, which drew such a clear, logical distinction between "suspicion" and "knowledge." Perhaps the court would have done better to write in terms of examining the "due diligence" of Mrs. Drazan, and whether she had any reason to make inquiry (i.e., engage in the "ghoulish" behavior the court did not want to encourage), rather than saying that the period would start to run when Mrs. Drazan acquired "suspicions" that only later were confirmed as "knowledge." In fact, at the end of the opinion, the court said that although the government bears the burden of proof when it asserts a statute of limitations defense, here "the government showed that the suit was untimely; it is up to the

<sup>442</sup>*Id.* at 58.

<sup>443</sup>*Id.* at 59.

<sup>444</sup>*Id.* at 59 (emphasis in the original).

<sup>445</sup>*Id.* (emphasis added).

<sup>446</sup>*Id.* at 60 (emphasis added).

plaintiff to show that she had no reason to believe that she had been injured by an act or omission by the government."<sup>447</sup>

Thus, the Seventh Circuit seems to be placing the burden of proving due diligence on plaintiff, and where she did not do anything (until late), of proving there was no apparent reason to be diligent. Apparently implicit in the phrase "the government showed that the suit was untimely" is the assumption that the period begins at the time of death absent some other circumstance, which plaintiff must prove.

The holding would also seem to require the filing of a claim once the claimant became "suspicious" if this occurred only shortly before the period would have ended, as any delay in obtaining records to raise the "suspicions" to "knowledge" could cause the claim to be time barred. There may well be a great deal of subjectivity creeping into judicial analysis of when a plaintiff became (or should have become) suspicious, which, at the minimum, makes predicting outcomes difficult. This situation might result in excessive claims being filed on "suspicion" alone; it seems more probable, however, that most people (if not their lawyers) would be hesitant to sue their doctors or their government on mere suspicion, and so would simply lose otherwise meritorious causes of action. In this way, the holding rewards the frivolous and penalizes those with restraint, just the opposite of the avowed goal of most courts.

The decision in *Green v. United States*,<sup>448</sup> decided one month after *Drazan* (although argued the same day in front of the same three-judge panel), affirmed a district court's dismissal on the government's motion for summary judgment. Plaintiff Green received radiation treatment in 1978 through April 1980 for mouth cancer in two VA hospitals. He was then hospitalized in Cook County Hospital (a nonfederal hospital) from May through July 1980, hemorrhaging from the mouth, during which he was told that "the dead tissue in his mouth" was caused by the radiation treatment.<sup>449</sup> Green was readmitted later, and eventually had to have portions of his jaw removed (in November 1980), finally being discharged in February 1981. Green filed a claim in October 1982 alleging excessive radiation in the VA treatment, and later also alleged failure to diagnose and treat. The district court, applying *Kubrick*, found that Green was aware of his injury

<sup>447</sup>*Id.*

<sup>448</sup>765 F.2d 105 (7th Cir. 1985).

<sup>449</sup>*Id.* at 106.



(osteoradionecrosis, i.e., death of bone from radiation) and its cause more than two years before filing his claim. Green argued that the osteoradionecrosis was an expected side effect of the radiation treatment, and his cause of action did not accrue until his physical maladies exceeded these expected side effects, and that he did not realize this until part of his jaw was removed (within the two years, of course). The Seventh Circuit, acknowledging this argument as "creative," rejected it as placing a "gloss upon the word 'injury' which is neither supported by the legislative history of section 2401(b) [of the FTCA] nor the holding of *Kubrick*."<sup>450</sup>

The Seventh Circuit agreed with the district court that Green knew or should have known the cause (radiation) of his "injury," having undergone eight major surgical procedures before the two years prior to filing his claim, and the "severity" of the injuries "would have caused a reasonably diligent claimant to seek advice in the medical and legal community."<sup>451</sup>

Addressing the failure to diagnose and treat allegations, the Seventh Circuit examined *Augustine v. United States*,<sup>452</sup> and purporting to apply *Augustine's* standard, found that Green knew he had been (allegedly) denied medical care by the VA when he was hospitalized in Cook County Hospital hemorrhaging from the mouth in May 1980, was diagnosed properly as of October 1980, and "[a] plaintiff, in the exercise of reasonable diligence, should have become aware of his injury at this time."<sup>453</sup>

While the Seventh Circuit's result is perhaps correct in light of *Kubrick*, the analysis regarding "side-effect" cases is disturbing. *Kubrick* as reported is not a true "side-effect" case. It would seem ill advised to categorically shut out claimants as time barred where "side effects" turn out worse than anticipated, as the line dividing an anticipated and unanticipated side effect is bound to be rather vague (as well as the parties probably disputing what the claimant was actually advised about them in any event). Presumably, a side effect is the result of treatment of a condition worse than the probable side effect. If the side effect turns out worse than the original condition, it should be questions of fact whether claimant received proper advice, whether he was simply unlucky, or whether the side effects could or could not have been prevented or reduced. If the side effect is not (quite) as bad as the

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<sup>450</sup>Id. at 107.

<sup>451</sup>Id. at 108.

<sup>452</sup>704 F.2d 1074 (9th Cir. 1983).

<sup>453</sup>765 F.2d at 109.

original condition, it still may be worse than it needed to be, and thus actionable. How should a claimant be expected to know (or "suspect," as in *Drazan*) that an operation that saved his life but cost him his leg need not have cost the entire leg, but only a few toes? Determinations such as the above are clearly factual, and most suitable for resolution at a trial on the merits. There was no discussion in *Green* about the expected extent of the radiation-induced injury, whether it needed to be the extent it was, what part chance played, or what advice Green received about how serious he could expect the side effects to be. All these would have been examined at a trial on the merits. Instead, the circuit and district courts simply found that Green's physical maladies were "serious" more than two years before his claim was filed, and he should have realized he had a cause of action long before he eventually made his claim. Aside from the short shrift this decision gave to a problem of weighty dimensions (i.e., side effect cases), it would have the effect of encouraging demands for hospital records and filing claims whenever side effects (less than, equal to or greater than the extent predicted) develop, simply to preserve the cause of action. Such "ghoulish consequences" ought not to be encouraged, least of all by a court that wrote *Drazan*.

The most recent decision by the Seventh Circuit directly on point was *Nemmers v. United States*.<sup>454</sup> This decision highlights how critical use of certain words by a district court can be, as well as how outcome can be shaped by emphasis and deemphasis of important facts.

Eric Nemmers was born in July 1973 at a Navy hospital some three weeks after the predicted birth date. His mother had difficulty during labor, but was sent home without tests or medication (other than a suppository) and told not to return or even call until her pains were regular and five minutes apart. After two days, she was taken back to the hospital, with pains still irregular; the baby was finally delivered by Caesarean section. The child was retarded and had cerebral palsy. The parents knew of the cerebral palsy when Eric was eighteen months old, but the district court found that they did not learn he had "severe retardation" until October 1979. A claim was filed in October 1981, and the parents argued they first realized there was a possible connection between the difficult birth and Eric's condition when they read two newspaper articles in August 1981.

The district court wrote that plaintiffs had sought information

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<sup>454</sup>795 F.2d 628 (7th Cir. 1986).

about what caused cerebral palsy from both naval and private physicians, and they "were assured that the causes were unknown and that it was just one of those things and only God knows the cause."<sup>455</sup> Those doctors never suggested the difficult birth as a possible cause, and so even though plaintiffs had access to the medical records, "they were effectively diverted from the import of those records by [those] statements."<sup>456</sup> In May 1977, a Dr. Cops evaluated Eric for possible rehabilitation and wrote a report with which the district court was "very concerned" and which the court "studied...carefully."<sup>457</sup> The district court indicated that the report

delineated a number of possible causes, but concluded that the actual cause was influenza suffered by Mrs. Nemmers in the first trimester. There was in the letter a reference to 'the trauma of the birth' and 'fetal distress,' but again, attention was diverted by his asserted belief that influenza was the cause.<sup>458</sup>

The court said "[c]learly, the Nemmers could have challenged the statements with respect to the nature of the disease,"<sup>459</sup> but as their goal was their son's rehabilitation rather than "assessment of blame," "there was no reason to do so."<sup>460</sup>

The district court wrote: "[T]he test for determining when the statute of limitations begins to run is focused on Plaintiffs and on that time when *they* reasonably knew or should have known of the existence of a cause of action."<sup>461</sup> The court said that "a careful consideration of the totality of the circumstances compels a finding that the Nemmers first realized there was a possible

<sup>455</sup>612 F. Supp. 928, 930 (D. Ill. 1985).

<sup>456</sup>*Id.* at 930.

<sup>457</sup>*Id.*

<sup>458</sup>*Id.* at 930-31.

<sup>459</sup>*Id.* at 931.

<sup>460</sup>*Id.* Of the two newspaper articles read by the Nemmers, one talked about a child who suffered distress at birth, and "reported a large out of court settlement." *Id.* at 930. The other merely reported a case not at all similar but in which parties sued the government. The Nemmers argued that the "juxtaposition" of the two articles first alerted them. If information in a 1977 report should not have raised their awareness to a possible cause of action because they were not interested in assessing blame, why should an article in 1981 talking about someone suing the government have raised this awareness? Compare *Nemmers with Wilkinson v. United States*, 677 F.2d 998 (4th Cir.), cert. denied, 459 U.S. 906 (1982).

<sup>461</sup>612 F. Supp. at 933 (emphasis by the court). The district court did not cite *Kubrick*, or indeed any other case, for this proposition or in any other context on the statute of limitations issue.

connection between Eric's cerebral palsy and the circumstances attendant his delivery on August 26, 1981."<sup>462</sup>

The court then examined the merits of the case, and eventually found for plaintiffs in the amount of \$1,835,542.30.

The Seventh Circuit reversed and remanded to the district court. They started out by observing that *Kubrick, Green, Drazan, and Stoleson* all cause the period to start "to run in a medical malpractice case when the plaintiff has the information necessary to discovery 'both his injury and its cause.'"<sup>463</sup> The court framed the issue as whether the period depends on "plaintiffs' personal knowledge and reactions or whether it depends on the reactions of the objective, 'reasonable' man" and held "[t]he answer is the latter."<sup>464</sup> The Seventh Circuit found that the district court had improperly applied a subjective standard.

If the district court had written about when a "reasonable man" knew or should have known, it is possible the Seventh Circuit would have left the lower court's findings stand, as they had in *Jastremski*. As it was, the circuit court looked more closely at the facts of the case, and although they did not explicitly say so, it is evident that the district court had "deemphasized" certain important facts. Although the district court had been "very concerned" with and "studied . . . carefully" Dr. Copps's report, it was the Seventh Circuit that reproduced this report in its entirety in their opinion.<sup>465</sup> This report said a "relatively severe influenza-like high fever illness" the mother had was a "possible" cause of Eric's problems, although "the trauma of delivery . . . might have also contributed somewhat."<sup>466</sup> The Seventh Circuit also informed the reader that Mrs. Nemmers in fact had "had only a cold, and not a 'severe influenza-like high fever illness' during her pregnancy."<sup>467</sup> In its findings of fact, the district court had not mentioned this, only stating obliquely that "the Nemmers could have challenged the statements with respect to the nature of the disease . . ." The Seventh Circuit thought that when a report that says a possible cause is "a", but "b" might have contributed "somewhat," combined with plaintiff's knowledge that "a" in fact was not present and so could not have been a cause,

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<sup>462</sup>*Id.* at 933.

<sup>463</sup>795 F.2d at 628, 629 (quoting *Kubrick*).

<sup>464</sup>*Id.* at 631.

<sup>465</sup>*Id.* at 630.

<sup>466</sup>*Id.*

<sup>467</sup>*Id.*

then it is time to get out the records and inquire further. The putative plaintiff need not know that the suspicious event is more likely than not the cause. He may need discovery to determine the most likely cause, and *Kubrick* emphasizes that the running of the statute of limitations does not depend on having enough information to prevail at trial.<sup>468</sup>

The bottom line is that "[a] medical report stating that there is a significant chance that an event caused an injury therefore is enough to start the period, which requires the claimant to begin his investigation."<sup>469</sup>

The Seventh Circuit also pointed out that *Kubrick*

"said that the statute runs even if the plaintiff, because of bad advice, is dissuaded from filing suit . . . [s]o what a plaintiff actually knows is not dispositive; the time may be running even if plaintiff has received unequivocal medical advice that the government is not to blame or did nothing wrong."<sup>470</sup>

The foregoing language is a bit sweeping, and care must be taken not to cite this out of context, because the Seventh Circuit earlier in the opinion had reaffirmed its holding in *Stoleson* that "a 'layman's subjective belief' in a cause does not start the statute when a competent medical professional would disagree with the belief."<sup>471</sup> Of course, in *Stoleson* the state of medical knowledge had not advanced far enough for doctors to have competent opinions about the true cause of Mrs. Stoleson's problems.

Interestingly, after its strong words about Dr. Copps's report, the Seventh Circuit remanded to the district court to make findings of fact as to whether a "reasonable man" should have known of the cause of Eric's problems within two years of the filing of the claim. The Seventh Circuit insisted that this factual resolution "is the district court's call," and "the court should not seek in our discussion clues about how the dispute should be resolved. We mean to leave none."<sup>472</sup> Nevertheless, the district court would probably be ill-advised to deemphasize the facts the Seventh Circuit saw fit to underline. Making factual determina-

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<sup>468</sup>*Id.* at 631-32.

<sup>469</sup>*Id.* at 632.

<sup>470</sup>*Id.*

<sup>471</sup>*Id.* at 631.

<sup>472</sup>*Id.* at 633.

tions is clearly in the district court's balliwick; it cannot, however, ignore facts in the record merely to achieve a desired result.

The Seventh Circuit also clearly held that the burden of persuasion was on plaintiffs. Paraphrasing *Drazan*, the court wrote, "The government showed that the suit was untimely. It is up to the [Nemmers] to show that [they] had no reason to believe that [Eric] had been injured by an act or omission of the government."<sup>473</sup>

The above is of great significance in allocating the burden of proof. In *Drazan*, a wrongful death case, a logical observation from the above language could be that the claim ordinarily accrues at the date of death, and it is plaintiff's burden to show the claim should accrue later. However, *Nemmers* was not a wrongful death case, and use of the *Drazan* language seems to have extended the concept of plaintiff's burden of proof to almost all circumstances of alleged medical malpractice where the claim was not filed until more than two years after some unspecified event, be it the commission of the malpractice, the identification of the injury, or simply passage of a good many years. Allocations of burdens of proof are often tricky, especially when they are said to shift, and the Seventh Circuit seems to have injected an extra complication into an already complex analysis.<sup>474</sup>

In *Brock v. TIC International Corp.*,<sup>475</sup> the Secretary of Labor sued the defendant corporation under the Employee Retirement Income Security Act (ERISA). The Seventh Circuit affirmed the district court's dismissal as time barred by the Act's three-year limitation period.<sup>476</sup> The Department of Labor had argued the statute was anomalous because if the Department had actual knowledge of a violation of the Act it had three years to sue, whereas if it had only "suspicion" of a violation it still had only three years to sue.

The Seventh Circuit observed:

[W]henever a statute of limitations is subject to a

<sup>473</sup>*Id.* (quoting *Drazan*, 762 F.2d at 60).

<sup>474</sup>The Seventh Circuit recently placed this "burden" on plaintiff in an FTCA case that did not involve medical malpractice nor wrongful death, *Crawford v. United States*, 796 F.2d 924, 929 (7th Cir. 1986) (citing *Drazan*). This case also reiterated that timeliness of the claim was jurisdictional; if this is the case, the burden to prove timeliness should be on plaintiff from the beginning anyway. *But see Harrison v. United States*, 708 F.2d 1023 (5th Cir. 1983); *Overstreet v. United States*, 517 F. Supp. 1098 (M.D. Ala. 1981).

<sup>475</sup>785 F.2d 168 (7th Cir. 1986).

<sup>476</sup>29 U.S.C. §§ 1104(a)(1)(B), 1113(a) (1982).

discovery rule, the interval for preparing and filing a suit is the same whether the plaintiff knows that he has a cause of action or should know, even though in the latter case he might have to do some more investigating before he could be certain that he had a cause of action. This point is so elementary that the cases assume rather than discuss it.<sup>477</sup>

At the district court level, in *Pardy v. United States*,<sup>478</sup> Pardy was admitted to an Air Force hospital for a urinary tract infection, had a severe reaction to an injection on November 6, 1978, and went immediately into a coma. He remained comatose until November 21, 1978, and was discharged on December 6, 1978. A claim (later found to be sufficient although signed only by plaintiff's attorney and not on Standard Form 95) was filed on November 10, 1980.

The government argued that the claim accrued on November 6, 1978 and so was time barred by four days. The district court reviewed *Kubrick*, finding that although *Kubrick* had "removed the third prong from the analysis holding that [accrual did not] 'await awareness that his injury was negligently inflicted,'" <sup>479</sup> it still required the two "prongs" of awareness of the injury and its cause. "Since Mr. Pardy was in a coma until November 21, 1978, he could not appreciate his injury or its cause until at least that date,"<sup>480</sup> so under *Kubrick* the claim accrued at that time.

The government argued that the "discovery rule" should not apply, since that rule was intended for situations where the injury is not manifested for many months or years. The district court, however, read "the broad language of *Stoleson* defining the purpose and scope of the discovery rule" and found that "the discovery rule applies when a plaintiff is rendered incompetent by the government's allegedly tortious conduct."<sup>481</sup> There was no doubt Pardy was "blamelessly ignorant," at least while he was in the coma.

The government also argued that incompetency does not toll the FTCA limitation period, but the district court found that the period is tolled

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<sup>477</sup>785 F.2d at 172.

<sup>478</sup>575 F. Supp. 1078 (S.D. Ill. 1983).

<sup>479</sup>*Id.* at 1080 (quoting *Kubrick*).

<sup>480</sup>*Id.*

<sup>481</sup>*Id.*

when the incompetency is caused by the very negligence of which the plaintiff is complaining... [because] the government shall not be allowed to benefit from its own wrong [and]... brain damage or destruction should not be classified in the same way as ordinary mental disease or insanity for purposes of barring an action.<sup>482</sup>

Interestingly, a very recent Seventh Circuit case, *Crawford v. United States*,<sup>483</sup> briefly analyzed whether mental incapacity can ever toll the administrative statute of limitations, and made it "clear that we regard it [this issue] as open."<sup>484</sup> No mention of *Pardy* was made at all, and it remains unclear how the Seventh Circuit might eventually decide this issue.

Finally, in *Utley v. United States*,<sup>485</sup> Glenda Utley was on active duty in the Air Force when she learned she was pregnant; she received prenatal care from Air Force physicians until her discharge on April 30, 1979. Her baby, Kurtis, was born on May 7, 1979 at a civilian hospital, and his severe physical problems (premature birth, convulsions from meningitis, intracranial hemorrhage, sepsis and hydrocephalus) were listed in a discharge report dated June 18, 1979. Plaintiff filed a claim on June 29, 1981, and brought suit when the claim was denied.

The government moved to dismiss the suit as time barred and as barred by the *Feres* doctrine. The district court rejected the government's argument that the claim accrued on June 18, 1979. It found immaterial whether plaintiff "should have been aware of the seriousness of [Kurtis's] injuries in June 1979"<sup>486</sup> because plaintiffs asserted, and the government did not contest, "that they had no reason to suspect until August of 1979"<sup>487</sup> that Kurtis's injuries were caused by the Air Force prenatal care. (The opinion did not say what occurred in August 1979 that might have led to suspicion that the prenatal care was linked to the baby's condition.) Applying *Kubrick* and *Stoleson*, the court found that plaintiff's claim did not accrue until then, when they learned the *cause* of the injury, in addition to the injury itself.

While the court dismissed Glenda Utley's claim as barred by *Feres*, it found that the claim filed on behalf of the baby Kurtis "poses little, if any, threat to military discipline,"<sup>488</sup> so the baby's

<sup>482</sup>*Id.* at 1081.

<sup>483</sup>796 F.2d 924 (7th Cir. 1986).

<sup>484</sup>796 F.2d at 927.

<sup>485</sup>824 F. Supp. 641 (S.D. Ind. 1986).

<sup>486</sup>*Id.* at 643.

<sup>487</sup>*Id.*

<sup>488</sup>*Id.* at 645.



claim was not barred.

## XI. EIGHTH CIRCUIT

Prior to *Kubrick*, the leading Eighth Circuit case was *Reilly v. United States*,<sup>489</sup> and this case has retained considerable vitality post-*Kubrick*. In *Reilly*, plaintiff had an asthma attack, was put on a mechanical respirator at an Air Force hospital in November 1968, and developed tracheal scar tissue. She was treated at another Air Force hospital from January to April 1969, but even so she could not speak from April to August 1969. The Eighth Circuit upheld the district court's finding that as of August 1969 this "extreme and unexpected consequence [was] sufficient to put the appellant on notice that she may have been legally wronged,"<sup>490</sup> despite her doctor's assurance at this time that her condition was normal, though rare. "[W]hen the facts became so grave as to alert a reasonable person that there may have been negligence related to the treatment received, the statute of limitations began to run."<sup>491</sup> Accordingly, her claim, filed December 1971, was time barred. Interestingly, the trial court also found that as of January 1969, she knew of the "causal relationship" between her condition and the November 1968 treatment, and *Kubrick* clearly would have had the claim accrue at this earlier date.

After *Kubrick* the Eighth Circuit has addressed these issues in a number of decisions.

In *Snyder v. United States*<sup>492</sup> plaintiff was diagnosed at a VA hospital as having lung cancer, given six months to live, and was given a cordotomy (destroying spinal nerves) to relieve the pain in December 1974. This did not relieve his pain, and in January 1975, he was informed that he did not have cancer after all. Snyder continued seeking treatment and was first told by a doctor in 1979 that his pain was caused by the cordotomy. He filed a claim in February 1980, alleging misdiagnosis and that the cordotomy was done negligently and caused his pain. On the government's motion for summary judgment, the district court dismissed the entire action as time barred. The Eighth Circuit agreed that the claim of misdiagnosis was barred since he knew of it five years before he filed his claim, but that on the record

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<sup>489</sup>513 F.2d 147 (8th Cir. 1975).

<sup>490</sup>*Id.* at 150.

<sup>491</sup>*Id.* This passage has been cited and quoted by numerous other cases pre-and post-*Kubrick*.

<sup>492</sup>717 F.2d 1193 (8th Cir. 1983).

before it, it could not allow dismissal of the latter claim. The Eighth Circuit cited *Kubrick* as controlling, but then, in perhaps a slip of dicta, wrote:

Whether Snyder's claim that he suffers pain because of the [negligent] cordotomy is barred is a close question. He clearly knew shortly after the cordotomy that it was unsuccessful in stopping his pain. However, it doesn't follow as a matter of law that this constitutes notice of *possible negligence*. We believe that whether Snyder knew or should have known that the cordotomy itself was the cause of his pain is a contested question of fact which cannot be resolved on summary judgment on the present record.<sup>493</sup>

The Eighth Circuit's holding is probably correct, because knowledge that the operation failed to *relieve* pain clearly is not the same as knowledge that the operation is *causing* pain in its own right. The court's language about "notice of possible negligence" is not consistent with *Kubrick*, however, nor is it consistent with the court's own interpretation of *Kubrick* two paragraphs earlier:

The general rule under the [FTCA] is that a tort claim accrues, for statute of limitations purposes, at the time of the plaintiff's injury. [*Kubrick*, cites omitted] Medical malpractice cases are a recognized exception to this rule. In these cases a claim accrues when a plaintiff has discovered both his injury and its probable cause, even though he may be ignorant of his legal rights.<sup>494</sup>

Note the implied limitation of *Kubrick* to medical malpractice FTCA cases.

In *Clifford v. United States*,<sup>495</sup> twenty-four year old Allen Clifford was treated by a VA hospital for suicidal depression, and was prescribed Elavil "on a long term basis . . . without check-ups and reevaluations."<sup>496</sup> On October 1, 1976, Allen took an overdose and was in a coma continuously through the date of circuit court decision. On January 23, 1979, Allen's father was appointed Allen's guardian, and he filed a claim on January 16, 1981. The district court dismissed the claim as time barred, holding that the claim accrued when he went into the coma. The Eighth Circuit,

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<sup>493</sup>*Id.* at 1195 (emphasis added).

<sup>494</sup>*Id.*

<sup>495</sup>738 F.2d 977 (8th Cir. 1984).

<sup>496</sup>*Id.* at 978.

however, agreed with plaintiff that it accrued when a guardian was appointed. The government argued that Allen's injuries and their cause were obvious to his family immediately, but the court noted that, as Allen was an adult, no one had a legal duty to act for him, and to accept the government's argument would penalize Allen for his family's inaction while he was unable to act for himself. The court said the important point was the government's actions complained of "are the very conduct which allegedly destroyed those plaintiffs' capacities to realize the existence and cause of their injuries."<sup>497</sup>

The court acknowledged that this could in theory leave the government open to suit indefinitely, but felt that as a practical matter, the longer the delay the harder for plaintiff to prove his case, and at any rate, to allow the government to "profit from its own (alleged) wrong" would be "still more objectionable."<sup>498</sup> Accordingly, in the Eighth Circuit under *Clifford*, the FTCA limitation period does not run while an adult patient is comatose and no guardian has been appointed. Interestingly, the court acknowledged that if the patient were a minor, parents would be under a duty to investigate and to act for the minor, and so the rule would be otherwise. This leads to the somewhat anomalous result that an injured party under *two* disabilities (minority and incompetency) could have his claim barred whereas an injured party under only one disability (incompetency) would not be barred.

*Brazzell v. United States*<sup>499</sup> was a swine flu vaccination case. Plaintiff was vaccinated on November 11, 1976, and within a few days complained of aches, chills, fever and "intense muscle pain throughout her entire body, a condition termed 'myalgia.'<sup>500</sup> Plaintiff was hospitalized from November 21—December 8, 1976, and her doctor's preliminary diagnosis was myalgia "probably secondary" to the vaccination. She saw her doctor in December and again on January 5, 1977, at which time she "expressed her belief that the vaccination had caused her trouble,"<sup>501</sup> but her doctor had changed his mind and "assured her that the vaccination's effect had long since worn off."<sup>502</sup> Plaintiff also began suffering emotional stress and received psychiatric care for neurosis and depression. She filed an administrative claim on

<sup>497</sup>*Id.* at 979.

<sup>498</sup>*Id.* at 980.

<sup>499</sup>788 F.2d 1352 (8th Cir. 1986).

<sup>500</sup>*Id.* at 1355.

<sup>501</sup>*Id.*

<sup>502</sup>*Id.*

February 8, 1980 (the opinion does not say what medical advice she may have received to precipitate this, but it does say she "discuss[ed] with a lawyer the circumstances surrounding her vaccination").<sup>503</sup> After her claim was rejected, plaintiff brought suit, alleging a failure to warn of the risk of myalgia and anxiety neurosis, sounding in negligence, strict liability and breach of warranty. The district court found for plaintiff on the strict liability theory for failure to warn, applying Iowa law.

The government argued that the claim should be time barred for two reasons. First, the district court should have applied the date of injury rule, rather than a "discovery" rule. The Eighth Circuit agreed with the district court, citing *Reilly* as adopting the "discovery" rule in FTCA medical malpractice cases, and found that "[w]hile in one sense appellee's claim sounds in products liability, that classification cannot destroy the medical context of the case. As with most medical malpractice claims, the true cause of appellee's injuries was clouded by conflicting medical advice."<sup>504</sup>

The court noted that plaintiff's doctor had changed his mind from his initial diagnosis that the vaccine had caused plaintiff's injuries, and also that the "elusive nature of the injury . . . made pinpointing the real cause tricky."<sup>505</sup>

The government then argued that plaintiff should have discovered the cause of her injuries well before two years prior to filing the claim (February 8, 1978). The Eighth Circuit held that "[a]lthough a close question,"<sup>506</sup> the district court's finding that plaintiff had been reasonably diligent was not clearly erroneous. The district court found that even though plaintiff thought the vaccination was the cause of her troubles in January 1977, "such thoughts were only 'speculation' and could not be substantiated by medical opinion,"<sup>507</sup> and that plaintiff could be charged with knowledge only after her doctor concluded "the vaccine was the culprit,"<sup>508</sup> which he did no earlier than November 15, 1979. The Eighth Circuit felt it would be "unfair" to charge plaintiff with knowledge of cause while her doctor was telling her the vaccine was not the cause. The court held that "[a]s to when appellee should have discovered the cause of her injuries, we believe that

<sup>503</sup>*Id.*

<sup>504</sup>*Id.* at 1356.

<sup>505</sup>*Id.*

<sup>506</sup>*Id.* at 1357.

<sup>507</sup>*Id.*; see also *Stoleson v. United States*, 629 F.2d 1265 (7th Cir. 1980).

<sup>508</sup>788 F.2d at 1357.

she ought to be charged with that knowledge as soon as she could have discovered the vaccination was the cause by asking a doctor."<sup>509</sup>

This holding was based on *Kubrick's* indication that knowledge should be charged when "inquiry among doctors with average training and exposure in such matters"<sup>510</sup> would have revealed the cause. In this case, no other doctor was in a better position to correctly diagnose plaintiff's injury because her myalgia due to vaccination "was probably the only such case in the country,"<sup>511</sup> and her doctor's familiarity with her history put him in the best position to discover the cause.

The Eighth Circuit also wrote the following interesting bit of dicta: "While in many cases the treating physician may have reason not to search diligently for the cause of an injury—for fear of impugning his own conduct—appellee's doctor had no such worries in finding the vaccine to be the cause."<sup>512</sup>

One can imagine the above observation, doubtless true in this case, used in all manner of contexts. Could this dicta be used to argue in favor of the "continuous treatment" doctrine, i.e., treating doctors "in many cases" not diligently looking for injury causes, or failing to disclose past questionable practices for fear of "impugning [their] own conduct?" Or does the dicta support an argument that in a government hospital setting, where various different doctors are giving treatment, there should be "no such worries" of personal consequences, and so no justification for the continuous treatment doctrine?<sup>513</sup> Is it not merely human nature to avoid striving to prove oneself culpable? If this is the case, could the dicta be used to argue that a claimant should become aware that a doctor who has been giving treatment for a lengthy period without positive results may well be fearful of "impugning his own conduct"? If this is so, is the claimant then not being reasonably diligent if he fails to seek a second opinion? Could this dicta be used to argue that in the real world ("in many cases") doctors do not deal with their patients on a fiduciary basis? If so, and if this is recognized by patients, is it fair to charge a doctor with "concealment" if he merely remains silent? Or, conversely, could this observation be viewed as a rebuke to the medical profession, and support for an argument that if "in many cases"

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<sup>509</sup>*Id.* (emphasis added).

<sup>510</sup>*Id.* (quoting *Kubrick*, 444 U.S. at 123).

<sup>511</sup>*Id.*

<sup>512</sup>*Id.*

<sup>513</sup>See *Overstreet v. United States*, 517 F. Supp. 1098 (M.D. Ala. 1981).

doctors are not striving diligently on their patient's behalf for fear of personal consequences they should be made to toe the line by imposing a fiduciary duty on them in no uncertain terms? One gets the feeling that this case will be cited for years to come in many opinions in this area of the law.

Also worth noting is a continued reluctance to extend *Kubrick* out of the FTCA medical malpractice area. The court looked upon *Kubrick* as controlling, and so felt constrained to characterize the suit as medical malpractice, even though no medical practitioner was ever accused of misfeasance, and the case turned on product liability theories.<sup>514</sup>

*Gross v. United States*<sup>515</sup> was far from being a malpractice case. Gross was a farmer who sued the government for alleged torts committed by officials<sup>516</sup> of the Agricultural Stabilization and Conservation Services Committee (ASCS) in denying Gross participation in a federal feed grain program and demanding refunds of previous payments under the program, claiming they had intentionally inflicted emotional distress upon him.<sup>517</sup> His claim was filed August 7, 1973 and the government eventually moved to dismiss it as time barred, arguing that under *Kubrick* his claim accrued when Gross "should have discovered his injury,"<sup>518</sup> and that statements he had made indicated he knew of his "injury" as of July 1971. The Eighth Circuit

reject[ed] the Government's position, based on *Kubrick*, that the limitations period of the [FTCA] runs from the time that Gross knew or should have known of his injury. *Kubrick* involved a medical malpractice action, not a continuing tort [citation omitted]. *Where the tortious conduct is of a continuing nature, the Kubrick rule does not apply.* Under the circumstances of this case, the focus should be on when the last tortious act occurred.<sup>519</sup>

The court did not find that "[u]nless the November 1971 demand for a refund [the only act committed within the two-year period prior to filing the claim] involves tortious conduct by the ASCS, Gross's action falls outside the statute of limitations and

<sup>514</sup>Compare *Brazzell with In re Swine Flu Product Liability Litigation*, 764 F.2d 637 (9th Cir. 1985) and *Gallick v. United States*, 542 F. Supp. 188 (M.D. Pa. 1982).

<sup>515</sup>676 F.2d 295 (8th Cir. 1982).

<sup>516</sup>Gross had earlier attempted to sue the officials individually.

<sup>517</sup>The court found an exception to the FTCA bar on intentional tort claims for this type of allegation. *Id.* at 303-04.

<sup>518</sup>*Id.* at 300.

<sup>519</sup>*Id.* (emphasis added).

must be dismissed."<sup>520</sup> The district court had made no findings on this issue, and so the Eighth Circuit remanded. There was no further discussion about what might have constituted a "continuing tort," but the court clearly recognized that, even for such torts, the statute starts to run once the tortious acts were completed. It did not find that Gross's troubles, which began in the 1960s, were continuous through November 1971, if the act in November 1971 was tortious, or whether Gross could only recover, if all, for the November 1971 act.<sup>521</sup>

Despite its far removal from the area of medical malpractice, *Gross* had been cited by several courts to support arguments that the continuous treatment doctrine<sup>522</sup> is an exception to *Kubrick*. This is all the more curious as the Eighth Circuit has not extended *Kubrick* beyond medical malpractice in the first place. Thus, to say *Kubrick* does not apply in a *Gross* situation simply because *Gross* may have involved continuing torts may be reading far more into the decision than the Eighth Circuit intended.

*Wollman v. Gross*<sup>523</sup> involved an auto accident, between Wollman and Gross. Neither was aware that Gross, a government employee, was within the scope of his employment at the time of the accident. Wollman argued that accrual of his claim should be delayed because of the "blameless ignorance" doctrine, as stated in *Urie* and *Quinton*. The Eighth Circuit held otherwise: "Even if the doctrine of 'blameless ignorance' extends beyond the medical malpractice area, a proposition we do not address, *Kubrick* prohibits the postponement of the accrual date in the instant action."<sup>524</sup> This was because Wollman knew Gross was a government employee, and was only unaware of this fact's legal significance.

An impassioned dissent thought that a discovery rule should apply, but that *Kubrick* ought not to control:

[I]t is more appropriate to characterize such a state of affairs as reflecting ignorance of a crucial fact [i.e. Gross's status], rather than doubt about whether a legal duty to one had been breached. Because Wollman was unaware of a critical factual predicate of his claim, and

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<sup>520</sup>*Id.*

<sup>521</sup>On remand, the district court awarded Gross \$35,000, which was affirmed on appeal. 723 F.2d 609 (8th Cir. 1983).

<sup>522</sup>See, e.g., *Page v. United States*, 729 F.2d 818 (D.C. Cir. 1984); *Maslauskas v. United States*, 583 F. Supp. 349 (D. Mass. 1984).

<sup>523</sup>637 F.2d 544 (8th Cir. 1980), cert. denied, 454 U.S. 898 (1981).

<sup>524</sup>*Id.* at 549.

not simply unaware that the defendant's actions might constitute actionable negligence, the case would appear to be distinguishable from *Kubrick*.<sup>525</sup>

The dissent also noted that in contrast to Mr. Kubrick, Wollman had "diligently pursued his claims" against Gross's insurance company.<sup>526</sup>

Although insisting *Kubrick* should not control, the dissent plainly felt that it should be applied, at least insofar as it supported the "discovery rule." In its plea for "justice" for a remediless plaintiff, the dissent ignored *Kubrick's* theme that once the claimant knows (or should know) the critical facts, whether he knows their legal significance is irrelevant. Wollman did know that Gross was a government employee, and if *Kubrick* is to be invoked to extend the discovery rule to cases other than medical malpractice, the rest of its reasoning must be followed also. One can quibble about what is a "critical fact," i.e., was one such the "fact" that Gross was a government employee? Or was it that he was within the scope of employment? Is the latter merely a legal issue? It seems that the case holds that once the plaintiff knows who caused his injury (Gross), he then has two years to learn all the legal ramifications about Gross, e.g., who he worked for, and what that might mean. Where there was no "blameless ignorance" of the injury, the Eighth Circuit saw no reason to extend the *Kubrick* rule.

*Renfro v. Eli Lilly & Co.*<sup>527</sup> was a DES product liability case. The Eighth Circuit did not consider *Kubrick*, but examined Missouri law, which says a cause of action accrues "when the plaintiff sustains damage that is capable of ascertainment."<sup>528</sup> The district court, however, recognized that even after the injury manifests itself, "the plaintiff might not be able to know the likely cause of the injury at that time."<sup>529</sup> Plaintiffs, two women, learned they had cervical cancer, but did not learn until some time later that DES was the cause. The Eighth Circuit adopted the district court's view, which seems to be a rule indistinguishable from *Kubrick*, i.e., the claim accrues when there is opportunity for knowledge of the injury and its cause.

In *Korgel v. United States*,<sup>530</sup> plaintiff's farmland was flooded

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<sup>525</sup>*Id.* at 553.

<sup>526</sup>*Id.*

<sup>527</sup>686 F.2d 642 (8th Cir. 1982).

<sup>528</sup>*Id.* at 647.

<sup>529</sup>*Id.*

<sup>530</sup>619 F.2d 16 (8th Cir. 1980).



by construction of a nearby Air Force Base. This flooding started in 1969, recurred annually, and the land never became usable from one year to the next. No claim was filed until October 1976, and the district court's dismissal as time barred was affirmed. The Eighth Circuit found it "questionable" whether to find in this case that

the cause of action accru[ing] depends on claimant's awareness of a cause of action. A similar test was rejected by the Supreme Court in the medical malpractice context [*Kubrick*], the area in which courts have typically shown the greatest willingness to extend the limitations period. [cites omitted] It thus seems doubtful that we should take the liberty in this case to extend the general rule that a tort claim accrues at the time of the plaintiff's injury.<sup>531</sup>

A few district court cases are worthy of brief note.

*Jackson v. United States*,<sup>532</sup> although decided after *Kubrick*, did not rely principally upon that case for the law. Plaintiff Jackson underwent an operation at a VA hospital in October 1974. During his hospitalization Jackson sustained cardiopulmonary collapse. The government stipulated that this was the result of negligence by the VA doctors. Jackson was "continuously under the care of [VA] doctors" from the time of the operation up to March 2, 1977, and "[a]t all times Mr. Jackson was informed [by the VA] that the problems he had following the surgery . . . were caused by a 'stroke' or 'cardiac arrest.'"<sup>533</sup> On March 2, 1977, Jackson was seen by a private doctor at the request of his disability insurance carrier, who "opined" that Jackson's problems were caused by the VA treatment. Jackson filed his claim on June 27, 1978.

Strangely, the district court first misstated the "discovery rule" under *Kubrick*:

'The discovery rule' is applicable in medical negligence claims under the FTCA; that is, the statute of limitations does not begin to run at the time of the act of medical negligence, but rather, begins to run when the claimant has discovered, or in the exercise of reasonable diligence

<sup>531</sup>*Id.* at 18.

<sup>532</sup>526 F. Supp. 1149 (E.D. Ark. 1981), *aff'd without opinion*, 696 F.2d 999 (8th Cir. 1982).

<sup>533</sup>*Id.* at 1151.

should have discovered, the acts constituting the alleged medical negligence.<sup>534</sup>

The use of the word "negligence" renders the decision suspect. The court did then correctly state the rule, saying the claim accrues when the claimant knew or should have known "both the existence of the injury and the critical facts concerning the cause of the injury."<sup>535</sup>

The court did make a useful observation: "A medical negligence claim does not accrue where a reasonably diligent claimant is told and relies upon a medical explanation which fails to disclose the 'critical facts' concerning the cause of the injury."<sup>536</sup>

The district court then found that the "critical facts" were "concealed" by the VA through March 2, 1977, and that Jackson was reasonably diligent and "could not have reasonably discovered" that his "stroke" was really caused by VA negligence.<sup>537</sup> Accordingly, Jackson's claim did not accrue until March 2, 1977 or afterward, and so his claim was timely. Although the "continuous treatment" doctrine was never discussed, it seems clear that if there had been no treatment by the VA through March 2, 1977, Jackson's claim would have accrued earlier. The continuing treatment and VA assurances met the requirement for reasonable diligence on Jackson's part; absent these, and cessation of VA treatment, say, in 1975, a court surely would have found he "should have" made some inquiry in some medical or legal quarters before June 27, 1976 (two years before he filed his claim).

In *Sweet v. United States*,<sup>538</sup> Sweet volunteered for Army chemical warfare experiments in 1957, and on three occasions drank "a clear, odorless substance" which he was told would cause him no harm. It later became known that the research program dealt with the effects of LSD, but available records did not reflect whether Sweet was given LSD or an inert control substance. Sweet left the Army in 1959, and reenlisted in 1961, but following an "acute episode of violent, uncontrollable behavior while in an intoxicated state," after which his commanding officer recommended voluntary discharge for "recurring nervous spells," he was discharged in 1962.<sup>539</sup> Sweet applied for VA benefits in

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<sup>534</sup>*Id.* at 1152 (emphasis added).

<sup>535</sup>*Id.*

<sup>536</sup>*Id.*

<sup>537</sup>*Id.* at 1153.

<sup>538</sup>528 F. Supp. 1068 (D.S.D. 1981), *aff'd on other grounds*, 687 F.2d 246 (8th Cir. 1982).

<sup>539</sup>*Id.* at 1070.

August 1976, claiming his nervous condition was from the drug experiment in 1957. The VA at first denied his application, but was reversed on appeal in June 1977. Sweet filed an FTCA claim with the Army on November 21, 1978.

Sweet argued that his claim did not accrue under *Kubrick* until he received a letter dated October 16, 1978 from the Army that "impliedly advised him that he had been given LSD . . . in 1957."<sup>540</sup> Actually, the letter, reproduced in a footnote, was ambivalent, indicating Sweet may or may not have been given LSD, and that if he experienced no "unusual mental phenomena [during the tests] . . . it [was] unlikely" he had been given LSD.<sup>541</sup> The government argued Sweet knew of his injury and probable cause far earlier, and at the very latest when he filed for VA benefits in August 1976. The court held that "Sweet's contention that his cause of action did not accrue until he was informed that he had ingested LSD is unfounded. No such requirement can be gleaned from *Kubrick*, nor does the expert testimony [from plaintiff's own expert] heard in the instant case support such a proposition."<sup>542</sup> Accordingly, Sweet knew the "critical facts" and did not need to know the identity of the drug involved, so the claim was time barred. The court also found the claim barred under the *Feres* doctrine.<sup>543</sup>

In *Roll v. United States*,<sup>544</sup> the district court cut through plaintiff's allegations and eventually found for the government. Roll had teeth extracted while in the Army, and two years after discharge, consulted the VA for pain in his jaw connected with this. A "right mental neurectomy" to relieve the pain was performed on June 24, 1977 (this operation to remove nerves was supposed to leave the right jaw numb). Roll was admitted on August 5, 1977, again for pain, was treated with drugs for two months, and finally, a "bi-lateral mental neurectomy" was performed on October 27, 1977 (which should have numbed the entire jaw). The pain increased, and Roll filed a claim on October 24, 1979, alleging malpractice in that the doctor who did this second operation failed to advise him that the surgery might actually increase the pain.

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At first glance, the claim seems timely, filed three days less

<sup>540</sup>*Id.* at 1071.

<sup>541</sup>*Id.* at 1071 n. 2.

<sup>542</sup>*Id.* at 1072.

<sup>543</sup>*Id.* at 1075. It was upon this ground that the Eighth Circuit based its affirmance, 687 F.2d at 246.

<sup>544</sup>548 F. Supp. 97 (E.D. Mo. 1982).

than two years from the second operation. However, the court found that any cause of action for the June 1977 operation accrued under *Kubrick* no later than August 1977, when he was readmitted, as Roll was aware then of the injury (increased pain) and the cause (August 1977 records said, "pain may be associated with neurectomy on 6-22-77").<sup>545</sup> The court rejected the plaintiff's contention that he was "continuously treated," because "[p]laintiffs have limited their complaint to a theory of informed consent with regard to a specific operation [i.e., the second operation]" and so "the entire history, treatment and surgery are not being treated as a whole."<sup>546</sup> The court also found that a "reasonable person" would have had the surgery, even if informed of the risks, and also found there was no evidence that the increased pain was the result of the second procedure. Putting this all together, the court found that there was no malpractice connected with the second operation, and the only part of the claim that might have been valid, i.e., in connection with the first operation, was time barred.

In *Raymer v. United States*,<sup>547</sup> plaintiff was in an auto accident on July 18, 1979, was removed from the scene by private ambulance, and at his request was moved to a VA hospital the same day. Although he had an apparent spinal injury from the accident, the court found that the injury was considerably aggravated by failure to properly immobilize him at the VA hospital. He was transferred to another VA facility the next day, and was treated by VA hospitals up until December 21, 1979, but remained paralyzed from the mid-chest down. Raymer sued the ambulance company for mishandling him, and his attorney sought his records from the VA from September 1979 until they were finally produced in May and June 1981. In June 1981, after reviewing all the records, plaintiff's expert doctor gave the opinion that the first VA hospital had been negligent. Plaintiff filed a claim in September 1981. The government argued the claim accrued on July 18 or 19, 1979, and so was time barred.

The district court considered *Kubrick*, and found that a medical malpractice FTCA claim "accrues when the claimant discovers, or in the exercise of reasonable diligence should discover, the essential facts relating to: (1) the existence of his injury and (2) its *probable cause*."<sup>548</sup> The court found that in this case, plaintiff had

<sup>545</sup>*Id.* at 100.

<sup>546</sup>*Id.* at 101 n.1.

<sup>547</sup>609 F. Supp. 1332 (E.D. Mo. 1985).

<sup>548</sup>*Id.* at 1339 (emphasis added).

not only diligently tried to obtain his VA records, he also had no reason to think the VA was a "probable" cause until he received the records in June 1981, as he thought it was the ambulance company that had been negligent; thus, a "reasonably diligent individual would have believed that he had all of the causative elements of his paralysis at hand."<sup>549</sup> Because Raymer had no reason to think that the VA was a "probable" cause until he got his records, the claim accrued in June 1981. The court clearly felt it did not need to address plaintiff's other argument, that he could not remember anything until "several months" after the accident, due to the trauma and medication; possibly, the court did not wish to address the problems of an "incompetent" plaintiff. In *Raymer*, plaintiff's purpose in requesting the VA records was to help his case against the ambulance company. If building a case against the VA had also been a purpose, would the claim have been held to have accrued earlier?<sup>550</sup>

In *Leftridge v. United States*,<sup>551</sup> an explosion and fire occurred at ADM Milling Co. on April 10, 1979. Plaintiff alleged that the Occupational Safety and Health Administration (OSHA) negligently failed to discover or report unsafe conditions that caused the explosion. A claim was filed in May 1984. Plaintiff argued that the "blameless ignorance" rule of *Urie* should apply, and so the claim did not accrue at the time of the explosion, but rather in June 1982, when, pursuant to a Freedom of Information Act request, he received the OSHA investigation. The district court analyzed *Kubrick*, and then found that other courts have relied on *Kubrick* in deciding whether to extend the "blameless ignorance" doctrine beyond medical malpractice. They have only done this, said the district court, when either the injury did not manifest itself until some time after the acts complained of, or the injury is known but the causation facts were concealed or inaccessible.<sup>552</sup> Here the injuries were immediate upon the explosion, and the court found that the causation facts were available, as the government had not concealed OSHA's investigation, and in fact the OSHA role had been publicized in newspapers in 1979. The court said that "[p]laintiff bears the burden of showing that his claim comes within the blameless ignorance doctrine,"<sup>553</sup> and that he failed to meet this burden. Note the shifting burden of proof. Ordinarily the statute of limitations is an affirmative defense that

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<sup>549</sup>*Id.*

<sup>550</sup>See *Drazan v. United States*, 762 F.2d 56 (7th Cir. 1985).

<sup>551</sup>612 F.Supp. 631 (W.D. Mo. 1985).

<sup>552</sup>*Id.* at 634.

<sup>553</sup>*Id.* at 635.

defendant must prove by a preponderance of the evidence.<sup>554</sup> Where the filing of the claim is jurisdictional, however, as the FTCA specifies, is it not plaintiff's burden to show he filed his claim timely? In any event, this district court felt that at a minimum, a plaintiff who seeks an exception to the "general rule" of accrual at time of injury bears the burden of proving the exception applies.

## XII. NINTH CIRCUIT

The Ninth Circuit's leading case prior to *Kubrick* was *Hungerford v. United States*.<sup>555</sup> Hungerford was wounded in the Korean war, and subsequently had blackouts and head pain. He was dishonorably discharged in 1953 after going AWOL. He was admitted to a VA hospital in early 1957, and incorrectly diagnosed as psychosomatic; he actually had organic brain damage correctible by surgery. Later, he was arrested for passing forged checks and eventually sent to state prison, where the brain injury was discovered. After an operation, he was released in April 1960. He began the action in July 1960, alleging negligent diagnosis and treatment by the VA, but the district court dismissed the suit as time barred. The Ninth Circuit reversed, adopting the *Quinton* rule that an FTCA malpractice claim accrues when the claimant discovers or should have discovered "the acts constituting the alleged malpractice."<sup>556</sup> The court then simply held "under the allegations of the complaint" that the suit was not time barred.<sup>557</sup>

The case discusses an early government argument: the government urged that the incorrect diagnosis communicated to plaintiff amounted to a "misrepresentation," which is not actionable under the FTCA. The Ninth Circuit found that there had indeed been a "misrepresentation," but that there had also been negligence in conducting the examination and failing to test plaintiff, which were actionable.

In a number of ways, *Brown v. United States*<sup>558</sup> was a fascinating precursor of *Kubrick*. Betty Jean Brown was born prematurely on February 21, 1955 in a Navy hospital, and was administered oxygen "heavily" "to save her life."<sup>559</sup> When she

<sup>554</sup>See, e.g., *Overstreet v. United States*, 517 F. Supp. 1098 (M.D. Ala. 1981).

<sup>555</sup>307 F.2d 99 (9th Cir. 1962).

<sup>556</sup>*Id.* at 102.

<sup>557</sup>*Id.*

<sup>558</sup>353 F.2d 578 (9th Cir. 1965).

<sup>559</sup>*Id.* at 579.

was released in May 1955 her parents were told that the oxygen administered would lead to impaired vision. In 1956, she was examined at another Navy hospital where her parents were told that she was permanently and totally blind because of the use of oxygen after her birth. The parents "learned that a claim against the Government might possibly lie"<sup>660</sup> in 1962, when they talked to an attorney about an insurance claim involving their child's blindness. They filed suit in June 1963, and the district court dismissed as time barred.

The Ninth Circuit affirmed. The court cited the *Quinton and Hungerford* rule as controlling, and noted that Betty's minority did not toll the statute. Plaintiffs argued that "they were entitled to place trust and confidence in government doctors and thus were not required to investigate or become suspicious until a full and complete disclosure of the medical treatment was made,"<sup>661</sup> and that the government should be "estopped" from asserting the statute since it misrepresented and concealed material facts. The court acknowledged that "no government physician stated there had been *negligent* treatment of the child,"<sup>662</sup> but the parents were informed of the "exact nature of the disability and its relationship to prior medical treatment"<sup>663</sup> at least as of 1956, so the parents then had "knowledge of facts sufficient to alert a reasonable person that there may have been negligence."<sup>664</sup> The court had almost precisely stated the *Kubrick* rule and rationale handed down fourteen years later, i.e., that knowledge of the "critical facts" of injury and cause are sufficient to commence the limitation period running.

The court also mentioned that certainly as of 1960, when the mother wrote in an application to a school for handicapped children that Betty's blindness was caused by "*excessive oxygen*,"<sup>665</sup> the parents had the knowledge they needed to investigate whether a mistake in treatment had been made.

Plaintiffs also argued that the period should not run while the physician-patient relationship continued, i.e., a continuous treatment theory. The court found that, even assuming such a rule applied to an FTCA claim, the treatment by the doctors at the first hospital had ended, thus terminating the relationship:

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<sup>660</sup>*Id.*

<sup>661</sup>*Id.* at 580.

<sup>662</sup>*Id.* (emphasis added).

<sup>663</sup>*Id.*

<sup>664</sup>*Id.*

<sup>665</sup>*Id.* (emphasis by the court).

We cannot accept the proposition that one who continues to receive treatment from succeeding government physicians is, regardless of the circumstances, excused from conducting diligent inquiry into the conduct of a doctor with whom the personal relationship has been terminated and who is not claimed to have acted in direct concert with the succeeding physicians.<sup>566</sup>

The court, in examining whether plaintiffs were entitled to place "confidence" in their doctors to inform them of negligent treatment, quoted the district court with approval, which had written: "To expect a doctor, voluntarily, absent an inquiry and absent special situations not existent here, to affirmatively advise a patient that he has been negligently treated, is unrealistic, and no cases have ever so held."<sup>567</sup>

In any event, *Brown's* fact pattern has striking similarity to *Kubrick*, and the Ninth Circuit reached the same result on the same rationale. It is not surprising that *Brown* is still cited extensively post-*Kubrick*.

Another significant pre-*Kubrick* Ninth Circuit decision was *Ashley v. United States*.<sup>568</sup> On September 6, 1963, a VA physician attempted to withdraw blood from Ashley's arm, contacted a nerve and caused a blood clot, which led to pain and swelling. The next day Ashley was advised that a nerve had been hit, and over a period not specified in the opinion, Ashley received treatment for this condition by VA physicians. He testified that doctors told him during this treatment that he had a "rare complication" and "there's never been a permanent damage known yet."<sup>569</sup> In September 1966, Ashley was examined at a VA hospital and told his condition was permanent, and he filed suit in July 1967. The Ninth Circuit affirmed the district court's dismissal as time barred. The court recognized the "very limited degree" to which they had "in a sense enlarged the limitation period."<sup>570</sup> in *Hungerford*, but this did not help plaintiff because "he knew of the acts constituting the alleged malpractice when they were done on September 6, 1963, and he also knew [within days] . . . that he

<sup>566</sup>*Id.*

<sup>567</sup>*Id.* But see *Harrison v. United States*, 708 F.2d 1023 (5th Cir. 1983); *Wilson v. United States*, 594 F. Supp. 843 (M.D. Ala. 1984).

<sup>568</sup>413 F.2d 490 (9th Cir. 1969).

<sup>569</sup>*Id.* at 492.

<sup>570</sup>*Id.*



had been injured and that it had not been expected that the injurious consequences would result from the test."<sup>571</sup>

The court wrote:

To hold that one who knows that an injurious tort has been committed against him by the Government may delay the filing of his suit until the time, however long, when he becomes knowledgeable as to the precise extent of the damage resulting from the tort would impose intolerable burdens upon the Government.<sup>572</sup>

Ashley had also argued that the limitation period never began to run because he was continuously treated by government physicians. The Ninth Circuit rejected "dictum" in the Second Circuit's *Kossick* decision that had suggested this principle "might . . . be appropriate for application in some medical malpractice suits instituted under the federal act."<sup>573</sup> The Ninth Circuit felt the continuous treatment doctrine "may have originated because it was thought that a private physician, knowing of his actionable mistake, might conceal it from his patient or continuously to (sic) lull the patient into failing to institute suit within the ordinarily permissible time period."<sup>574</sup>

The Ninth Circuit then distinguished suits under the FTCA: "To apply such a rationale in this case would be unrealistically to imagine that a government physician in a Veterans hospital would be able to conspire successfully with all other government physicians and medical attendants."<sup>575</sup>

The Ninth Circuit apparently feels that no such thing as a "conspiracy of silence" could ever exist in the context of medical treatment by government physicians. In any event, it appears that the "continuous treatment" doctrine is not favored in FTCA suits in the Ninth Circuit, although it might support a claim where the patient was seen and treated by only one government physician over a period of years (unlikely, perhaps, but not impossible).

The first post-*Kubrick* case out of the Ninth Circuit to address these issues was not precisely medical malpractice. In *Davis v. United States*,<sup>576</sup> Sabin vaccine was given to Davis in March 1963.

<sup>571</sup>*Id.*

<sup>572</sup>*Id.* at 493.

<sup>573</sup>*Id.*

<sup>574</sup>*Id.*

<sup>575</sup>*Id.* Compare *Ashley with Overstreet v. United States*, 517 F.Supp. 1098 (M.D. Ala. 1981).

<sup>576</sup>642 F.2d 328 (9th Cir. 1981), cert. denied, 455 U.S. 919 (1982).

He was paralyzed from the waist down and exhibiting other symptoms of polio within thirty days. Davis sued the vaccine manufacturer in 1964, and in deposing a doctor in 1965, he obtained records of a test under government auspices showing "acceptable limits." In 1973, Davis learned from another attorney of another test that did not fall within the acceptable range, and he filed a claim in April 1973.

The Ninth Circuit found that "[w]hile the present case is not technically one involving medical malpractice, it is in many ways similar to such an action, and we will assume, *arguendo*, that it should be assimilated to the category of medical malpractice for statute of limitations purposes."<sup>577</sup>

The court found that *Kubrick* made it plain that

[w]ith knowledge of the fact of injury and its cause the malpractice plaintiff is on the same footing as any negligence plaintiff. The burden is then on plaintiff to ascertain the existence and source of fault within the statutory period. It follows that diligence or lack of diligence in these efforts is irrelevant [once the cause has accrued]. In the absence of fraudulent concealment, it is plaintiff's burden, within the statutory period, to determine whether and whom to sue.<sup>578</sup>

Because Davis knew in April 1963 of his injury and that the vaccine was the "likely cause of his injury" (or at the latest in 1964 when he sued the vaccine manufacturer), he was at that time "on the same footing as other negligence plaintiffs. The claim, then, *accrued at the time of injury* and the statute started to run."<sup>579</sup> The emphasized language is not consistent with the court's analysis up to that point, and may be erroneous dicta, as the implication had been that Davis needed to know both the injury and the cause.

The Ninth Circuit also agreed with the district court that there had been no "fraudulent concealment." Davis had argued that certain press releases stating there was "no probable link" of the vaccine to polio cases amounted to fraudulent concealment, but the court found this meritless: "It may well be that the government was negligent in maintaining and publishing records. However, failure of the government to ascertain and publish the

<sup>577</sup>*Id.* at 330.

<sup>578</sup>*Id.* at 331.

<sup>579</sup>*Id.* (emphasis added).

fact of its negligence is hardly sufficient to constitute fraudulent concealment."<sup>580</sup>

A dissent suggested that the record was incomplete and did not justify summary judgment, noting that Davis may have "suspected" that the vaccine caused his polio, but did not have knowledge, especially in the face of various doctors telling him otherwise as of 1964. This seems to fly in the face of the fact that Davis sued the vaccine manufacturer in 1964 on the theory that the vaccine caused the polio. The situation is similar to *Wollman v. Gross*,<sup>581</sup> or *Wilkinson v. United States*,<sup>582</sup> where plaintiff knew of his injury and what had caused it, but was ignorant of the government's role. *Davis* was not decided on that reasoning, but if it had been the result would doubtless have been the same.

In *Fernandez v. United States*<sup>583</sup> the Ninth Circuit affirmed the district court's dismissal on the grounds the claim was time barred. Mark Fernandez (and his twin Wayne) were born six weeks prematurely on March 14, 1958 in an Army hospital. Three days later his blood was tested for bilirubin after the nurses noticed he was jaundiced, and over the next three days he was given two complete transfusions; his bilirubin level varied up and down and finally stabilized at normal limits. Mark's treatment was completed on June 30, 1958 and a discharge summary with all the facts of his treatment was given to his mother. Brother Wayne had also had jaundice soon after birth, but developed normally, whereas Mark developed deafness, reduced I.Q. and lower leg spasticity within two and one-half years. In October 1964 Mark's mother wrote on a school application that his deafness was caused by jaundice soon after birth. A claim was filed in November 1976, claiming that discovery of the jaundice, the blood test, and the transfusions were all negligently done too late. The opinion does not state what finally prompted the Fernandezes to make a claim.

The Ninth Circuit agreed with the district court that, under *Kubrick*, Mark's parents were aware of injury and that it was caused by jaundice, and having the discharge summary, they had all the facts needed if they had sought advice as to whether the treatment was negligent. The court said: "[h]ere, as in *Kubrick*

<sup>580</sup>*Id.* at 332.

<sup>581</sup>637 F.2d 544 (8th Cir. 1980), cert. denied, 454 U.S. 893 (1981).

<sup>582</sup>677 F.2d 998 (4th Cir.), cert. denied, 459 U.S. 906 (1982).

<sup>583</sup>673 F.2d 269 (9th Cir. 1982).

and *Davis*, we decline to defer accrual of the claim until fault, as distinguished from injury and cause, is determined."<sup>584</sup>

The court did not find specifically when the claim did accrue, but said "[n]o such advice was ever sought for twelve years."<sup>585</sup> The claim was filed over eighteen years after Mark's birth and fifteen years after his parents must have known of his injuries. The only twelve-year period dates from when his mother admitted in writing that she was aware of at least part of the injury and the cause. It was likely that even then the claim was long barred, and the court was simply declining to address whether "reasonable diligence" would have required accrual even earlier.

*Augustine v. United States*<sup>586</sup> marked the Ninth Circuit's first hint that the *Kubrick* doctrine might have limits. An Air Force dentist told Augustine he had a bump on his upper palate, and Augustine had it examined by an Air Force oral surgeon in November 1975. This doctor ultimately was not able to make a diagnosis. In November 1977 he mentioned the bump during a routine physical examination. It was found to be cancerous and was removed on November 16, 1977. Augustine had further surgery in August 1980 when it was found he had developed metastatic spread of the cancer. He filed his claim in April 1978, alleging failure to timely diagnose, warn and treat the cancer. The district court dismissed the claim as time barred.

The Ninth Circuit wrote that "[t]he holdings in *Kubrick* and *Davis* are instructive but cannot be applied mechanically to cases involving the failure to diagnose, treat or warn"<sup>587</sup> because those cases involved affirmative treatment where the injury was obvious. In *Augustine*, the claims were different:

When a physician's failure to diagnose, treat, or warn a patient results in the development of a more serious medical problem than that which previously existed, identification of both the injury and its cause may be more difficult for a patient than if affirmative conduct by a doctor inflicts a new injury. Where a claim of medical malpractice is based on the failure to diagnose or treat a pre-existing condition, the injury is not the mere undetected existence of the medical problem at the time the physician failed to diagnose or treat the patient or the mere continuance of that same undiagnosed problem in

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<sup>584</sup>*Id.* at 272.

<sup>585</sup>*Id.*

<sup>586</sup>704 F.2d 1074 (9th Cir. 1983).

<sup>587</sup>*Id.* at 1078.

substantially the same state. Rather, the injury is the *development* of the problem into a more serious condition which poses greater danger to the patient or which requires more extensive treatment.<sup>588</sup>

The Ninth Circuit then stated its rule:

In this type of case, it is only when the patient becomes aware or through the exercise of reasonable diligence should have become aware of the development of a pre-existing problem into a more serious condition that his cause of action can be said to have accrued for purposes of section 2401(b).<sup>589</sup>

Because the "injury" was the "development" into a more serious condition,

[t]he issue of accrual in this case thus depends upon when and if plaintiff discovered or through the exercise of reasonable diligence should have discovered that the failure of his doctors to diagnose, treat, or warn him led to his deteriorating physical condition. . . . That, in turn, depends upon whether the attending dentists properly diagnosed Augustine's condition and adequately informed him of the need to obtain prompt supplemental care, issues which go to the heart of Augustine's negligence action under the FTCA.<sup>590</sup>

Accordingly, "[i]n such cases it is both proper and necessary for the trial court first to resolve the merits of the claim to the extent necessary to allow the court to properly determine its own jurisdiction."<sup>591</sup>

After examining the merits, the trial court should then reexamine whether the claim had been timely filed.

The Ninth Circuit's language about having to "resolve the merits of the case" is a bit sweeping. In *Augustine*, there were factual disputes: Augustine claimed that the doctors in 1975 expressed no concern and failed to refer him to eye, ear, nose and throat specialists, even after he requested this, whereas the government asserted that Augustine had been informed of "the nature and seriousness of his condition and advised to seek

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<sup>588</sup>*Id.* (emphasis in the original).

<sup>589</sup>*Id.*

<sup>590</sup>*Id.*

<sup>591</sup>*Id.* at 1079.

further care, which he failed to do,"<sup>592</sup> and the Ninth Circuit felt the district court should make findings of fact on these issues. Such findings would in reality have determined whether Augustine had been "reasonably diligent," but the court implied that if Augustine's version was correct, not only had he been diligent but the government had been negligent, and if the government's version was true, Augustine was not diligent and the doctors also were not negligent. Thus in *this case* the "basic factual issues"<sup>593</sup> were merged, but the sweeping language above might imply that these issues are invariably merged in failure to diagnose, treat or warn cases.

The following year, *Raddatz v. United States*<sup>594</sup> carried Augustine's language to its logical conclusion. Mrs. Raddatz, a Navy wife, had an IUD inserted at an Army medical facility on February 28, 1977, and she experienced severe pain. The Army doctor then removed it, and told her "he had perforated the right side of her uterus and that she would experience pain and cramping for a few days."<sup>595</sup> She twice visited the Army facility emergency room and was finally referred back to the Navy Regional Medical Center. She was treated by the Navy three times during March 7-14, 1977, and was assured each time her painful symptoms "were an acceptable side effect of the perforation of her uterus,"<sup>596</sup> and she was prescribed only pain killers. On March 29, 1977, she consulted a civilian doctor, who prescribed antibiotics and, after surgery, diagnosed pelvic inflammatory disease; ultimately she required a hysterectomy. She filed a claim against the Navy on March 1, 1979 alleging failure to properly diagnose and treat her pelvic disease, and a claim against the Army on March 5, 1979 alleging negligent puncture of her uterus. The Navy never sent a letter of denial. The Army sent a letter January 18, 1980 denying the claim, then a letter February 7, 1980 saying it was reconsidering, and finally a letter November 5, 1980, which said that both the Army and the Navy had decided to deny the claim. Plaintiff filed suit on June 12, 1981, over seven months after the November 1980 letter from the Army, and alleged only that the Navy had failed to treat her pelvic disease. On the government's motion, the district court dismissed, finding that causes of action against both the Army and the Navy accrued on February 28, 1977, when plaintiff's uterus was

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<sup>592</sup>*Id.*

<sup>593</sup>*Id.*

<sup>594</sup>750 F.2d 791 (9th Cir. 1984).

<sup>595</sup>*Id.* at 793.

<sup>596</sup>*Id.*

punctured and that the Army's letter was effective to deny the claim against the Navy.

The Ninth Circuit found that the district court had erred in both findings. It found that the Army letter was not sufficient to deny the Navy claim, quoting the language from 28 U.S.C. § 2401(b) that the denial must be sent from the agency to which it was presented, and found that the Army had not been designated to act for the Navy under the applicable federal regulations.

More interesting was the Ninth Circuit's analysis of the claim against the Navy. Ultimately, of course, the pelvic disease was the injury for which both claims were made, but the Ninth Circuit pointed out "[i]t is an elementary proposition of tort law that two separate acts of negligence may combine to create an injury, and joint liability on the part of the tortfeasors."<sup>597</sup>

At this point, to find the Navy claim timely, the Ninth Circuit had several choices of analysis. Probably the easiest thing it could have done was hold that a claim against the Navy could not have accrued until the Navy had done something. The Navy had done nothing until, at the earliest, March 7, 1977, and so the Navy claim filed March 1, 1979 was timely. Similarly, the court could have reasoned that, under *Kubrick*, plaintiff's claim did not accrue until after she should have known the cause of her injury, i.e., the Navy's failure to diagnose and treat, which would be some time after the one-week period of Navy treatment (ending on March 14, 1977). A logical time under this reasoning would have been March 29, 1977 when she consulted her civilian doctor.

The Ninth Circuit did not follow either of these paths of reasoning. Instead, the court drew a sharp distinction between malpractice in *commission* of negligent acts and malpractice in *omission*, i.e., failure to diagnose, treat, or warn, as in the Navy claim. The Ninth Circuit wrote "[t]he district court's application of [*Kubrick*] and [*Ashley*] to the Navy claim is therefore misplaced."<sup>598</sup> *Kubrick* and *Ashley* both "involved affirmative acts of negligence inflicting clearly identifiable injuries."<sup>599</sup> In *Raddatz* only the Army's negligence fit into this category:

We find that the *Kubrick* standard applies only to the Army claim in this case. That claim was predicated upon

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<sup>597</sup>*Id.* at 795.

<sup>598</sup>*Id.*

<sup>599</sup>*Id.* at 796.

the negligent insertion of the IUD, resulting in a perforation of Mrs. Raddatz's uterus, immediately brought to her attention on February 28, 1977. Under the *Kubrick* standard, her claim against the Army accrued on that date, and is now barred.<sup>600</sup>

The Navy claim was not based on the IUD insertion, but on the development of the infection caused by the failure to diagnose, treat or warn:

When a claim of malpractice is based on a failure to diagnose, warn, or treat a patient for a pre-existing injury, rather than affirmative conduct creating a new injury, 'identification of both the injury and its cause may be more difficult for a patient' [quoting *Augustine*], and the *Kubrick* standard does not apply.<sup>601</sup>

The court then said that "[t]he *Augustine* standard is the applicable legal standard for Mrs. Raddatz's claim against the Navy,"<sup>602</sup> which is when the patient learns or should have learned "of the development of a pre-existing problem into a more serious condition."<sup>603</sup> Under the *Augustine* standard, the Navy claim accrued on March 29, 1977, when Mrs. Raddatz's civilian doctor told her the perforated uterus had caused infection.

The Navy doctors' assurances during the one-week period in March 1977 that everything was normal "may be reasonably relied upon by a patient"<sup>604</sup> to explain the fifteen days between the end of the Navy's treatment and her consultation with her civilian doctor. Accordingly, "such assurances" are considered when deciding whether plaintiff was "reasonably diligent." Actually, in this case this analysis was not really necessary as the Navy claim was filed within two years of the Navy treatment anyway, but it does explain why the court held the claim did not accrue until March 29, 1977.

The Ninth Circuit still considers *Ashley* good law, at least in "affirmative" acts of malpractice cases: "*Ashley* holds that a claim does not wait until a party knows the precise extent of an injury."<sup>605</sup> It may be because of its adherence to *Ashley* that the Ninth Circuit did not want to read *Kubrick* broadly enough to

<sup>600</sup>*Id.*

<sup>601</sup>*Id.* (emphasis added).

<sup>602</sup>*Id.*

<sup>603</sup>*Id.* (quoting *Augustine*).

<sup>604</sup>*Id.*

<sup>605</sup>*Id.*



encompass the Army claim. It seems harsh to hold that plaintiff's Army claim accrued on the day of the perforation of her uterus, even though the infection injury could not have developed until sometime later. In *Kubrick*, the claim did not accrue when the negligent neomycin treatment was given, or even six weeks later when hearing loss injury developed. In any event, plaintiff did not pursue the Army claim in her suit, so this part of the opinion should be read only as dicta. The Army claim was of course barred in any event as suit was not brought within six months of the Army's denial of the claim.<sup>608</sup>

For the Navy claim, however, the Ninth Circuit carved out a certain group of FTCA malpractice cases where it simply found that *Kubrick* did not apply. Only one other circuit has gone this far.<sup>607</sup>

*In Re Swine Flu Products Liability Litigation*<sup>608</sup> involved a plaintiff whose wife was vaccinated on December 12, 1976, and died on January 4, 1977. The government had discontinued vaccinations on December 16, 1976 after reports of a link to Guillain-Barre Syndrome (GBS). An autopsy did not reveal the cause of death, and plaintiff took no steps to discover the cause until he read a magazine article in August 1979 describing a link between GBS and swine flu vaccination. He filed a claim on May 2, 1980. The district court dismissed, holding that an FTCA wrongful death claim accrues on the date of death so the suit was time barred, and even if the "medical malpractice 'discovery rule' governed," plaintiff did not make his claim within two years of when with reasonable diligence he should have discovered his wife's injuries and their cause.<sup>609</sup>

The Ninth Circuit reversed. It first recognized a "split" in the circuits "on whether the medical malpractice discovery rule should be extended to wrongful death claims under the FTCA."<sup>610</sup> The court mentioned that it had done a "discovery rule analysis for a FTCA wrongful death claim"<sup>611</sup> in *Dyniewicz v. United States*.<sup>612</sup> *Dyniewicz* was a suit by decedents' children who discovered more

<sup>608</sup>See 28 U.S.C. § 2401(b)(1982).

<sup>607</sup>See *Page v. United States*, 729 F.2d 818 (D.C. Cir. 1984).

<sup>609</sup>764 F.2d 637 (9th Cir. 1985).

<sup>610</sup>*Id.* at 638.

<sup>611</sup>*Id.* at 639; see, e.g., *Garrett v. United States*, 840 F.2d 24 (6th Cir. 1981); *Barrett v. United States*, 689 F.2d 324 (2d Cir. 1982), cert. denied, 462 U.S. 1131 (1983); *Stoleson v. United States*, 629 F.2d 1265 (7th Cir. 1980); *Gallick v. United States*, 542 F. Supp. 188 (M.D. Pa. 1982).

<sup>612</sup>764 F.2d at 639.

<sup>613</sup>742 F.2d 464, 486-87 (9th Cir. 1984).

than two years after a flash flood caused their parents' death that park rangers may have negligently supervised traffic on the road their parents took. There the court upheld dismissal, finding that once the children knew of the deaths and the "immediate physical cause," i.e., the flood, their ignorance of the government's involvement was irrelevant.

The Ninth Circuit also reviewed *Kubrick* and *Urie*, cited a "general trend toward applying the discovery rule in latent disease cases,"<sup>613</sup> and finally decided to "follow the suggestion of *Kubrick* and *Dyniewicz*, and apply the medical malpractice discovery rule to [plaintiff's] FTCA wrongful death claim."<sup>614</sup> Under this rule, "the dispositive issue is whether [plaintiff] knew or should reasonably have discovered the cause of his wife's death within two years of filing his claim with the government."<sup>615</sup>

The Ninth Circuit also eventually found that whether plaintiff had been reasonably diligent in seeking to discover the cause of his wife's death was a "genuine issue of material fact,"<sup>616</sup> not to be decided short of a trial. In support of this, the court noted the medical controversy that had surrounded the link between GBS and the vaccine, and cited the Tenth Circuit's *Exnicious v. United States*<sup>617</sup> and the Sixth Circuit's pre-*Kubrick* *Jordan v. United States*<sup>618</sup> as cases where a "credible explanation" served to excuse "failure" to (diligently) pursue a claim.

*Washington v. United States*<sup>619</sup> was also a wrongful death case, but turned on facts other than the date of death. Beatrice Washington received a spinal anesthetic during childbirth at a New York Air Force hospital, and she went into a coma. She was comatose for twelve years, was transferred to a California Air Force hospital, and died there two years later on June 3, 1981. Her husband and dependents filed a claim with the Air Force in February 1982, which was approved for \$60,000. They filed a lawsuit under the FTCA on May 25, 1983 for wrongful death.

The district court dismissed as time barred, applying New York law,<sup>620</sup> under which a survivor can only sue for wrongful death if

<sup>613</sup>764 F.2d at 639.

<sup>614</sup>*Id.* at 640.

<sup>615</sup>*Id.* at 642.

<sup>616</sup>*Id.* at 641.

<sup>617</sup>563 F.2d 418 (10th Cir. 1977).

<sup>618</sup>503 F.2d 620 (6th Cir. 1974).

<sup>619</sup>769 F.2d 1436 (9th Cir. 1985).

<sup>620</sup>28 U.S.C. § 1346(b) (1982) provides for a wrongful death action against the United States if a private person would be liable under the law of the place where the culpable conduct occurred.

the decedent could have sued at the time of death. The district court found that decedent's personal injury action lapsed two years after she went into a coma, because her husband knew of the injury and its cause.

The Ninth Circuit found New York law did apply, but found that decedent's husband's knowledge was irrelevant, because the personal injury action would have been hers and not her husband's. The Ninth Circuit adopted the Eighth Circuit's reasoning in *Clifford*,<sup>621</sup> finding that decedent's husband had no legal duty to have someone appointed a guardian for his comatose wife. The court held that because Mrs. Washington became comatose when she was given the anesthetic, she never became aware of her injury or its cause, and so her personal injury claim never accrued; if she had come out of the coma, it might have accrued at that time, but as she did not, the claim accrued at the time of her death, and the survivor's action was timely.

*Gibson v. United States*<sup>622</sup> involved an alleged conspiracy by the FBI and the Los Angeles Police Department to violate plaintiffs' civil rights. In examining the accrual of the FTCA claims, the Ninth Circuit analyzed *Kubrick*, and wrote regarding the "discovery rule," "this circuit has consistently cited *Kubrick* for the limited proposition that 'under the FTCA a claim accrues when the plaintiff knows of his injury and its cause.'"<sup>623</sup>

The opinion quoted an earlier Ninth Circuit case, *Washington v. United States*,<sup>624</sup> *Gibson*, however, ignored part of the quote. The complete quote from *Washington* reads: "The Supreme Court in [*Kubrick*] applied the discovery rule and held that in a medical malpractice case under the FTCA a claim accrues when the plaintiff knows of his injury and its cause."<sup>625</sup>

Accordingly, the Ninth Circuit has backed into applying the *Kubrick* rule in all FTCA cases, citing as authority a case that in reality said no such thing but only applied it, as *Kubrick* had, to a medical malpractice case.

In *Burns v. United States*<sup>626</sup> Burns had surgery at a VA hospital for an abscess and pus in his chest, and was discharged in October 1976. Later in 1976, multiple brain abscesses were

<sup>621</sup>738 F.2d 977 (8th Cir. 1984).

<sup>622</sup>781 F.2d 1334 (9th Cir. 1986).

<sup>623</sup>*Id.* at 1344.

<sup>624</sup>769 F.2d 1436 (9th Cir. 1985).

<sup>625</sup>*Id.* at 1438.

<sup>626</sup>764 F.2d 722 (9th Cir. 1985).

surgically removed at a civilian hospital, leaving Burns disabled and not able to communicate. He contacted the VA in early 1977 and a VA Form 21-526 ("Veteran's Application for Compensation or Pension") was apparently completed by a VA case worker. The VA awarded him a pension of \$499 per month, which was reduced in 1980. Burns wrote his U.S. Senator seeking an increase by having his disability claim filed as service-connected, which the senator passed on to the VA. The Board of Veteran Appeals denied additional pension in May 1982, and in June 1982 Burns filed suit against the United States alleging malpractice in that VA surgery caused the brain abscesses.

The Ninth Circuit affirmed the district court's dismissal, finding that Burns had failed to file a sufficient administrative claim, and noting that the 1980 letter to the senator showed Burns was then aware of his injury and its probable cause. The court found that the only document which could arguably be called an administrative claim was the letter to the senator, which was insufficient since it did not request a "sum certain."<sup>627</sup> The Ninth Circuit also gave short shrift to Burns's contention that the government should be estopped from asserting the insufficiency of his claim and that equity should toll the limitation period, merely saying "[t]he government may not be equitably barred from asserting jurisdictional requirements."<sup>628</sup>

In a dissent three times as long as the majority opinion, a circuit judge argued that although the government may not be "estopped" from asserting the insufficiency of a claim, equity should toll the limitation period. The VA caseworker was required by VA regulations to provide VA Form 95 ("Claim for Damage, Injury or Death") to Burns, and negligently failed to do so. The proper form was filed May 1983, and the district court should have allowed the complaint to be amended to include this form. The dissent said the record was not clear whether the VA through its caseworker should have known Burns was interested in filing a malpractice claim.<sup>629</sup> The dissent felt that

in circumstances such as these where a veteran who is

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<sup>627</sup>See 28 U.S.C. § 2675(b) (1982).

<sup>628</sup>764 F.2d at 724. One would feel more comfortable about this holding if the Ninth Circuit had at least considered and attempted to distinguish venerable cases such as *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946) ("This equitable doctrine [fraudulent concealment toll] is read into every federal statute of limitation."), and *Atlantic City Electric Co. v. General Electric Co.*, 312 F.2d 236, 241 (2d Cir. 1962), which found the *Holmberg* policy "so strong that it is applicable unless Congress expressly provides to the contrary in clear and unambiguous language."

<sup>629</sup>*Id.* at 728 n.6.

unable to communicate—possibly because of serious negligent conduct on the government's part—comes to the [VA] seeking help in obtaining compensation for his injuries . . . and where [the injuries'] seriousness is readily apparent to the VA caseworker, the government may well have an obligation to inquire about the type of claims the veteran wishes to file or to supply the veteran with the correct forms to file an FTCA claim . . . Certainly, the government should not have lulled Burns into allowing the filing period to run by filling out a form that failed to preserve his tort claim.<sup>630</sup>

As appealing as this dissent's reasoning is, it ignores (as did the majority opinion) when the claim would have accrued in any event. If the letter to the senator, written in early 1980, was conclusive evidence of knowledge at that time of injury and cause, then Burns needed to make some sort of request for tort damages no later than "early" 1982. Suit was not commenced until June 1982. The dissent seems to suggest that Burns may well have thought he had filed a tort claim with the VA caseworker (from the "lulled" language), but the information in the majority opinion suggests otherwise. A more fruitful avenue of appeal might have focused on showing that Burns's incapacity was *caused by malpractice*, thus postponing accrual.<sup>631</sup> If accrual of a claim can be so postponed, excusing the filing of *any* claims until later, surely such an incapacity could excuse the filing of the wrong form, or a misunderstanding on plaintiff's part. Possibly plaintiff's mistake was in talking in terms of tolling the statute, rather than postponing accrual of a cause of action; federal courts in FTCA cases are extremely reluctant to do the former, whereas they often seek out inventive ways to do the latter.

In *Targett v. United States*,<sup>632</sup> plaintiff had been exposed to radiation from atomic explosions in 1954 and 1955 while he was on active duty in the Army. He was discharged in November 1955, suffered body hair loss in 1961, developed a pituitary tumor in 1969 and then had two brain operations. He filed a claim with the Army on April 23, 1981, alleging that after his discharge the government never warned him of the risks or symptoms of radiation exposure, and never put him on medical surveillance.

<sup>630</sup>*Id.* at 728-29.

<sup>631</sup>See, e.g., *Washington v. United States*, 769 F.2d 1436 (9th Cir. 1985); *Clifford v. United States*, 738 F.2d 977 (8th Cir. 1984); *Zeldier v. United States*, 601 F.2d 527 (10th Cir. 1979).

<sup>632</sup>561 F. Supp. 1231 (N.D. Cal. 1982).

The government moved to dismiss on the ground that the suit was barred by the *Feres* doctrine and the statute of limitations.

The district court found that *Feres* did not apply because the alleged government wrongdoing was after his discharge. In analyzing the statute of limitations problem, the court noted that some documents more than two years before the filing of the claim talked about connections between radiation and brain tumors (e.g., a VA application for compensation), but then found that these documents "established only that Targett knew before April 23, 1979 that one of the potential causes of his health problems was his exposure to radiation."<sup>633</sup> Targett's claim was based on the government's failure to warn and to provide medical surveillance, and because no document indicated he was aware of these "causes" (as opposed to the radiation being a "cause"), dismissal on motion was not proper.

Decided before *Augustine* and *Raddatz*, the opinion uses a similar analysis, and finds a number of different "causes" for the injury. If some of these "causes" were omissions, it was obviously more subtle when plaintiff should have gained knowledge of them. The district court did not analyze whether plaintiff was reasonably diligent in discovering his cause of action. One suspects that under *Kubrick*, once radiation was known to be a cause of the injury, a bit more diligence was necessary to preserve the cause of action against the government.

*Mack v. A. H. Robins Co., Inc.*<sup>634</sup> was a products liability Dalkon Shield case where the shield had been inserted into plaintiff in 1971, and caused pelvic inflammation disease leading to a hysterectomy in 1979. Plaintiff filed suit in February 1982, and sought to avoid the two-year Arizona statute of limitations by suggesting her cause of action did not accrue until December 1981, "when she learned of the defective nature of the defendant's product through a newspaper article."<sup>635</sup> Plaintiff had admitted that she knew the shield had caused her infection as of 1979, but insisted she did not know it was caused "by some defect in the shield."<sup>636</sup> The court did a searching analysis, finding no Arizona cases directly on point and finding the "discovery rule" generally applicable. However, it then found Arizona law requires plaintiff to be reasonably diligent:

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<sup>633</sup>*Id.* at 1236 (emphasis in original).

<sup>634</sup>573 F. Supp. 149 (D. Ariz. 1983).

<sup>635</sup>*Id.* at 150.

<sup>636</sup>*Id.* (emphasis in the original).

[B]ecause a products liability claim does not raise the policy considerations [discussed earlier in the opinion] involved in a professional malpractice case, this court concludes that, as with the majority of jurisdictions, this final element of requiring a plaintiff to have reason to know of the defendant's improper conduct or defect in the product is not required in Arizona. In other words, in Arizona a cause of action accrues when the plaintiff knows of the injury and the causal connection between the defendant's product and that injury.<sup>637</sup>

The last sentence sounds much like the *Kubrick* rule. The court earlier had said, "[t]he United States Supreme Court recently applied this version of the discovery rule in [*Kubrick*] where it held that claims arising under the [FTCA] accrue once plaintiffs know their injuries and the causal origins of those injuries."<sup>638</sup>

The district court has in dicta extended the *Kubrick* rule to all FTCA cases. Oddly, the court implies that the Arizona rule in malpractice cases (at least) possibly should be different, because those cases had additional "policy considerations."<sup>639</sup> Yet it relied upon *Kubrick*, a medical malpractice case, to support its ruling on what the Arizona rule would be in a nonmedical malpractice case.

Finally, *Genson v. Ripley*<sup>640</sup> was an odd case brought by a pro se plaintiff who sued the Smithsonian Institution in March 1981 under the FTCA for allegedly not educating the American public about a coin he had discovered and given to the museum; he claimed the coin proved Vikings had visited the New World in the 8th Century, whereas the Institution returned the coin to him in November 1977 telling him the coin was not what he said it was. The district court dismissed the suit as time barred, finding that the "claim" accrued the day the coin was returned to him. The court said "[t]he Supreme Court has stated that 'accrual' commences from the time plaintiff knows both the existence and the cause of the injury."<sup>641</sup> Because plaintiff "knew how the

<sup>637</sup>*Id.* at 154.

<sup>638</sup>*Id.* at 153.

<sup>639</sup>The district court analogized all professionals to attorneys, and quoted with approval language from *Long v. Buckley*, 129 Ariz. 141, 629 P.2d 557 (1981), a legal malpractice case: "the right of the client to rely on the superior skill and knowledge of the attorney [professional]; . . . the duty of the attorney [professional] to make full and fair disclosure to the client; . . . the fiduciary character of the attorney [professional] client relationship."

<sup>640</sup>544 F. Supp. 251 (D. Ariz. 1981), *aff'd*, 681 F.2d 1240 (9th Cir. 1982), *cert. denied*, 459 U.S. 937 (1982).

<sup>641</sup>*Id.* at 253 (citing *Kubrick*).

Smithsonian had dealt with his coin and that he was not satisfied with their treatment"<sup>642</sup> on the day they gave him back his coin, failing to file a claim within two years barred his suit. This case is another example of a district court apparently applying *Kubrick* to any or all FTCA cases.

### XIII. TENTH CIRCUIT

Several pre-*Kubrick* decisions by the Tenth Circuit are worth discussing.

In *Casias v. United States*,<sup>643</sup> plaintiff entered a VA hospital for a tonsillectomy and received preoperative injections on November 14, 1969 that damaged his sciatic nerve, leading to paralysis of his left leg. He filed a claim on July 24, 1972, but the trial court found that the claim accrued before July 24, 1970, and dismissed. The Tenth Circuit affirmed, noting the district court's findings that as of December 1969 Casias knew the injections had caused his injury: "[W]ell before the crucial date [Casias] knew he was injured and knew the act which caused the injury."<sup>644</sup> Although not stated as a "rule" of law, the phrasing certainly suggests the *Kubrick* rule.

Casias had claimed that a doctor had given him an alternative "credible explanation."<sup>645</sup> The district court had found that no such "explanation" had been given. The Tenth Circuit cited the Eighth Circuit's *Reilly*<sup>646</sup> as stating the general pre-*Kubrick* rule, i.e., accrual when plaintiff should have discovered "the alleged malpractice."<sup>647</sup> and also cited *Reilly* for the proposition that a reasonable person, "when the facts are so grave," should be alerted that there may have been negligent treatment.

Casias also said the trial court should have considered his "mental condition during his treatment" as possibly tolling the period, but the Tenth Circuit held that "[i]nsanity, such as constitutes a legal disability in most states, does not toll the statute of limitations under the [FTCA]."<sup>648</sup>

In *Exnicious v. United States*,<sup>649</sup> plaintiff had surgery on his left arm in 1959, while he also had a streptococcal pharyngeal

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<sup>642</sup>*Id.*

<sup>643</sup>532 F.2d 1339 (10th Cir. 1976).

<sup>644</sup>*Id.* at 1341.

<sup>645</sup>See *Jordan v. United States*, 503 F.2d 620 (6th Cir. 1974).

<sup>646</sup>*Reilly v. United States*, 513 F.2d 147 (8th Cir. 1975).

<sup>647</sup>532 F.2d at 1340.

<sup>648</sup>*Id.* at 1342.

<sup>649</sup>563 F.2d 418 (10th Cir. 1977).



infection (strep throat). In 1960, the VA diagnosed his condition as traumatic arthritis. Plaintiff eventually alleged that performing the surgery while he had the infection caused necrosis of the left humerus ("dead bone"), and he filed a claim July 10, 1974. The district court dismissed, finding that plaintiff discovered the "acts" constituting the alleged malpractice in May 1972, when he consulted a doctor who told him he had a "dead bone," and who commented "it was a bad operation."<sup>650</sup> The Tenth Circuit noted, however, that these doctors did not tell him of a link between the "dead bone" and the failure to postpone surgery until after the infection cleared up. The court adopted the *Bridgford*<sup>651</sup> rule that the claim did not accrue until there was "reasonable opportunity to discover *all* of the essential elements of a possible cause of action for malpractice - damages, duty, breach and causation . . ."<sup>652</sup> It also found that, with the credible explanation of traumatic arthritis, "he may not be found to have failed to exercise reasonable diligence because he did not earlier pursue his claim."<sup>653</sup> The Tenth Circuit reversed the lower court, finding there were issues of fact as to whether plaintiff knew all four of the *Bridgford* requirements that could not be disposed of on summary judgment.

The court, in reviewing the district court's findings, impliedly approved the lower court's note that for the claim to accrue "there must be discernible some legally cognizable injury or damage, even though the ultimate damage is unknown or unpredictable."<sup>654</sup> This part of the case's reasoning seems to have survived *Kubrick*.<sup>655</sup>

*Zeidler v. United States*<sup>656</sup> is a curious case that has been the foundation for an "exception" to mental incapacity not tolling the FTCA period. Although preceding *Kubrick*, this case's reasoning is persuasive, was not impinged upon by *Kubrick*, and has retained vitality in some other circuits post-*Kubrick*.

Two lobotomy operations were performed at a VA hospital in 1947 and 1948 "in an effort to control plaintiff's conduct."<sup>657</sup> A conservator was appointed for him in October 1975, was first able to examine medical records in January 1976, and filed a claim in

<sup>650</sup>*Id.* at 423.

<sup>651</sup>*Bridgford v. United States*, 550 F.2d 978 (4th Cir. 1977).

<sup>652</sup>563 F.2d at 420 (emphasis by the court).

<sup>653</sup>*Id.* at 421.

<sup>654</sup>*Id.*

<sup>655</sup>*See Robbins v. United States*, 624 F.2d 971, 973 (10th Cir. 1980).

<sup>656</sup>601 F.2d 527 (10th Cir. 1979).

<sup>657</sup>*Id.* at 527.

October 1976, alleging negligence in performing the lobotomies and in caring for plaintiff (who had been receiving VA treatment ever since the lobotomies). The district court applied the rule that insanity or incompetency did not toll the statute, and dismissed. The Tenth Circuit, while acknowledging that *Casias* supported that rule, nevertheless held "[i]t would be highly unjust to rule that general insanity and the statute of limitations govern in the extraordinary circumstances which are here presented."<sup>658</sup> It held that

brain damage or destruction is not to be classified in the same way as ordinary mental disease or insanity for the purpose of barring such an action; that the incapability of the plaintiff to comprehend the elements of possible malpractice, if such existed or exists, should indeed toll the statute and should not bar the plaintiff from ever pursuing a remedy for violation of his rights.<sup>659</sup>

The court remanded for a trial on the merits to ascertain, among other things, plaintiff's actual mental capabilities and awareness. Interestingly, the Tenth Circuit did not require the "brain damage or destruction" to have been as the result of the alleged malpractice, although on the facts of this case it clearly was. The circuits that have examined this problem post-*Kubrick*, although citing *Zeidler* as controlling, have emphasized that in their cases the alleged malpractice was the cause of the disability.<sup>660</sup>

The court recognized that "[t]here is some division among the circuits on whether this is the proper interpretation of the accrual rule."<sup>661</sup> When *Zeidler* was written, the Supreme Court had already granted certiorari in *Kubrick*,<sup>662</sup> and the Tenth Circuit was careful not to base its holding necessarily on *Exnicious's* rule.

*Robbins v. United States*<sup>663</sup> was the Tenth Circuit's first post-*Kubrick* FTCA medical malpractice decision. Robbins developed psoriasis when he was fifteen years old; he was treated at an Air Force base in August 1972 with the drug Prednisone. He developed skin marks, called stria, on his thighs, back and groin, and the drug was discontinued in October 1972 by another doctor

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<sup>658</sup>*Id.* at 531.

<sup>659</sup>*Id.* at 531.

<sup>660</sup>See, e.g., *Clifford v. United States*, 738 F.2d 977 (1984); *Dundon v. United States*, 559 F. Supp. 469 (E.D.N.Y. 1983).

<sup>661</sup>601 F.2d at 530.

<sup>662</sup>440 U.S. 906 (1979).

<sup>663</sup>624 F.2d 971 (10th Cir. 1980).

who told him "the drug should not have been given to him" because of his youth.<sup>664</sup> He was told at that time and later by other doctors that the stria "might or might not go away as he grew older."<sup>665</sup> In December 1976, a doctor told Robbins the marks might be permanent and he filed a claim on April 20, 1977. The district court dismissed on the government's motion for summary judgment.

On appeal, Robbins first asserted the standard should be when he was aware that a legal duty to him had been breached, but the Tenth Circuit held *Kubrick* clearly controlled. The Court also rejected the notion that plaintiff's minority tolled the statute. Finally, plaintiff argued that an issue of fact existed as to whether he timely knew in October 1972 that he had been injured, because "he lacked knowledge of the extent and ramifications of the injury," i.e., he did not know the stria would be permanent.<sup>666</sup>

The facts of *Kubrick* did not raise the issue whether a claimant's lack of knowledge concerning the permanency of an injury tolls the statute of limitations. . . . [A] legally cognizable injury or damage begins the running of the statutory period of § 2401(b) even though the ultimate damage is unknown or unpredictable.<sup>667</sup>

The court cited *Exnicious* for this proposition, observing that *Kubrick* had only disapproved *Exnicious* for holding the claimant needs to know the legal implications of his injury.<sup>668</sup>

The court found that Robbins was aware of his injury and its cause "shortly after it occurred," certainly by October 1972. "That he might have then believed the injury was only temporary is irrelevant."<sup>669</sup>

This decision stands in stark contrast to *Lavallee v. Listi*,<sup>670</sup> and there is no apparent way to reconcile them. The Fifth Circuit had read into *Kubrick* itself a requirement to know the "permanency" of the injury to start the period running. While it is questionable that *Kubrick* mandates such a result, it certainly does not compel the opposite result either, as the Tenth Circuit acknowledged. Still, under the facts of this case, where Robbins

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<sup>664</sup>*Id.* at 972.

<sup>665</sup>*Id.*

<sup>666</sup>*Id.* at 973.

<sup>667</sup>*Id.*

<sup>668</sup>*Id.* at 973 n.1.

<sup>669</sup>*Id.* at 973.

<sup>670</sup>611 F.2d 1129 (5th Cir. 1980); see also *Rispoli v. United States*, 578 F. Supp. 1398 (E.D.N.Y. 1983); *Dundon v. United States*, 559 F. Supp. 469 (E.D.N.Y. 1983).

was undeniably told that his injury "might or might not" go away, he certainly was aware of the *possible* extent of his eventual injury. A person hit by a car is often in the same situation, and does not know the ultimate extent of his injuries either, yet no one suggests tolling the statute under those circumstances.

Decided one year later than *Robbins* (and written by the same judge), *Gustavson v. United States*<sup>671</sup> applied *Robbins* to a rather more troubling set of facts. Plaintiff's decedent Newcomb as a child had a severe bedwetting problem, which Air Force doctors misdiagnosed as an anxiety reaction. Finally, in 1973 civilian doctors correctly diagnosed the problem as vesico-ureteral reflux and resulting infection. They operated to reimplant his ureters, told Newcomb that this "could have been done years before and that his kidneys had been seriously damaged by the long-continued reflux."<sup>672</sup> The court said Newcomb did realize at least some of the military doctors had misdiagnosed his problem. By 1973, when his condition was corrected, the damage had been done and his "health had deteriorated irreversibly; his kidneys eventually failed and he went on dialysis."<sup>673</sup> He died in 1977, shortly after he filed his claim.

Newcomb's representatives argued that the period did not commence until Newcomb "realized his kidney condition was irreversible, requiring dialysis or transplant, and that he might die."<sup>674</sup> The Tenth Circuit held that *Robbins* controlled, saying in that case they had "held that a claimant is aware of the injury once he or she has been apprised of the *general nature* of the injury. Lack of knowledge of the injury's permanence, extent and ramifications does not toll the statute."<sup>675</sup> Accordingly, the period began in 1973.

The troubling aspect of this decision becomes apparent when one compares the facts of *Robbins* and *Gustavson*. In *Robbins*, at the time the court said the claim accrued, the claimant knew that his injury *might* be permanent; he did not know for certain the extent of his injury, but he knew of the possibilities. In *Gustavson*, the opinion does not say that in 1973 Newcomb knew he might die from the kidney problem, or even that he might have to go on dialysis. Also, although *Robbins* was cited, the "general

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<sup>671</sup>655 F.2d 1034 (10th Cir. 1981).

<sup>672</sup>*Id.* at 1036.

<sup>673</sup>*Id.*

<sup>674</sup>*Id.*

<sup>675</sup>*Id.* (emphasis added).

nature of the injury" language is new with *Gustavson*. Although *Gustavson* clearly fits within the written reasoning of *Robbins*, it may be that the "extent" or "ramifications" of this reasoning were not foreseen, and may not yet be in sight. Fortunately, for courts that follow this line of reasoning and reject the Fifth Circuit's reasoning, the phrase "general nature of the injury" may prove sufficiently elastic to avoid manifest injustice. Courts ought to find it difficult to charge a claimant with such knowledge if, e.g., he knows of a misdiagnosed ingrown toenail, and three years later loses his leg.

Also in *Gustavson*, plaintiff argued that separate causes of action arose from each misdiagnosis, pointing to an apparently later (not dated in the opinion) visit to a military doctor concerning fever and a painful mass in his neck, which was allegedly connected to the kidney problem but such connection not detected by the doctor. The court simply held that Newcomb had the facts he needed in 1973, and if further misdiagnoses were made later by military doctors for the same problem,

regardless of whether we characterize this suit as involving multiple causes of action or a single cause of action the statute of limitations began to run in 1973. . . . Once Newcomb was armed with the knowledge of his injury and its cause, the burden was on him to ascertain in what instances his condition should have been recognized.<sup>676</sup>

Thus, the rule could be perhaps stated that if claim is made for one injury, regardless of how many times it is misdiagnosed, the period begins to run when claimant has reason to know of this injury and that a misdiagnosis caused it.

Not discussed was the aspect of wrongful death, and it appears that the *Gustavson* claim was purely a survivor's action, a continuation of Newcomb's claim that rose or fell with the timeliness of that claim.

Although the "permanence" issue may have seemed most significant in *Gustavson*, other issues became the linchpin the Tenth Circuit rested upon in *Arvayo v. United States*.<sup>677</sup> On January 30, 1979, five-month-old Jose Arvayo, Jr., who had had a fever for nine days, was diagnosed at an Air Force hospital as having upper respiratory infection (i.e., a cold). He was brought back the next day suffering convulsions, and this ailment was

<sup>676</sup>*Id.* at 1037.

<sup>677</sup>786 F.2d 1416 (10th Cir. 1985).

found to be bacterial meningitis. By August 1979, his parents "were aware that Jose had suffered significant brain damage from the meningitis,"<sup>678</sup> but the parents made no further medical inquiry until August 1981, when they consulted an attorney in connection with the government's insurance coverage for Jose's medical expenses. This attorney informed them of "the possible connection between delayed diagnosis of meningitis and mental retardation,"<sup>679</sup> and the parents filed a claim in December 1981. After a trial on the merits, the district court found for the plaintiffs in the amount of \$1,950,000.

The government's argument was straight forward: as of August 1979, the Arvayos knew both of the injury (brain damage) and the cause (meningitis), and so the claim should be time barred. The Arvayos argued that the "cause" of the injury was not simply meningitis, but was also the doctor's failure to diagnose and treat the condition as meningitis on January 30, 1979. Plaintiffs pointed out that *Kubrick* involved malpractice in "commission," i.e., the doctor did something to cause the injury, whereas here the malpractice was in omission, and argued a distinction must be made where a claimant is aware of "the bare medical cause" of the injury but unaware of "the omissions or misdiagnoses."<sup>680</sup>

The Tenth Circuit agreed that the alleged "cause" means "more than mere awareness of the medical cause in cases involving a failure to diagnose, treat or warn,"<sup>681</sup> and found support for this in *Kubrick* and in *Gustavson*, which recognized the "cause" of claimant's injury there was not simply vesico-ureteral reflux, but was also the failure to detect and correct this earlier.<sup>682</sup>

The Tenth Circuit then went on, however, to examine whether the Arvayos had been reasonably diligent, finding that under *Kubrick*, "in the context of failure to diagnose, treat and warn cases such an extension of the duty [to diligently inquire] seems unavoidable."<sup>683</sup>

The Court perceptively recognized that even if an "omission" does not necessarily mean a doctor breached community stan-

<sup>678</sup>*Id.* at 1418.

<sup>679</sup>*Id.*

<sup>680</sup>*Id.* at 1419.

<sup>681</sup>*Id.* at 1420.

<sup>682</sup>The court cited the Fifth Circuit case, *Waits v. United States*, 611 F.2d 550 (5th Cir. 1980), discussed *supra* text accompanying notes 341-51.

<sup>683</sup>766 F.2d at 1421. Reading *Kubrick* broadly in this way, the Tenth Circuit avoided finding that *Kubrick* did not apply to this type of case, in contrast to what the Ninth Circuit did in similar cases. See *supra* text accompanying notes 586-607.

dards (i.e., was negligent), discovery that any supposed "omission" was a "cause" of an injury necessarily implies knowledge of duty that was not fulfilled, and "any attempt to distinguish the two concepts would be largely futile."<sup>684</sup>

The Court then found that it did not really need to "speculate" whether *Kubrick* mandated extension of the duty to diligently inquire in omission cases, because "such an extension has already occurred in this circuit. That is, the potential plaintiff already has the duty to inquire as to both 'causation' and 'negligence' in light of our holding in *Gustavson*."<sup>685</sup>

Because in *Gustavson* Newcomb had not been told of the connection between the lump in his neck and his kidney problem, "this court implicitly placed a burden on him to discover not only whether these doctors breached a duty to him, but also to discover in the first instance whether there was a causal connection between their actions, or inactions, and his injury."<sup>686</sup>

Having thus raised the issue, the Tenth Circuit proceeded to resolve it against the Arvayos. The court found that the parents had "never made any inquiry whatsoever,"<sup>687</sup> and found a reasonable person should "have made *some* type of inquiry" where there was knowledge of "two drastically different diagnoses in a twenty-four-hour period."<sup>688</sup>

The court noted that there was no hint of concealment by the government, and found that "[t]he Arvayos' contention that a cause of action does not accrue under the FTCA in a failure to diagnose, treat or warn case until they are aware—informed—of a possible connection between a misdiagnosis and an inquiry could possibly toll the statute indefinitely."<sup>689</sup> The court was careful to note that they did "not intend to imply that in every failure to diagnose, treat or warn case the plaintiff's cause of action accrues at the time the plaintiff receives a diagnosis different from a previous diagnosis and is aware that he or she has been injured."<sup>690</sup>

The court also did not decide what questions should have been asked, merely that "some type of inquiry" should have been

<sup>684</sup>766 F.2d at 1421.

<sup>685</sup>*Id.*

<sup>686</sup>*Id.* at 1422.

<sup>687</sup>*Id.*

<sup>688</sup>*Id.* (emphasis by the court).

<sup>689</sup>*Id.*

<sup>690</sup>*Id.*

made. The Tenth Circuit noted that the district court mentioned that the Arvayos were "quite young, wholly trusting of authority, particularly medical persons," and that no one suggested a connection between the delay in diagnosis and the child's condition.<sup>691</sup> To the Tenth Circuit, this indicated that the district court applied a subjective standard, whereas the "reasonably diligent" standard is objective, and also that the district court "would require . . . a duty of disclosure on the part of the doctors, rather than a duty of inquiry on the part of the plaintiff,"<sup>692</sup> which the Tenth Circuit clearly did not accept. The former (objective versus subjective) seems well settled among the circuits, whereas the latter (no doctor duty to disclose, implying a "nonfiduciary" relationship) is not so well settled. An impassioned dissent, written by a judge who had sided with the majority in *Robbins*, thought that the district court's language did not necessarily mean it had applied a subjective standard, and that the lower court as the finder of fact (i.e., of due diligence) should not have been reversed unless clearly erroneous.

Several other Tenth Circuit decisions addressed related issues. *Kynaston v. United States*<sup>693</sup> was a swine flu vaccination case. Kynaston timely filed his administrative claim (within two years of the vaccination) and the issue in the case was whether the action survived after his death from cancer (unrelated to the vaccination). The court considered whether a change in a Utah statute in May 1977 would diminish the recovery allowed under the earlier law, and found that the action accrued at the "earliest" on December 9, 1976 (date of vaccination) and at the "latest" on February 21, 1977 (when a physician diagnosed him as having G.B.S., which has been linked to swine flu vaccination). The court did not decide when the action did accrue because in either case the earlier Utah statute applied.

The case is interesting for its dicta: "Under the FTCA a cause of action accrues at the time the plaintiff is injured, or, in a medical malpractice action, when the plaintiff has discovered both his injury and its cause."<sup>694</sup>

The Tenth Circuit seemed in no hurry to extend the *Kubrick*

<sup>691</sup>*Id.* at 1418.

<sup>692</sup>*Id.* at 1422.

<sup>693</sup>717 F.2d 506 (10th Cir. 1983).

<sup>694</sup>*Id.* at 508 (citing *Kubrick*). Compare *Kynaston with Brazzell v. United States*, 788 F.2d 1352 (8th Cir. 1986) (because the Eighth Circuit has not extended *Kubrick* beyond medical malpractice, it felt it necessary to analogize a vaccination case to a medical malpractice action).



rule as other circuits have done, and avoided deciding just when the claim actually accrued.

*Williams v. Borden, Inc.*<sup>695</sup> was an occupational disease case alleging product liability theories against the manufacturer of polyvinyl chloride [PVC]-treated plastic film for wrapping meat. Plaintiff developed chronic pulmonary disease after being exposed to the fumes given off when she cut the film with a hot wire while wrapping the meat. The district court found the claim barred by the Oklahoma two-year statute of limitations. The Tenth Circuit reversed, holding that Oklahoma law would adopt a rule stated by the Oregon Supreme Court in *Schiele v. Hobart Corp.*,<sup>696</sup> another PVC meat wrapping case, that an occupational disease from a dangerous product does not produce a cause of action "until the plaintiff knows, or as a reasonably prudent person should know, that he has the condition for which his action is brought and that the defendant caused it."<sup>697</sup>

This rule sounds identical to the rule laid down in *Kubrick*. The Tenth Circuit, however, continued to follow the language of *Schiele*:

[W]e reject defendants' claim that knowledge of symptoms and their causal relationship to defendants' actions in and of itself initiates the running of the statute. We do not believe the legislature intended that the statute be applied in a manner which would require one to file an action for temporary sickness or discomfort or risk the loss of a right of action for permanent injury.

The statute of limitations begins to run when a reasonably prudent person associates his symptoms with a serious or permanent condition and at the same time perceives the role which the defendant has played in inducing that condition.<sup>698</sup>

Accordingly, knowledge of "serious or permanent" injury is required. In a footnote, the court wrote "[w]e have noted the opinion in [*Kubrick*], a malpractice case under the [FTCA], but are not persuaded that it indicates that a different accrual standard should be applied in this product liability case."<sup>699</sup> In reality, *Kubrick*, by its own terms poses no philosophical conflict with

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<sup>695</sup>637 F.2d 731 (10th Cir. 1980).

<sup>696</sup>284 Or. 483, 587 P.2d 1010 (Or. 1978).

<sup>697</sup>*Williams*, 637 F.2d at 734 (quoting *Schiele*).

<sup>698</sup>*Id.* (quoting *Schiele*).

<sup>699</sup>*Id.* at 735 n.7.

*Williams* or *Schiele* at all, but the Tenth Circuit's gloss on *Kubrick* (*Robbins* and *Gustavson*) might, so the court felt it necessary to somehow distinguish *Kubrick*.

In *Maughn v. SW Servicing, Inc.*,<sup>700</sup> plaintiffs alleged wrongful death from leukemia caused by radiation from a uranium processing plant. Applying Utah law, the court found "[c]ases involving suspected carcinogens . . . are analogous to medical malpractice cases,"<sup>701</sup> and held that a "discovery" rule should apply: the statute is tolled "until the plaintiff knows or should know of the facts constituting the cause of action . . . including the fact of causation."<sup>702</sup> The court also noted "[t]here is a substantive difference between knowledge of causation and mere suspicion."<sup>703</sup>

Finally, *Knapp v. United States*<sup>704</sup> was an action to quiet title, under 28 U.S.C. § 2409a(f), which says the claim accrues when "the plaintiff or his predecessor in interest knew or should have known of the claim against the United States." The Tenth Circuit then said "[k]nowledge of the claim's full contours is not required," and compared *Kubrick*, stating the rule thus: "medical malpractice claim against Government accrues when plaintiff becomes aware of existence of his injury and its *probable* cause, not when he later learns of its legal significance."<sup>705</sup>

In no case has the Tenth Circuit seemed inclined to extend the *Kubrick* rule beyond medical malpractice FTCA cases, although it has not in so many words rejected such an extension.

#### XIV. ELEVENTH CIRCUIT

Post-*Kubrick*,<sup>706</sup> the first case in the FTCA medical malpractice area by the Eleventh Circuit was *Burgess v. United States*,<sup>707</sup> which reversed the district court's dismissal of the claim as time

<sup>700</sup>758 F.2d 1381 (10th Cir. 1985).

<sup>701</sup>*Id.* at 1385.

<sup>702</sup>*Id.* at 1387.

<sup>703</sup>*Id.*

<sup>704</sup>636 F.2d 279 (10th Cir. 1980).

<sup>705</sup>*Id.* at 283 (emphasis added).

<sup>706</sup>There are, of course no pre-*Kubrick* decisions by the Eleventh Circuit, as this circuit did not come into being until October 1, 1981, pursuant to the Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1995, which divided the former Fifth Circuit into a "new" Fifth Circuit and the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), was the first decision by the Eleventh Circuit: it held that the decisions of the "former" Fifth Circuit as it existed on September 30, 1981 "shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit." *Id.* at 1207.

<sup>707</sup>744 F.2d 771 (11th Cir. 1984).

barred. Omar Burgess was born in an Army hospital on September 5, 1978. During delivery his head emerged but his shoulders could not follow, and the doctor finally broke both the child's clavicles. The right fracture injured the nerve causing Erb's palsy, i.e., paralysis of the arm. His parents learned on that day or the next that his clavicles had been broken, and were then aware his arm was not fully functional, but were assured "all would be okay" with the child's arm, and they had "no reason to believe there was any permanent damage to [their] son."<sup>708</sup> The hospital records reflected that the parents were first advised of possible nerve damage to the arm on September 29, 1978. An FTCA claim was perfected on September 15, 1980.

The district court dismissed, finding that the parents knew the child's clavicles had been broken and the arm was not fully functional (i.e., cause and injury) on September 6, 1978. The Eleventh Circuit reversed, finding that the only knowledge of injury the parents had on September 6, 1978 was of broken bones, and that they did not gain knowledge of the nerve injury until September 29, 1978. The court also found that the parents "acted reasonably in relying upon the government's representations and assurances concerning appellant's condition. Thus, since appellant's parents did not know of the *existence* of the injury until the physicians made them aware of it on September 29, 1978, the statute of limitations commenced running at the time."<sup>709</sup> The court distinguished the Tenth Circuit's *Robbins* decision,<sup>710</sup> because there the claimant knew almost five years before making his claim that the marks "might not go away," and all he learned when he claimed the period began was that the marks "might be permanent."<sup>711</sup>

Thus, the Eleventh Circuit focused in on knowledge of the *existence* of an injury, and found that the district court had applied the limitations period to the wrong injury. The distinction between a broken bone and a nerve injury is evident. Less evident, and perhaps more troubling, would be the distinction between, say, knowledge of a broken bone and knowledge that this broken bone would be a source of permanent injury. One is reminded of the "general nature of the injury" language in the Tenth Circuit's *Gustavson*,<sup>712</sup> and the requirement some courts

<sup>708</sup>*Id.* at 772.

<sup>709</sup>*Id.* at 775 (emphasis by the court).

<sup>710</sup>*Robbins v. United States*, 624 F.2d 971 (10th Cir. 1980).

<sup>711</sup>744 F.2d at 775 n.9.

<sup>712</sup>*Gustavson v. United States*, 655 F.2d 1034 (10th Cir. 1981).

have read into *Kubrick* for knowledge of *permanence* of the injury. The Eleventh Circuit evidently saw no need to reach that question.

*Price v. United States*<sup>713</sup> had the following facts: Mrs. Price was diagnosed at a Navy hospital as having a uterine disease and an andexal tumor or cyst. A serum pregnancy test was reported as negative and an ultrasound test also showed no evidence of pregnancy. Ten days later, on September 25, 1980, Mrs. Price underwent a hysterectomy, and after the uterus was removed, it was found to contain an eight week old fetus. The Prices were told of this a few days after the surgery. "The Prices made no attempt to ascertain what had gone wrong until August 1983,"<sup>714</sup> at which time they consulted an attorney. This attorney suggested they obtain the pregnancy test report, and "the Navy turned over information indicating that it was likely the result of the pregnancy test had actually been positive."<sup>715</sup> Both parties stipulated the result was erroneously reported as negative. Plaintiffs filed their claim "immediately" after the Navy provided the information. When the claim was not acted upon, the Prices filed suit in April 1984 and the district court dismissed the case as time barred.

The Eleventh Circuit affirmed, finding that in September 1980 Mrs. Price knew she had lost a fetus (injury) and also that the surgeon had relied on information that she was not pregnant:

Although appellant did not know exactly which mistake, or whose mistake, led the doctor to believe that she was not pregnant when in fact she was, she had to know that her injury was probably connected to some act of those responsible for her treatment. If she intended to pursue the matter, there was no reason for her not to seek advice from others as to whether her treatment had been negligent, and whether she should bring a legal claim.<sup>716</sup>

The court wrote that, as plaintiff "was on notice that there probably had been an act of negligence,"<sup>717</sup> once she learned she had lost a fetus, merely because she "did not know whether the *particular cause* of her injury was the failure of the pregnancy test to yield an accurate result, or the failure of a person to record

<sup>713</sup>755 F.2d 1491 (11th Cir. 1985).

<sup>714</sup>*Id.* at 1493.

<sup>715</sup>*Id.*

<sup>716</sup>*Id.* at 1494.

<sup>717</sup>*Id.*

the result of the test accurately, did not toll the statute of limitations period."<sup>718</sup>

Plaintiffs argued that the Fifth Circuit's *Waits v. United States*<sup>719</sup> compelled a different result.<sup>720</sup> The Eleventh Circuit distinguished *Waits*, finding in that case Mr. Waits had no reason to think that doctors were responsible for loss of his leg until he received his medical records, and also but for the delay in producing those records Waits would have filed his claim within two years of his discharge. Here, within days of the hysterectomy plaintiff knew she had lost a fetus because of some mistake, and her failure to obtain her records in time to file a claim was not due to any delay in producing them.

A dissent would have reversed and remanded to the district court "to determine when the Prices knew or should have known that the *negligent act* of reporting a negative result caused them to lose the opportunity of having a child."<sup>721</sup> The dissent noted that "medical tests are not perfect," the ultrasound test was negative, and so "[w]hy would the Prices have pursued some course of investigation?"<sup>722</sup> The dissent also considered that recording the test as negative "was an act of *negligence* not known or discovered until August 1983."<sup>723</sup> This sounds as if knowledge or opportunity for knowledge of *negligence* should be required before the period starts to run, which is clearly counter to *Kubrick*. The dissent did not cite *Waits*, but the knowledge of "negligence" language in *Waits*, which caused that case to be questioned in the Seventh Circuit's *Drazan*,<sup>724</sup> may have influenced the dissent.

A small bit of dicta by the majority may well be seen in the future. In analyzing *Kubrick*, the Eleventh Circuit wrote that one justification for the discovery rule was that "the plaintiff might not suspect that the injury was caused by a person who treated her, particularly where the plaintiff continues to be treated by the person who caused the injury."<sup>725</sup>

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No great leap of the imagination is required to anticipate cases

<sup>718</sup>*Id.* (emphasis added).

<sup>719</sup>611 F.2d 550 (5th Cir. 1980).

<sup>720</sup>*Waits* was decided post-*Kubrick*, and before the establishment of the Eleventh Circuit, and thus is binding precedent in that Circuit. See *supra* note 706.

<sup>721</sup>775 F.2d at 1495 (emphasis added).

<sup>722</sup>*Id.*

<sup>723</sup>*Id.* (emphasis added).

<sup>724</sup>*Drazan v. United States*, 762 F.2d 56 (7th Cir. 1985).

<sup>725</sup>*Id.* at 1493.

citing that passage as support in the Eleventh Circuit for the "continuous treatment" doctrine.

*Ballew v. A.H. Robins Co.*<sup>726</sup> was a Dalkon Shield product liability case. Plaintiff had the shield inserted in 1971, and had abdominal pain in April 1977. Her doctors told her they "could not say whether or not the IUD was causally related" to her infection.<sup>727</sup> She had a hysterectomy in September 1977. She read a newspaper article in January 1978 about another woman who had sued for injuries from a Dalkon Shield, and eventually she was able to track down that woman and was referred to the woman's attorney, who advised her she had a cause of action. She filed suit on June 12, 1979. The district court dismissed on the grounds that the action was barred by the Georgia two-year statute of limitations, finding that the cause of action accrued in April 1977. It found that plaintiff's inquiries during that hospital stay evidenced a "suspicion" the IUD and her infection were linked, and "the equivocal responses of her physicians... were enough to prompt further inquiry."<sup>728</sup>

The Eleventh Circuit interpreted Georgia law in a way that is really indistinguishable from *Kubrick*, although it nowhere cited *Kubrick*, but instead looked to the Georgia Supreme Court's decision in *King v. Seitzingers, Inc.*<sup>729</sup> The court said *King* held that

in the instance of a continuing tort, such as the one involved here, 'a cause of action does not accrue so as to cause the statute of limitations to run until a plaintiff discovers or with reasonable diligence should have discovered that he was injured' [quoting *King*; other cites omitted]. Nor will a cause of action accrue until the plaintiff knew or through the exercise of reasonable diligence should have discovered the causal connection between the injury and the alleged negligent conduct of the defendant.<sup>730</sup>

The Eleventh Circuit noted that whether prior to June 12, 1977 plaintiff knew or reasonably should have discovered the connection between her injuries and "appellee's alleged misconduct"<sup>731</sup> is

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<sup>726</sup>688 F.2d 1325 (11th Cir. 1982).

<sup>727</sup>*Id.* at 1326.

<sup>728</sup>*Id.* at 1327.

<sup>729</sup>160 Ga. App. 318, 287 S.E.2d 252 (1982).

<sup>730</sup>688 F.2d at 1327.

<sup>731</sup>*Id.*

a question of fact for the jury, not suitable for the summary judgment granted by the district court.

The Eleventh Circuit also felt that plaintiff's "suspicions" were "quashed" when in being "reasonably diligent," she asked her doctors and they responded "equivocally."<sup>732</sup> This commonsense approach is probably correct, because if the several doctors she spoke to did not feel they could connect the IUD to the infection, there ought to be no reason why plaintiff should seek fourth, fifth, or sixth opinions. The doctor's response could indicate that the extent of medical knowledge at that time simply was not great enough that the defendant had actually concealed pertinent medical information (as was alleged here), or could simply indicate her case was weak (as was suggested in a different context in *Fidler v. Eastman Kodak Co.*<sup>733</sup>). The court noted that her pursuit of the woman mentioned in the January 1978 article indicated plaintiff did not know the critical facts as of that date and was being reasonably diligent trying to learn them. The court also mentioned that it was not until September 1980 (over a year after suit was filed) that defendant officially notified physicians of a possible link between this IUD and pelvic infection, which raised the question whether plaintiff could have discovered the "cause" of her injury even when she read about it in the January 1978 newspaper.

Although the Eleventh Circuit applied Georgia law, it seems likely that the court would have done the same analysis and reached the same result had this been an FTCA malpractice case in which *Kubrick* would have controlled.

*Overstreet v. United States*<sup>734</sup> was decided after the first part of a bifurcated trial, the only issue tried being whether the action was timely filed. A retired air serviceman was operated on for a hiatal hernia in June 1974 at an Air Force hospital, and for the purpose of the trial, the government admitted that during the operation the surgeon negligently severed the hepatic artery, common bile duct, cystic artery, and removed Overstreet's gall bladder, and that plaintiff was not advised of any of the above directly after the operation. He developed very serious physical problems, including jaundice and fever, and filed his claim in February 1979. The court held that the government had "not sustained its burden of proving that plaintiff knew both of the existence and the cause of his injury prior to September 1977 [sic;

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<sup>732</sup>*Id.* at 1328.

<sup>733</sup>714 F.2d 192 (1st Cir. 1983).

<sup>734</sup>517 F. Supp. 1098 (M.D. Ala. 1981).

this should be February 1977]."<sup>735</sup> Despite the timeliness of the claim being jurisdictional, the court placed the burden squarely on the government.

The government had suggested that the claim accrued in September 1976, when plaintiff for the first time was advised that his gall bladder had been removed. The court found that removal of the gall bladder did not cause Overstreet's physical problems, because they resulted from strictures in his bile ducts from their negligent severing during the hernia operation. This was not discovered until late 1977, when sophisticated diagnostic procedures were used at another Air Force hospital. A doctor in 1976 said he "suspected a probable cause of plaintiff's jaundice and fever was the stricture's known severance of the bile duct, but this was *only one probable cause*" and none of the diagnostic tests in 1976 "had been able to establish the cause of plaintiff's disease."<sup>736</sup>

The court held: "It would be contrary to *Kubrick* and hard to conclude that plaintiff had reason to know what his doctors only suspected—particularly when the logic of the situation compels the conclusion to this Court that the doctors would not have communicated such fears and suspicions to plaintiff."<sup>737</sup>

The court found this case to be "polar to *Kubrick*," "where for five years before *Kubrick* filed his claim under the [FTCA]"<sup>738</sup> he knew his deafness was caused by the neomycin treatment.

After the remainder of the trial, the same district court wrote another opinion, *Overstreet v. United States*,<sup>739</sup> which considered the government's renewed arguments that the claim was time barred. The government pointed out that the doctor who did the hernia surgery testified he told Overstreet "that the operation was more complicated than anticipated and in performing the surgery, 'we divided a duct,' which had to be repaired, but 'we got everything repaired,' and the plaintiff 'would be all right.'"<sup>740</sup> The doctors did not advise Overstreet whether or not they had intended to "divide the duct" and did not admit to him that it was done inadvertently. The court again found the facts "polar to

<sup>735</sup>*Id.* at 1099.

<sup>736</sup>*Id.* at 1103 (emphasis added).

<sup>737</sup>*Id.* Compare *Overstreet* to *Ashley v. United States*, 413 F.2d 490 (9th Cir. 1969), which said it was unrealistic to imagine government physicians conspiring to conceal mistakes in treatment.

<sup>738</sup>*Id.* at 1103.

<sup>739</sup>528 F. Supp. 838 (M.D. Ala. 1981).

<sup>740</sup>*Id.* at 842.



*Kubrick*," and held to its original finding that claim was timely.<sup>741</sup>

The court noted:

Mr. Overstreet was totally dependent not only on his doctors' skill but also their communications with him. After each surgery, he was sewed up. [Plaintiff underwent some seven operations after the hernia procedure.] When he was required to have his entire esophagus removed a few months following the unsuccessful hiatal hernia repair and his colon substituted for his esophagus, none of his doctors even suggested to him that a cause of the ineffective hiatal hernia repair requiring the second surgery was the severance or 'division' of the bile duct, hepatic artery and cystic artery. As noted, plaintiff was not even told that some of these things had occurred, and to the extent that he allegedly was told of them, no one suggested that the 'division of the duct' was not planned as an incident to the operation. If the doctors did not tell plaintiff that they had erred in completely severing the common bile duct after the first surgery or at the time of the second major surgery, or that the removal of his esophagus was caused in whole or in part by problems incident to a surgical error in severing vital areas of his body, by what logic is this Court asked to conclude that in 1976, when the doctors only 'suspected' that plaintiff's continuing problem was caused by strictures from severance of the common bile duct, that they then explained to him their errors in the 1974 surgery and how they suspected that perhaps these errors were causing plaintiff's recurring problems?<sup>742</sup>

The court then brusquely wrote: "The statute of limitations has its place in the law when one suffers an injury, knows of the injury, and realizes how the injury was caused. It has no area of operation under the facts in this case."<sup>743</sup>

One must always be leery when a court poses its legal analysis in the form of a question ("by what logic . . . ?") On the facts of this case, however, the court's finding is correct, even under *Kubrick*. Simply put, even if Overstreet knew his bile duct had been cut in the 1974 operation, he had no reason to know this had caused his injury when even his doctors, who were performing

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<sup>741</sup>*Id.* at 843.

<sup>742</sup>*Id.* at 844.

<sup>743</sup>*Id.*

sophisticated tests to find out why he was having problems, and who had all the information about what was done in the hernia operation, did not know "how the injury was caused." The government had focused totally on whether Overstreet knew (1) the "injury," and also (2) the "cause," without ever considering whether he knew or could have known that the "cause" was linked to the injury.<sup>744</sup>

In *Wilson v. United States*,<sup>745</sup> tried before the same district court judge who decided *Overstreet*, a young girl was treated at an Air Force hospital for abdominal pain on October 9, 1971. She was diagnosed as having viral gastroenteritis. Her symptoms worsened, got better, then worsened again. She was examined several times over the next two weeks until on October 23, 1971 it was discovered that she had had an inflamed appendix which had already ruptured. The appendix was removed in a second operation in March 1972. Years later, plaintiff married and found it difficult to become pregnant. In October 1980, a laparoscopy revealed her fallopian tubes were scarred and occluded, causing sterility. Plaintiff filed a claim on January 29, 1981.

The government argued the claim accrued in March 1972, when a doctor testified he had told plaintiff's mother about the scarring and that plaintiff "might not be able to have children" (plaintiff and her mother denied this was told to them).<sup>746</sup> The court found that no doctor informed plaintiff or her mother "of the injuries to her fallopian tubes in a way that was meaningful to either of them."<sup>747</sup>

The government also argued that even if plaintiff's sterility was not known to her in 1972, she knew she had suffered an injury (pelvic abscess), caused in part by the initial misdiagnosis, and relied "upon the well-established principle of tort law that lack of knowledge of the injury's permanence, extent or ramifications does not toll the statute where the plaintiff in fact knows she has suffered an injury and who caused the injury."<sup>748</sup>

The government relied upon the Tenth Circuit decisions in *Gustavson*<sup>749</sup> and *Robbins*.<sup>750</sup> The district court distinguished

<sup>744</sup>*Compare Overstreet with Ciprut v. Moore*, 540 F. Supp. 817 (E.D. Pa. 1981), *aff'd without opinion*, 688 F.2d 819 (3d Cir. 1982).

<sup>745</sup>594 F. Supp. 843 (M.D. Ala. 1984).

<sup>746</sup>*Id.* at 847.

<sup>747</sup>*Id.* at 848.

<sup>748</sup>*Id.* at 849.

<sup>749</sup>*Gustavson v. United States*, 655 F.2d 1034 (10th Cir. 1981).

<sup>750</sup>*Robbins v. United States*, 624 F.2d 971 (10th Cir. 1980).

these two cases: "Unquestionably, plaintiffs [in *Gustavson* and *Robbins*]...learned of the particular injury (and its cause) for which they sued more than two years before actually commencing suit. Each plaintiff was ignorant of the injury's permanence or ramifications, yet the courts in each case correctly viewed such ignorance as irrelevant."<sup>751</sup>

While the above dicta sounds as if the district court has accepted the Tenth Circuit's reasoning, the court noted that in medical malpractice actions, a plaintiff might not know she has been injured or that her doctor's negligence contributed to the injury, and "her doctor might hesitate to supply the necessary information" for fear of precipitating a lawsuit.<sup>752</sup>

The district court then went on to impose a fiduciary responsibility on doctors:

Since the extent of plaintiff's knowledge of her injury and its cause is crucial in determining whether she had a fair opportunity to assert her claim, some courts have imposed a duty upon the doctor fully to disclose to plaintiff the nature of her injuries. [citations as discussed below] Where a doctor fails faithfully to discharge this obligation, courts have analogized this failure to fraudulent concealment and have accordingly tolled the statute of limitations until plaintiff actually learns of her injuries. The Court is persuaded by the wisdom of such a rule and determines that application of that rule to the present case would be appropriate.<sup>753</sup>

The court cited for this proposition a Florida intermediate appeals court case, *Almengor v. Dade County*,<sup>754</sup> and said *Pollard v. United States*<sup>755</sup> was in "accord." *Almengor* did hold that under Florida law, accrual of a medical malpractice cause of action is tolled by active concealment or failure "to reveal to the plaintiff facts [as distinguished from mere possibilities or conjecture] known to, or available to such physicians by efficient diagnosis, relating to the malpractice and/or cause of the plaintiff's adverse physical condition."<sup>756</sup> *Pollard*, however, involved wrongful death claims for participants in the Tuskagee Syphilis Study, and the court there held that the claims, which in general would have

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<sup>751</sup>594 F. Supp. at 849.

<sup>752</sup>*Id.*

<sup>753</sup>*Id.*

<sup>754</sup>359 So.2d 892 (Fla. Dist. Ct. App. 1978).

<sup>755</sup>384 F. Supp. 304, 309-10 (M.D. Ala. 1974).

<sup>756</sup>*Almengor*, 354 So.2d at 893.

accrued upon death, would be tolled where there was active concealment by defendant. Nothing was said about any duty of a doctor to disclose, or any fiduciary relationship that might exist between doctor and patient.

The *Wilson* holding is similar to dicta in the Fifth Circuit's *Harrison*,<sup>757</sup> and is in rather stark contrast to the decisions in the Tenth Circuit, such as *Arvayo*.<sup>758</sup> A possible mitigating factor not discussed by the district court could affect the duty to diligently discover injury and its cause. The opinion does not give the age of plaintiff, other than to characterize her as a "young girl,"<sup>759</sup> at least as of 1971, and not becoming married until 1976. It seems likely that in 1971 plaintiff was only a young teenager, and the court might have felt, although unstated, that a girl of such tender years had no "duty" to "diligently inquire" whether she would be able to have children in five years. While understandable, such a consideration is really no more (and possibly much less) justified than in other cases under the FTCA that involved minors and sometimes mere infants. It is difficult, although perhaps possible, to find a distinction in the *parent's* duty to be diligent to discover the ramifications of their child's known injury if it on the one hand seriously debilitates the child, or on the other hand, renders the child sterile. Depending on the type of injury, sterility in a child might be immediately detectable, or it might not be detectable at all until the child has matured. Rather than enter such a philosophical morass, the court opted to impose an essentially fiduciary duty on the doctors to disclose the injuries' potential ramifications.

In *Scott v. Casey*,<sup>760</sup> plaintiffs were several inmates at the U.S. Penitentiary in Atlanta, Georgia who volunteered for a study about LSD and its possible antidotes in 1956. Each inmate signed a consent agreement that clearly indicated that LSD was involved in the study. The agreement by its terms was with the Department of Pharmacology, Emory University, and did not list the government as a party. The court found that by the late 1960s, LSD's "general properties, . . . including its propensity to cause hallucinations, flashbacks, and personality disorders, had become a matter of public knowledge."<sup>761</sup> There also had been articles in the media describing the research at the Atlanta prison as being

<sup>757</sup>*Harrison v. United States*, 708 F.2d 1023 (5th Cir. 1983).

<sup>758</sup>*Arvayo v. United States*, 766 F.2d 1416 (10th Cir. 1985).

<sup>759</sup>594 F. Supp. at 844.

<sup>760</sup>562 F. Supp. 475 (N.D. Ga. 1983).

<sup>761</sup>*Id.* at 479.

partly funded by the government at least by mid-1975. Plaintiffs' claims were filed in late 1977 and 1978, and were held time barred. The court found that plaintiffs' claims in the instant case accrued in the 1960s, because plaintiffs knew then their "injuries" were from ingestion of LSD, and that they were aware of the government's involvement in the study. The court rejected plaintiffs' argument that their claims did not accrue until they learned which agency of the government (i.e., the CIA) was behind the study.

Finally, *Hitchmon v. United States*<sup>762</sup> was a wrongful arrest/imprisonment case. Plaintiffs were arrested by DEA officers, tried, and convicted of assault on the federal officers. Eventually their convictions were reversed, and the United States thereafter, for reasons not stated, dismissed the indictments. Plaintiffs had served two and one-half years of four-year sentences. The district court rejected plaintiffs' argument that their claims accrued when their indictments were dismissed, holding that the cause of action accrued when they were arrested. The court cited *Kubrick* as the "seminal case" in the FTCA medical malpractice area, holding the claim "accrues where [plaintiff] knows, or reasonably should know of the existence and cause of his injury. Knowledge of the fact of injury is the focal point; whether the plaintiff is aware of a legally compensable harm is irrelevant."<sup>763</sup>

The court did not specifically say it was adopting the reasoning of *Kubrick*, but it was clearly influenced by this "seminal case." If one fits the facts to the *Kubrick* rule, it appears that plaintiffs were clearly aware of their "injury" (arrest/imprisonment) and who caused it (the government) at the time of their arrest. It may be best not to dwell on the practical difficulties of the application of such a rule in a false imprisonment case. If in this case plaintiffs had filed their claims within two years of their arrests, their causes of action would have been preserved, but because they were still serving sentences for crimes they had been convicted of, doubtless they would have failed on the merits.

## XV. CONCLUSION

It is worthwhile to observe two consequences of the development of the law of statute of limitations in FTCA medical malpractice cases.

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<sup>762</sup>585 F. Supp. 256 (S.D. Fla. 1984).

<sup>763</sup>*Id.* at 261.

First, the discovery doctrines (of "injury," and of "cause of injury") have, not surprisingly, evolved considerably beyond medical malpractice cases. In only two circuits have the federal courts expressed real reluctance to extend the *Kubrick* doctrine beyond FTCA medical malpractice, and *Kubrick's* influence has been felt throughout the entire body of the law, in state decisions as well as federal.<sup>764</sup> *Kubrick's* influence has also been indirect, through its progeny, even where that case itself is not cited. For example, *Buckley v. American Honda Motor Co., Inc.*<sup>765</sup> was a products liability case filed after an automobile accident. The accident, a frontal collision, occurred on March 2, 1980 and the 1979 Honda Civic driver was seriously injured. Plaintiff sued American Honda on March 2, 1984, and sought to avoid the applicable three-year Massachusetts statute of limitations by arguing that her cause of action did not "accrue" until the National Highway Traffic Safety Administration (NHTSA) published a report in November 1981 finding that 1981 Honda Civics' performance in frontal crashes was significantly improved over earlier models. She claimed there was "no way she could have reasonably discovered the causal relationship between her injuries and the design deficiencies of her car prior to publication of the November 1981 report."<sup>766</sup>

The First Circuit upheld the district court's dismissal of the action, but thoughtfully considered whether the case was governed by a statute of limitations for "inherently unknowable wrongs."<sup>767</sup> The First Circuit finally concluded that crashworthiness theories were well enough known at the time of the accident, and

the circumstances surrounding the crash, i.e. the low speed, the extent of her car's damage . . . [etc.] . . . and the state of the law at the time were sufficient indicia to place her on notice that design deficiencies were a contributing cause of her injuries and to trigger an inquiry into defendant's potential liability.<sup>768</sup>

Accordingly, the First Circuit found the cause of action accrued at the time of injury, but not without going through a *Kubrick*-

<sup>764</sup>A survey of *Kubrick's* influence in state court decisions is beyond the scope of this article, but a glance at Shepard's United States Citations will reveal the extent to which the case has been cited and followed.

<sup>765</sup>780 F.2d 1 (1st Cir. 1985).

<sup>766</sup>*Id.* at 2.

<sup>767</sup>*Id.* at 1.

<sup>768</sup>*Id.* at 3.

type analysis of opportunity for knowledge of injury and cause. *Kubrick* may well be a precursor to a gradual, general change in approach to statute of limitations analysis.

The second observation is a consequence of the first: as the issues to be determined become more complex, outcomes become more uncertain and courts seek to avoid the issue if they can. An example of this is *Wilson v. United States*.<sup>769</sup> In that case, a tankerman was injured working on a ship, and was treated at a Public Health Service hospital for nerve problems in his right hand and arm. On April 30, 1979, surgery was performed transposing the ulnar nerve; he initially improved but later got worse. A second operation was performed on November 19, 1980, which did not help, and plaintiff's condition grew "remarkably" worse,<sup>770</sup> including ulnar nerve palsy and clawing of the right hand. Plaintiff filed suit on September 7, 1982 (the opinion does not indicate whether an administrative claim was filed), alleging negligence in both operations. After a full-blown trial, the court examined the merits and found no malpractice in the first operation, but did find malpractice in the second operation.

In a footnote, the court acknowledged that the government had argued that the claim for the first operation was time barred, while the plaintiff "urge[d] the court to adopt a continuous treatment rule."<sup>771</sup> The court then wrote: "In light of my disposition of this claim, I need not reach this issue."<sup>772</sup>

The district court has doubtless developed considerable expertise in finding facts, and may well feel more comfortable in finding facts than deciding knotty questions of law. Nevertheless, when the timely filing of a claim is a prerequisite to the federal court's exercising *jurisdiction*,<sup>773</sup> then it would appear that the timeliness of a claim *must* be considered first. If the claim for the first operation was not timely, the district court simply had no jurisdiction to even consider the merits of that claim, and if, as on its face it appears, the claim was not timely, the court surely would have been spared considerable testimony and time both during the trial and afterward. Yet, the district court opted for what it evidently considered the easier way out, and the govern-

<sup>769</sup>613 F. Supp. 1322 (E.D.N.Y. 1985).

<sup>770</sup>*Id.* at 1324.

<sup>771</sup>*Id.* at 1326 n.1.

<sup>772</sup>*Id.* at 1326.

<sup>773</sup>See *Quinton v. United States*, 304 F.2d 234, 242 (5th Cir. 1962) (concurring opinion). For a recent restatement and discussion of this rule, see *Crawford v. United States*, 796 F.2d 924, 927-28 (7th Cir. 1986).

ment probably will not be appealing that portion of the ruling in any event.<sup>774</sup>

Determination of timeliness of a claim traditionally has been a preliminary, if sometimes complicated, step. For a court to put the cart before the horse (particularly if it may be jurisdictionally prohibited from doing so) because it is simpler to find the cart empty anyway is a telling observation on the state of FTCA medical malpractice statute of limitations law. The traditional focus of limitations periods, i.e., their certainty, has been totally abandoned in this area of the law, policy decisions having been made that it is simply unfair to hold to rigid application of the "general rule" in medical malpractice cases. As we have seen, similar analysis has begun to crop up even in different areas of the law.

This article has attempted to present and analyze the current state of the law, as put forth by the Supreme Court and the courts of appeal and district courts in the different circuits. There is little doubt that statute of limitations analysis in FTCA medical malpractice and other contexts will continue to evolve, but the foundations of future decisions in this area of the law have already been set in the cases discussed above.

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<sup>774</sup>An even more striking example is *Sweet v. United States*, 687 F.2d 246 (8th Cir. 1982). Sweet appealed the dismissal of his FTCA action, raising three claims of error: (1) incorrect statute of limitations analysis, (2) error in finding no cause of action under the FTCA, and (3) error in finding Sweet failed to prove the government liable. The Eighth Circuit wrote "Sweet's legal arguments in support of contentions (1) and (2) present difficult questions. *We do not reach them*, however, because the district court's findings" of no government liability were not "clearly erroneous." *Id.* at 248 (emphasis added); see *supra* text accompanying notes 538-43 for a discussion of this case.



# THE PROBLEM OF JURISDICTION OVER CIVILIANS ACCOMPANYING THE FORCES OVERSEAS— STILL WITH US

by Captain Gregory A. McClelland\*

## I. THE PROBLEM: THE JURISDICTIONAL VOID

### A. THE SETTING

Could a civilian United States citizen accompanying our armed forces overseas murder a United States service member and escape trial and punishment for the crime? The Supreme Court's 1957 decision in *Reid v. Covert*<sup>1</sup> created such a possibility. *Covert* resolved two cases, both involving women who had murdered their service member husbands overseas. The previous term, the Court had decided in both cases (these original 1956 decisions are hereinafter jointly referred to as the *Krueger* cases) that military courts *could* exercise criminal jurisdiction over military dependents for crimes they committed while accompanying the forces overseas. Now, in an unusual rehearing of both cases, the Court reversed itself.

In one of the *Krueger* cases,<sup>2</sup> Mrs. Dorothy Krueger Smith was convicted by general court-martial in Tokyo, Japan, for the

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\*Judge Advocate General's Corps, United States Army. Currently assigned as Instructor, Department of Law, United States Military Academy, West Point, New York. Formerly assigned as Chief, Military Affairs, and Chief, International Law, 193d Infantry Brigade (Panama), 1982 to 1985; Chief, Legal Assistance, and Trial Counsel, Office of the Staff Judge Advocate, Fort Dix, New Jersey, 1980 to 1981; enlisted service, 3/35th Field Artillery, Wertheim, Federal Republic of Germany, 1972 to 1974. B.A., Dartmouth College, 1972; J.D., Suffolk University, 1979. Graduate, 34th Judge Advocate Officer Graduate Course, 1986; Graduate, 92d Judge Advocate Officer Basic Course, 1980. Author of *Assessing Damages in Churning Cases: An Argument for Loss-of-Bargain Recovery*, 9 *The Advocate* (Suffolk University Law Journal) No. 1, at 18 (1977); *Denial of Delay: A Limitation on the Right to Civilian Counsel in the Military*, *The Army Lawyer*, Jan. 1984, at 13; *Article 139: A Remedy for Victims of Soldier Misconduct*, *The Army Lawyer*, Aug. 1985, at 18. Member of the bars of the Commonwealth of Massachusetts, the United States Court of Military Appeals, the United States Army Court of Military Review, and the United States Supreme Court. This article was originally submitted in satisfaction of the thesis elective of the 34th Judge Advocate Officer Graduate Course.

<sup>1</sup>354 U.S. 1 (1957).

<sup>2</sup>*Kinsella v. Krueger*, 351 U.S. 470 (1956).

premeditated murder of her husband, a colonel in the United States Army. Court-martial jurisdiction over civilians in Japan was based on article 2(11), Uniform Code of Military Justice (UCMJ),<sup>3</sup> and an administrative agreement with Japan<sup>4</sup> allowing United States service courts to try offenses against the laws of Japan committed by members of the United States armed forces, civilian component, and their dependents. While Mrs. Smith was serving her life sentence in West Virginia, her father filed a habeas corpus action in her behalf, and in 1956 the Supreme Court granted review of the federal district court's discharge of the writ.

The other *Krueger* case<sup>5</sup> concerned the court-martial conviction of Mrs. Clarice Covert for the murder of her Air Force sergeant husband at a United States air base in England. Under the United States of America Visiting Forces Act of 1942,<sup>6</sup> Mrs. Covert's case was released by British authorities for trial by court-martial upon certification by United States authorities that she was subject to American military law. The basis of her amenability to military law, as in Mrs. Smith's case, was article 2(11) UCMJ. After Mrs. Covert's conviction, she was returned to the United States to serve her life sentence. The Court of Military Appeals ordered a retrial based on errors in the adjudication of her insanity defense, and while awaiting retrial she filed a habeas corpus petition. The Supreme Court granted a government request for review of the district court's release of Mrs. Covert from Air Force custody.

The decision in *Covert*, the Supreme Court's 1957 consolidated rehearing of both cases, was a split one. Four Justices signed the lead opinion, which Justice Black wrote. Justices Frankfurter and Harlan each wrote concurring opinions, and Justices Clark and Burton joined in a dissenting opinion. The Black opinion started by emphasizing that United States citizens retain all their constitutional rights when they go abroad. Primary among these rights, according to Justice Black, are the rights to trial and indictment by jury. The opinion stated that *In re Ross*<sup>7</sup> and the

<sup>3</sup>Uniform Code of Military Justice art. 2(11), 64 Stat. 108, 109 (1950) (current version at 10 U.S.C. § 802 (1982)). This article made all persons accompanying the forces outside the United States subject to the UCMJ if authorized by the host country (pursuant to treaty or agreement).

<sup>4</sup>Administrative Agreement with Japan, February 28, 1952, art. XVII, 3 U.S.T. (Part 3) 3342, T.I.A.S. 2492.

<sup>5</sup>*Reid v. Covert*, 351 U.S. 487 (1956).

<sup>6</sup>5 & 6 Geo. 6, c. 31.

<sup>7</sup>140 U.S. 453 (1891).

*Insular Cases*,<sup>8</sup> authorities on which the Court relied in the *Krueger* cases to justify curtailment of constitutional rights in trials of Americans overseas, were anachronisms, and their application should be limited to their facts. Because court-martial proceedings do not offer trial and indictment by jury and other rights, Justice Black felt court-martial jurisdiction must be limited.

Justice Black acknowledged that Congress' power to "make Rules for the Government and Regulation of the land and naval Forces"<sup>9</sup> allows Congress to authorize trial of service members without certain constitutional safeguards; however, he rejected the government's argument that the term "land and naval forces" includes dependents of service members. He also stated that Congress' power to take all acts "necessary and proper"<sup>10</sup> to regulate the forces does not allow it to extend military jurisdiction beyond the "land and naval forces" to military dependents. According to Justice Black, the limited scope of the term "land and naval forces," coupled with the affirmative grants of rights in article III, section 2 and the fifth and sixth amendments to the Constitution, which limit the government's power, make "military trial of civilians . . . inconsistent with both the 'letter and spirit of the constitution.'" <sup>11</sup>

After summarizing the history of British and American experiences with military authority, Justice Black harshly criticized military justice and military law. Calling the former "a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties,"<sup>12</sup> he stated, "[T]here has always been less emphasis in the military on protecting the rights of the individual than . . . in civilian courts."<sup>13</sup> He noted that, because courts-martial often consist of officers subservient to the convening authority, they are susceptible to command influence. But "[l]ooming far above all other deficiencies of the military trial, of course, is the absence of trial by jury before an independent judge after an indictment by a grand jury."<sup>14</sup>

Military law "is, in many respects, harsh law which is fre-

<sup>8</sup>*Balzac v. Puerto Rico*, 254 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Downes v. Bidwell*, 182 U.S. 244 (1901).

<sup>9</sup>U.S. Const. art. I, § 8, cl. 14.

<sup>10</sup>*Id.*

<sup>11</sup>*Covert*, 354 U.S. at 22.

<sup>12</sup>*Id.* at 36.

<sup>13</sup>*Id.*

<sup>14</sup>*Id.* at 37.

quently cast in very sweeping and vague terms. It emphasizes the iron hand of discipline more than it does the even scales of justice."<sup>15</sup> Justice Black noted that the President's power to create substantive as well as procedural military law unites legislative, executive, and judicial power over the military in one branch, which runs counter to the principle of separation of powers. The President or Congress, stated Justice Black, has arbitrary power to change military law at any time and make it even less congruous with constitutional guarantees.<sup>16</sup>

Justice Black's opinion never states a holding in succinct form. It does make clear that the result—release of the civilian defendants—was justified by the need to stop the encroachment of military authority over civilians and reaffirm the extraterritorial validity of Bill of Rights guarantees.

Justice Frankfurter was unwilling to decide the cases by simply excluding military dependents from the definition of "land and naval forces." He cited the language from the fifth amendment granting a right to grand jury indictment "except in cases arising in the land or naval forces,"<sup>17</sup> suggesting that cases involving civilians accompanying the forces might fairly be said to come within those words. The significance of the necessary and proper clause, he said, is to enable Congress, "in the exercise of a power specifically granted to it, . . . [to] sweep in what may be necessary to make effective the explicitly worded power."<sup>18</sup> Thus, anything (such as control of accompanying civilians) reasonably within Congress' power to "make Rules for the Government and Regulation of the land and naval Forces" is arguably constitutional.

"The issue in these cases involves regard for considerations not dissimilar to those involved in a determination under the Due Process Clause."<sup>19</sup> From this point of departure, Justice Frankfurter proceeded to balance government necessity against the individual rights of the defendants. He carefully limited the scope of his opinion to trial of civilian dependents in capital cases in peacetime. In capital cases, he said, the balance must be weighted in favor of individual rights. On the government side of the scale, he found particularly significant the small number of capital cases among all civilians accompanying the forces overseas and the

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<sup>15</sup>*Id.* at 38.

<sup>16</sup>*Id.* at 37-39.

<sup>17</sup>U.S. Const. amend. V.

<sup>18</sup>*Covert*, 354 U.S. at 43.

<sup>19</sup>*Id.* at 44.

speculative nature of the consequences of the absence of military jurisdiction over dependents.<sup>20</sup> He concluded that "in capital cases the exercise of court-martial jurisdiction over civilian dependents in time of peace cannot be justified by Article I, considered in connection with the specific protections of Article III and the Fifth and Sixth Amendments."<sup>21</sup>

Justice Harlan was the only member of the *Covert* majority who had also voted with the majority in the *Krueger* cases to sustain court-martial jurisdiction over the civilian dependents.<sup>22</sup> He explained his defection by stating that he now believed the *Krueger* Court had erred in failing to base its conclusion that Congress could legislate court-martial jurisdiction over civilians on an express constitutional power.<sup>23</sup> The *Krueger* Court had also erred, he felt, in reading *Ross* and the *Insular Cases* to say that constitutional safeguards do not follow American citizens overseas.

Justice Harlan went on to say that the only way to justify Congress' authorization of court-martial jurisdiction over civilians is to find that it is a proper exercise of the article I power to regulate the armed forces. In making this finding, the Court could also find that the necessary and proper clause expands the article I power. Here, Justice Harlan disagreed with Justice Black. He also disagreed with Justice Black's belief that because of the framers' fears of the growth of military power, Congress' power to legislate military authority should be narrowly construed. "[W]hat they [the framers] feared was a military branch unchecked by the legislature, and susceptible of use by an arbitrary executive power."<sup>24</sup>

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<sup>20</sup>"The Government's own figures for the Army show that the total number of civilians (all civilians 'serving with, employed by, or accompanying the armed forces' overseas and not merely civilian dependents) for whom general courts-martial for alleged murder were deemed advisable was only 13 in the 7 fiscal years, 1950-1956." *Id.* at 47-48. "[T]his Court cannot speculate that any given nation would be unwilling to grant . . . extraterritorial jurisdiction over civilian dependents . . . [E]ven if such were the case, [those dependents] would . . . merely be in the same position as . . . other United States citizens who are subject to the laws of foreign nations when residing there." *Id.* at 48-49.

<sup>21</sup>*Id.* at 49.

<sup>22</sup>Of the other members of the *Krueger* majority, Justices Reed and Minton had retired, and Justices Clark and Burton were now in the minority.

<sup>23</sup>"The underlying premise of the June opinion, . . . is that under the Constitution the mere absence of a prohibition against an asserted power, plus the abstract reasonableness of its use, is enough . . . I think this is erroneous. . . . Congress has only such powers as are expressly granted or . . . implied." *Covert*, 354 U.S. at 66. "Those trials by court-martial were originally sustained, as it were, *in vacuo*." F. Wiener, *Civilians Under Military Justice* app. IV, at 309 (1967).

<sup>24</sup>*Covert*, 354 U.S. at 68 (emphasis in original).

Justice Harlan conducted his analysis in two steps. First, he asked whether there was "a rational connection between the trial of these army wives by court-martial and the power of Congress to make rules for the governance of the land and naval forces."<sup>25</sup> He decided there was because he thought the government had made a strong showing that control of dependents was necessary to the proper and effective functioning of our overseas installations. Second, he asked if the article I power could stand against the rights guaranteed by the Constitution to the defendants as United States citizens. Here he stated that although citizens do not lose their constitutional rights when they go overseas, *Ross* and the *Insular Cases* do stand for the proposition that citizens abroad are not entitled to all constitutional guarantees in observance of specific rights would be "impracticable and anomalous."<sup>26</sup> In the case of capital charges, however, Justice Harlan felt article I must bow to individual rights.

Justice Clark wrote a strongly-worded dissent. Lamenting the release of the defendants "though the evidence shows that they brutally killed their husbands...while stationed in quarters furnished by our armed forces,"<sup>27</sup> Justice Clark accused the majority of overturning the "old and respected" precedent of *Ross* as well as the *Krueger* cases, and of offering neither a majority opinion nor authoritative guidance to Congress and the Executive in their place. He had stated in the *Krueger* cases that military courts offer basic rights, so they are acceptable in the absence of article III courts.<sup>28</sup> Reaffirming his and Justice Burton's adherence to the bases for the decision in the *Krueger* cases, he stated that the Court had upheld military jurisdiction over dependents of service members overseas in *Madsen v. Kinsella*.<sup>29</sup> Although he admitted that *Madsen* dealt with military jurisdiction in occupied foreign territory (Germany, 1949), and therefore was justifiable as an exercise of Congress' war powers, he insisted that there was no factual distinction between that situation and that of Dorothy Krueger Smith (Japan, 1952).

In the rest of his opinion, Justice Clark speculated about the possible consequences of the Court's decision in *Covert*. Taking away from the military the power to deal with drug offenses, contraband, and other crimes committed by civilians in the

<sup>25</sup>*Id.* at 70.

<sup>26</sup>*Id.* at 74.

<sup>27</sup>*Id.* at 78.

<sup>28</sup>*Krueger*, 351 U.S. at 478-79

<sup>29</sup>343 U.S. 341 (1952).

"tightly knit" overseas military communities would impair morale and combat readiness among our troops. Not only would it leave civilians free (in the absence of prosecution by foreign authorities) to sell drugs to troops, for instance, it would also create a demoralizing double standard in the punishment of crime. If Congress decided on the alternative of trying civilians in article III courts overseas, it would have to contend with the problem of constituting juries in a foreign country. Also, such an enterprise would require the consent of the host country. Trial in the United States would waste military time and money transporting parties, witnesses, and evidence from overseas, and, under international law, foreign witnesses could not be compelled to attend. Leaving civilian offenders to the jurisdiction of foreign courts could result in no trial (if the host waived jurisdiction) or in exposing United States citizens to "the widely varying standards of justice in foreign courts throughout the world."<sup>30</sup>

Because of the lack of consensus in the *Covert* decision, the "bottom line" holding was narrow. Civilian dependents of members of the armed forces overseas cannot constitutionally be tried by a court-martial in peacetime for capital offenses committed abroad. Other issues involving jurisdiction over civilians accompanying the forces overseas remained unresolved. Decisions negating military jurisdiction over dependents in noncapital cases,<sup>31</sup> and jurisdiction over civilian employees of the forces for capital<sup>32</sup> and noncapital<sup>33</sup> offenses followed fast on the heels of *Covert*. The issue of the military jurisdiction over civilians in wartime remains unresolved. This issue arose most recently in the case of a civilian employee of a private firm that was under contract to provide services to United States forces engaged in combat in the Republic of Vietnam (*United States v. Averette*).<sup>34</sup> The employee was charged with attempted larceny of military property while working in Vietnam, and was tried and convicted by court-martial. The Court of Military Appeals held that the military had no jurisdiction to try the employee because Congress had not formally declared war in the Vietnam conflict; thus no official state of war giving rise to military jurisdiction over civilians existed. The court refused to speculate, in light of *Covert*, whether military jurisdiction over civilians could exist even in time of formally declared war. The Army Court of Military Review

<sup>30</sup>*Covert*, 354 U.S. at 89.

<sup>31</sup>*Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960).

<sup>32</sup>*Grisham v. Hagan*, 361 U.S. 278 (1960).

<sup>33</sup>*McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960).

<sup>34</sup>19 C.M.A. 363, 41 C.M.R. 363 (1970).

reaffirmed this position in finding no military jurisdiction to try another civilian government contractor employee charged with shooting three United States soldiers in Vietnam (*United States v. Grossman*).<sup>35</sup> In this second case, the civilian was released despite "the fact that [he would] probably never be retried for the offenses."<sup>36</sup>

The *Covert* decision, with its "fruit salad" of views on military jurisdiction, raised at least as many questions as it answered. This article will survey and criticize some of the many scholarly articles that have been written about *Covert* and its consequences in the nearly thirty years since the decision was handed down. It will also try to identify the origins and true nature of our nation's attitudes on military jurisdiction and its role in a democratic, civilian society. Specifically, which view is more accurate, Justice Black's (military trial of civilians is inconsistent with our common law tradition) or Justice Clark's (military trial of civilians can be justified by necessity)? Also, what are the consequences of *Covert*? To what extent have Justice Clark's dire predictions come true? The problems created by *Covert* remain unresolved—Congress has taken no action to extend United States jurisdiction over civilians accompanying the forces overseas. This article will venture a guess as to why this is so and will analyze the potential solutions to the problem. Finally, the author will propose a solution.

### ***B. MILITARY JURISDICTION OVER CIVILIANS: ORIGINS OF DISTRUST AND SHIFTING PARAMETERS***

Justice Black's criticism of military law in *Covert* is a refrain often heard in common law jurisdictions.<sup>37</sup> Why does this distrust exist? Which opinion of military law is more representative of our common law tradition—Justice Black's or Justice Clark's? Can the answers have an impact on our solution to the absence of United States jurisdiction over civilians accompanying our forces abroad, or did *Covert* moot this issue?

A quick answer to the first question is that the distrust arises

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<sup>35</sup>42 C.M.R. 529 (A.C.M.R. 1970).

<sup>36</sup>*Id.* at 530.

<sup>37</sup>"[I]n Truth and Reality [martial law] is not a Law, but something indulged, rather than allowed as a Law. The necessity of Government, Order and Discipline, in an Army, is that only which can give those laws a Countenance. . . ." M. Hale, *History and Analysis of the Common Law of England* 40, 41 (London 1713). Note how the term "martial law" is used here to describe the law governing troops.



from the tension between the democratic values of our liberal society and the authoritarian ones of the military.<sup>38</sup> This author feels that the explanation goes deeper—to the common law history we share with Great Britain. Although early common law institutions probably have no direct impact on present day ones, our present attitudes toward military law were formed by historical experiences.

In discussing military jurisdiction, it is necessary to define the various terms associated with military authority. The term "martial law" often has been used indiscriminately<sup>39</sup> throughout history. This has been a source of much misunderstanding regarding military law. Charles Fairman distinguished five types of military jurisdiction connoted by the term "martial law":

1. Marshal law, or the jurisdiction of the court of the constable and marshal, which extended to military and civil matters;

2. The suspension of the laws of the realm by the sovereign for political reasons (*i.e.*, to control persons in situations unrelated to military operations, as occurred during the Tudor and early Stuart dynasties);

3. Military law, or law for the government of the armed forces (the law which the *Covert* majority refused to extend over civilians and which is the subject of this article);

4. Military occupation government, or the government imposed on a nation by the occupying forces of a belligerent nation (the situation in the *Madsen*<sup>40</sup> case, which Justice Clark tried to analogize to the *Covert* facts, and the current situation in Berlin, where the Soviet Union, France, Britain, and the United States each rules its sector of the city as an occupying power);

5. Martial law in its modern sense, or jurisdiction enforced by troops in times of extreme peril, "insurrection or invasion, or of civil or foreign war, within districts or localities whose ordinary law is no longer adequate to secure public safety and private

<sup>38</sup>"First, a gulf appears between the values held by the professional military and those implicit in the liberalism which has dominated the nation, in one form or another, from the beginning. Appropriately reflecting their grim business, the military attach greater weight to prompt and unquestioning obedience of commands, to the cohesion and safety of the group." Girard, *The Constitution and Court-Martial of Civilians Accompanying the Armed Forces—A Preliminary Analysis*, 13 Stan. L. Rev. 461 (1961).

<sup>39</sup>C. Fairman, *The Law of Martial Rule* 19-21, 28-29, 39-40 (1943); see also *supra* note 37.

<sup>40</sup>343 U.S. 341 (1952).

rights."<sup>41</sup> This jurisdiction is enforced in the domestic territory of the ruling military forces. Fairman preferred to refer to it as "martial rule."<sup>42</sup>

One other term—"military jurisdiction" or "the military jurisdiction"—will be used in this article. It will refer to the extent of the power of military courts and commissions to adjudicate disputes and render and enforce judgments over persons and criminal offenses.

### 1. *The British Experience.*

In medieval England, several systems of law existed side-by-side, each represented by its own court. Among these legal systems were common law, equity, canon law (represented by ecclesiastical courts), admiralty, and what was then called marshal law (represented by the court of the constable and marshal). This last court—the ancestor of military courts and commissions—had both a civil and a criminal jurisdiction, which encompassed:

- (1) Crimes committed abroad. (2) Especially the transgressions of soldiers against the articles of war promulgated on the occasion of expeditions to the Continent.
- (3) Contracts growing out of war beyond the realm.
- (4) Matters relating to war within the realm. (5) Injuries to honor and encroachments in matters of armour and precedence. Within its proper sphere the court of the constable and marshal exercised a jurisdiction of which the common law courts would take notice, and not until this jurisdiction was abused did they interfere by writ of prohibition.<sup>43</sup>

As the passage suggests, rivalries developed among the various courts involving disputes over jurisdiction. The result, for the court of the constable and marshal, was a series of parliamentary acts between 1384 and 1439 limiting its jurisdiction. By 1640, the court had stopped functioning, and existed only in name. The necessity of maintaining jurisdiction over troops remained, especially when they were overseas or engaged in warfare, so the military jurisdiction survived the demise of its original forum.<sup>44</sup>

Meanwhile, military jurisdiction had gone through a period of expansion, which led to abuses. During the domestic conflict

<sup>41</sup>*Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 142 (1866).

<sup>42</sup>C. Fairman, *supra* note 39, at 28-29.

<sup>43</sup>*Id.* at 3-4.

<sup>44</sup>*Id.* at 4-6.

known as the Wars of the Roses (1455-1485) there were "very terrible powers of summary justice granted the constable."<sup>45</sup> The Tudors continued the expansion, using military jurisdiction "as an extraordinary mode of punishing civilians at pleasure,"<sup>46</sup> and against rebels. The Stuarts followed the practice of granting martial law commissions to control English troops camped on home soil and "other dissolute persons joining with them"<sup>47</sup> in creating disorders. The "other dissolute persons" were civilians, and the reach of these commissions caused a backlash which resulted in the Petition of Right (1628).

The Petition of Right was an enigmatic document whose true import is still debated. It was forced upon Charles I by a Parliament upset by the tyranny of the military commissions. It stated in pertinent part (after reciting that the martial law commissions had resulted in soldiers and other persons being adjudged and put to death in violation with Magna Carta and procedures established in the law of the land):

Sec. X. . . . that the aforesaid Commissions, for proceeding by Martial Law, may be revoked and annulled; and that hereafter no Commissions of like Nature may issue forth to any person or Persons whatsoever to be executed as aforesaid, lest by Colour of them any of your Majesty's Subjects be destroyed, or put to death contrary to the Laws and Franchise of the Land.<sup>48</sup>

This language has been interpreted in at least three ways. In one view, it forbade the monarch to govern even troops by means of military commissions in peacetime in areas where common law courts were available. The rationale behind this argument was that the mood in Parliament at the time was one of apprehension and defensiveness with regard to royal authority, so the Petition was intended to be given broad application. Because the document was a reaction to commissions appointed to control both civilians and troops on English soil, and because its language was so general ("lest . . . any of your Subjects be destroyed"), it must apply to soldiers as well as civilians. Only in wartime could soldiers be governed by "martial law," and civilians never could be.<sup>49</sup>

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<sup>45</sup>F.W. Maitland, *The Constitutional History of England* 266 (1928).

<sup>46</sup>C. Fairman, *supra* note 39, at 7.

<sup>47</sup>*Id.* at 8 (citing Rymer's *Foedera* XVII, 647; XVIII, 254, 751, 763).

<sup>48</sup>Petition of Right, 1628, 3 Car. 1, ch. 1.

<sup>49</sup>C. Fairman, *supra* note 39, at 11.

Another view held that neither the circumstances nor the language of the Petition addressed wartime jurisdiction or jurisdiction over soldiers. The commissions had been appointed in peacetime and the Petition had been a reaction to their jurisdiction over civilians. The application of the document must be limited to the circumstances that gave rise to it. The crown could provide for the government of its troops in all circumstances but could not use military commissions to rule civilians in peacetime.<sup>50</sup> A third view held that the language of the Petition could be interpreted to justify the crown's use of military commissions to control civilians at royal discretion. If the monarch declared that a state of war existed, the citizenry could be subjected to military jurisdiction.<sup>51</sup>

In 1689, Parliament made an attempt to define the military jurisdiction in the first Mutiny Act.<sup>52</sup> The Mutiny Acts were annual parliamentary enactments which, in effect, renewed the army's license to exist. Unlike the navy, the army had no permanent status because of the popular fear generated by its use by Cromwell and his predecessors to suppress opposition.<sup>53</sup> Soldiers were considered to be under military jurisdiction "in time of war" (in England, when the civil courts were closed or unavailable) and when "on active service" (overseas and in the area of military operations).<sup>54</sup> Of the various groups of civilians that accompanied the army, the seventeenth and eighteenth century Mutiny Acts specifically included only "Officers and Persons employed in the Trains of Artillery" within their terms.<sup>55</sup> At times, other civilians accompanying the army on active service were tried by court-martial, but in general the Acts narrowly construed military jurisdiction.<sup>56</sup>

If the Mutiny Acts had been the only source of military jurisdiction, much of the controversy surrounding the authority of military courts over civilians might have been avoided. Unfortu-

<sup>50</sup>*Id.* at 13-18.

<sup>51</sup>*Id.* at 13.

<sup>52</sup>1 W. & M. c. 5.

<sup>53</sup>F. Wiener, *supra* note 23, at 235-37.

<sup>54</sup>*Id.* at 14.

<sup>55</sup>*Id.* at 11. Three main classes of civilians accompanied the British Army from the seventeenth through the nineteenth centuries. They were: *Retainers to the camp*: "officers' servants, volunteers (i.e., young gentlemen awaiting commissions), and women and children;" *Sutlers*: "precursors of nonappropriated fund instrumentalities and the like, who ministered to soldiers' comforts—for a price; the commodity primarily supplied was liquor;" *Civilian employees of the military departments of the army*: many of these are now military branches, such as artillery, finance, and quartermaster. *Id.* at 7.

<sup>56</sup>*Id.* at 12, 13.

nately, the Mutiny Acts authorized the crown to create Articles of War—executive directives meant to implement the terms of the Act. Although each set of Articles was supposed to mirror the Act which had given it life, the Articles soon acquired an independent status. The result was a bifurcated system of military law in England until 1879, when the Articles and the Acts were finally consolidated.

The Articles of War were more liberal than the Mutiny Acts in defining military jurisdiction. By statute, no British soldier could be tried by court-martial in England for murder or other common-law felony after 1716,<sup>57</sup> and the Articles of War were brought into line with this. However, the 1722 Articles contained a provision, which had no basis in the Mutiny Acts, allowing court-martial of soldiers for felonies committed "in our Garrison of Gibraltar, Island of Minorca, Forts of Placentia and Annapolis Royal, . . . or in any other Place beyond the Seas, . . . where there is no form of Our Civil Judicature in Force."<sup>58</sup> This provision was expanded in the 1749 Articles:

[T]he Generals or Governors or Commanders respectively, [of the garrisons and forts named] are to appoint General Courts-Martial to be held, who are to try all Persons guilty of wilful Murder, Theft, Robbery, Rapes, Coining, or Clipping the Coin of Great Britain, or of a foreign Coin, current in the Country or Garrison, and all other Capital Crimes or other Offenses and punish offenders according to the Known Laws of the land, or as the Nature of their Crimes shall deserve.<sup>59</sup>

The words "all Persons" were held by some to extend military jurisdiction in the locations named to civilians accompanying the forces. Another school of thought adhered to the principle that no classes of persons not named in the Mutiny Acts could be legally subjected to military jurisdiction.<sup>60</sup>

The Articles of 1742, meanwhile, had added another provision, which again had no basis in the Mutiny Act. "All Sutlers and Retainers to a Camp and all Persons whatsoever Serving with Our Armys in the Field, tho' no enlisted Soldiers, are to be Subject to Orders, according to the Rules and Discipline of War."<sup>61</sup> Again,

<sup>57</sup>*Id.* at 14.

<sup>58</sup>British Articles of War of 1722, art. 45.

<sup>59</sup>British Articles of War of 1749, § XX, art. 2.

<sup>60</sup>F. Wiener, *supra* note 23, at 23-24.

<sup>61</sup>British Articles of War of 1742, § XIV, art. 28.

there were two interpretations of the language. One held that "Subject to Orders" meant subject to military (thus court-martial) jurisdiction. The other continued to refuse to extend military jurisdiction to persons not named in the Mutiny Acts. This last provision was in force at the time of the American Revolution, was copied verbatim into the first American Articles of War, and remained there until 1917.<sup>62</sup>

The split in authority and interpretation led to a hodge-podge of results in the field. In Gibraltar, the law for soldiers and civilians alike was administered for a number of years by the military governor and a quasi-military court consisting of an army officer and two civilians.<sup>63</sup> The British forces in India had their own Mutiny Act, with a provision which extended military jurisdiction over "licensed Sutlers and Followers." Soldiers' wives were tried by court-martial under this provision until 1878.<sup>64</sup> In North America, dependents and other civilians accompanying the forces were often court-martialed in areas of military operations or occupation.<sup>65</sup> The same occurred during military operations on the European continent and Ireland.<sup>66</sup> On the other hand, there were many instances where military jurisdiction was checked and the strict line of the Mutiny Acts observed. In England, no person not named in the Mutiny Act was tried by court-martial after 1745.<sup>67</sup>

From this brief survey, we can conclude that from 1689 through 1878, British military jurisdiction was exercised over civilians primarily overseas, and even there, mainly in zones of military operations or occupation. In 1879, Britain's bifurcated system of military law ended—the Mutiny Act and the Articles of War were consolidated under the Army Discipline and Regulation Act.<sup>68</sup> This was later amended and reenacted as the Army Act of 1881.<sup>69</sup> Under these laws, civilians were amenable to military jurisdiction only when they accompanied the forces "on active service," which was defined as follows:

[W]henever [a person accompanying the forces] is attached to or forms part of a force which is engaged in

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<sup>62</sup>F. Wiener, *supra* note 23, at 22-23.

<sup>63</sup>*Id.* at 24-26.

<sup>64</sup>*Id.* at 213-15.

<sup>65</sup>*Id.* chs. II-VI.

<sup>66</sup>*Id.* at 12, 33-34, and ch. VIII.

<sup>67</sup>*Id.* at 21.

<sup>68</sup>Army Discipline and Regulation Act, 1879, 42 & 43 Vict., ch. 33 [hereinafter ADRA].

<sup>69</sup>44 & 45 Vict., ch. 58 [hereinafter AA 1881].

operations against an enemy or is engaged in military operations in a country or place wholly or partly occupied by an enemy, or is in military occupation of any foreign country.<sup>70</sup>

Although "military occupation" did not necessarily mean hostile occupation,<sup>71</sup> this provision marked the period of the narrowest scope of military jurisdiction in English history.

The pendulum swung back in 1955. The Army Act of that year extended military jurisdiction to cover civilians accompanying even forces not on "active service."<sup>72</sup> Parliament made this change because of several historical developments, one of which was the demise of the consular court system. Consular courts were tribunals established by a number of western nations to try their citizens who committed crimes in certain "non-Christian" countries. The host nation would give up jurisdiction over all citizens of the sending nation in its territory, and the sending nation's consuls would try the offenders pursuant to their home country's law. The obvious implication of this procedure was that the host country's legal system was too primitive to dispense justice acceptable to modern nations, and it was partly because of this stigma that the system was finally abolished. Before 1955, British civilians accompanying forces not on "active duty" had been under the jurisdiction of consular courts in such "non-Christian" countries as Egypt and Iran. With the disappearance of consular jurisdiction, Britain faced the choice of having her citizens overseas subjected to foreign courts or no courts at all.<sup>73</sup>

Another development was the end of the period of allied occupation of Germany after World War II. During the occupation, British forces in Germany were on "active service" and civilians with them were therefore subject to military jurisdiction. When the occupation ended, Britain had the status of a visiting power—not an occupation force—and her troops therefore no longer were on active service. In the NATO Status of Forces Agreement (NATO SOFA),<sup>74</sup> Germany gave the visiting forces

<sup>70</sup>ADRA, *supra* note 68, § 181; AA 1881, *supra* note 69, § 189(1).

<sup>71</sup>F. Wiener, *supra* note 23, at 218, n.64.

<sup>72</sup>*Id.* at 233.

<sup>73</sup>*Id.* at 232.

<sup>74</sup>Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951 [1953] 4(2) U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 [hereinafter NATO SOFA] and Supplementary Agreement to the NATO Status of Forces Agreement with Respect to Forces Stationed in the Federal Republic of Germany, August 3, 1959 [1963] 1 U.S.T. 531, T.I.A.S. No. 5351, 481 U.N.T.S. 262.

concession of jurisdiction. The language of the SOFAs, however, allowed the visiting powers to exercise only *military* jurisdiction over civilians accompanying their forces. As long as the active service requirement remained on the books, Britain could not take advantage of this concession.<sup>75</sup>

In extending military jurisdiction over civilians, Britain was influenced by the fact that most of her allies—including the United States—allowed military trial of civilians in 1955.<sup>76</sup> Finally, the British felt that trying British subjects in British military courts was the lesser evil to leaving them to the jurisdiction of foreign countries.<sup>77</sup>

## 2. *The American Experience.*

As already noted, when the Continental Congress needed articles of war to govern the new American Army, it merely appropriated the contemporary British Articles with minor changes.<sup>78</sup> The British camp follower clause, subjecting sutlers, retainers, and others to military jurisdiction when serving with the army in the field, was adopted unchanged. According to the great weight of opinion, "in the field" meant "in time of war and in the theatre of war," and extended to no other time or place. Thus, it was equivalent to the British "on active service."<sup>79</sup>

In practice, civilians were tried by military courts under this provision. There are records of trials of wagon drivers,<sup>80</sup> suppliers,<sup>81</sup> and dependents accompanying the army.<sup>82</sup> There were also courts-martial of civilians on the western frontier between 1793 and 1798.<sup>83</sup> Generally, civilians were court-martialed in areas where hostilities were ongoing or imminent and access to civilian courts would have been impossible or extremely impractical, although such was not always the case.<sup>84</sup> There was definitely a fear and distrust of military power among the framers and the early Congresses, based on a general consciousness of military abuses through history and on colonial experiences with the stationing of large numbers of British troops in American cities.<sup>85</sup>

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<sup>75</sup>F. Wiener, *supra* note 23, at 232-33.

<sup>76</sup>*Id.* at 233.

<sup>77</sup>*Id.*

<sup>78</sup>See *supra* note 62 and accompanying text.

<sup>79</sup>F. Wiener, *supra* note 23, at 218-19, 228.

<sup>80</sup>Girard, *supra* note 38, at 483.

<sup>81</sup>*Id.*

<sup>82</sup>*Id.*

<sup>83</sup>*Id.* at 485-86.

<sup>84</sup>*Id.* at 486.

<sup>85</sup>*Id.* at 486-87.



Despite these sentiments, no effort was made to rewrite the military jurisdiction provisions until 1916.

In the nineteenth and early twentieth centuries, there were numerous instances in which martial law was declared in the United States. Probably the most well-known American martial law case, *Ex parte Milligan*,<sup>86</sup> arose as a result of President Lincoln's declaration of martial law in Indiana during the Civil War. *Milligan* held that civilians cannot be tried by martial law commission in an area in which actual hostilities do not exist.<sup>87</sup> In the heyday of the labor movement, martial law was declared on a number of occasions and troops were used to suppress strikers.<sup>88</sup> Although this article is not concerned with martial law *per se*, the use of troops against civilians has much to do with society's attitudes toward all things military, which is relevant to our inquiry. Finally, there were several instances during the World Wars when civilians accompanying or serving the forces were subjected to military law.<sup>89</sup> Again, wartime jurisdiction is distinguishable from the *Covert* situation, but is part of the history of military jurisdiction.

In 1916, United States military jurisdiction was expanded. Major General Enoch Crowder, then Judge Advocate General of the Army, secured passage of a new camp follower article which subjected to military jurisdiction "[a]ll retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States . . . though not otherwise subject to these articles . . ."<sup>90</sup> The "in the field" limitation had been dropped.

According to one commentator, the expansion was based on two assumptions.<sup>91</sup> The first was General Crowder's interpretation of the fifth amendment language mandating indictment by grand jury "except in cases arising in the land or naval forces." He felt this referred to the location where the cases arose rather than the status of the defendant as either military or nonmilitary. Thus, if

<sup>86</sup>71 U.S. (4 Wall.) 2 (1866).

<sup>87</sup>*Id.* at 127.

<sup>88</sup>C. Fairman, *supra* note 39, at c. V.

<sup>89</sup>Maurer, *The Court-Martialing of Camp Followers, World War I*, 9 Am. J. Legal Hist. 203 (1965). A sampling of cases follows: *Hines v. Mikell*, 259 F. 28 (4th Cir.), *cert. denied*, 250 U.S. 645 (1919); *In re Berne*, 54 F. Supp. 252 (S.D. Ohio 1944); *McCune v. Kilpatrick*, 53 F. Supp. 80 (E.D. Va. 1943); *In re Di Bartolo*, 50 F. Supp. 929 (S.D.N.Y. 1943); *Ex Parte Jochen*, 257 F. 200 (S.D. Tex. 1919); *Ex Parte Falls*, 251 F. 415 (D.N.J. 1918); *Ex Parte Gerlach*, 247 F. 616 (S.D.N.Y. 1917).

<sup>90</sup>American Articles of War of 1916, art. 2(d), 39 Stat. 619, 650.

<sup>91</sup>F. Wiener, *supra* note 23, at 228 app. IV.

a civilian was accompanying the forces when he committed an offense, he would be "in" the armed forces (geographically) for purposes of the fifth amendment even though he was not in uniform. Second, General Crowder assumed that constitutional protections did not apply outside the United States.

These assumptions were firmly rooted in the legal authority of the day. General Crowder's reading of the fifth amendment was widely accepted, and his second assumption was explicitly supported in dicta in *Ross*.<sup>92</sup> The main dissenting voice was that of Colonel William Winthrop, who had written in 1886: "In the view of the author, the [Fifth] Amendment . . . is rather a *declaratory recognition and sanction* of an existing military jurisdiction than an original provision initiating such a jurisdiction."<sup>93</sup> Winthrop had given his opinion of the "existing military jurisdiction" with regard to civilians in the famous passage quoted by the Supreme Court in *Covert*: "[A] statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace."<sup>94</sup> If Winthrop was right, the fifth amendment could not be used as a source to create a new military jurisdiction over civilians in peacetime.

The majority carried the day, but subsequent events eroded General Crowder's assumption and supported Colonel Winthrop's point of view. One such event was the Supreme Court decision in *United States ex rel. Toth v. Quarles*.<sup>95</sup> In *Toth*, the defendant had helped to commit a murder while in the Air Force stationed in Korea. His involvement in the crime was not discovered until after his return to the United States and discharge from the service. The Air Force had him arrested and returned to Korea for court-martial. Toth filed a habeas corpus petition, demanding his release by military authorities on the ground that he was now a civilian and beyond military jurisdiction. He based his assertion on *United States ex rel. Hirshberg v. Cooke*,<sup>96</sup> a case in which the Supreme Court had declared that discharge terminated amenability to military jurisdiction.

The government based its defense in *Toth* on article 3(a), UCMJ,<sup>97</sup> which Congress had enacted in response to the *Cooke*

<sup>92</sup>140 U.S. 453 (1891).

<sup>93</sup>W. Winthrop, *Military Law and Precedents* \*52-53 (2d ed. 1920) (emphasis in original).

<sup>94</sup>*Id.* at \*146 (emphasis in original).

<sup>95</sup>350 U.S. 11 (1955). For a good discussion of this erosion process see F. Wiener, *supra* note 23, at app. IV.

<sup>96</sup>336 U.S. 210 (1949).

<sup>97</sup>64 Stat. 109 (1950) (current version at 10 U.S.C. § 803(a) (1982)).

decision. Article 3(a) attempted to circumvent the *Cooke* result by stating that, within the limitations period, the government could try persons who had committed certain offenses while in a military status if they were not subject to trial by another court for the offense. The *Toth* Court rejected the government's argument, echoing Colonel Winthrop: "The Fifth Amendment . . . does not grant court-martial power to Congress; it merely makes clear that there need be no indictment for such military offenses as Congress can authorize military tribunals to try under its Article I power to make rules to govern the armed forces."<sup>98</sup>

As for the theory that constitutional safeguards do not apply overseas, a series of cases after *Ross* supported the principle that United States citizens retain their rights vis-a-vis their own government no matter where they are.<sup>99</sup> Finally, in the short period between the *Krueger* and *Covert* decisions, the American consular court system,<sup>100</sup> one of the mainstays of the *Krueger* decisions upholding court-martial of civilians, was statutorily dismantled by Congress. The state was set for *Covert*.

### 3. Significance of the Common Law Heritage.

From this brief historical review, we can draw some conclusions about military jurisdiction and its place in a common law system. First, there is a strain of fear and distrust of all things military running through common law history. Second, despite these sentiments, and contrary to the tone of Justice Black's opinion in *Covert*, the prevailing attitude toward military jurisdiction over civilians has not been one of staunch opposition, but rather ambiguity. Third, Britons and Americans have approached the problem of controlling military jurisdiction with a sense of practicality rather than crusading zeal.

Distrust of the military—and hence of military law and jurisdiction—has a strong basis in common law history. In the legal sphere we can trace it back to the jealousy between courts in medieval England. It was reinforced by the abuses of military commissions by several English monarchs and, in our own country, by the use of troops to suppress angry colonists and striking workers. Much of the problem is doubtless a result of

<sup>98</sup>350 U.S. at 14 n.5.

<sup>99</sup>*United States v. Pink*, 315 U.S. 203, 226 (1942), cited in F. Wiener, *supra* note 22, app. IV at 311; *United States v. Belmont*, 301 U.S. 324, 332 (1937); *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 318 (1936).

<sup>100</sup>For a description of the British consular court system, see *supra* text accompanying note 73. The American consular court system was, for all practical purposes, identical.

confusion of the concepts of military power and military law. Even legal commentators and judges have been known to make this mistake.<sup>101</sup>

The *Covert* decision—with all its opinions—is probably an accurate reflection of the common law attitude toward military law. There is a sense, in a review of common law history, of a distrust of military jurisdiction coupled with a recognition of its necessity, as when the court of the constable and marshal was laid to rest but its jurisdiction was spared. This ambiguity has resulted in a periodic waxing and waning of military jurisdiction rather than its long-term growth or decay. The royal abuses of military commissions were followed by the Petition of Right; the expansion of military jurisdiction in the British Articles of War gave way to a limited camp follower article in the early Army Acts, which was in turn replaced by the substantial power of military authorities over civilians accompanying Britain's forces overseas today. Meanwhile, in the United States, the rather limited camp follower article inherited from England was greatly expanded by the Crowder article, then peacetime military jurisdiction over civilians was terminated by *Covert*. Further, history has shown that practice has not always followed the blackletter law in the field of military jurisdiction, but practice too has followed an up-and-down course.

Practice has highlighted the realism of the common law attitude toward military law. Throughout English and American history (at least from the nineteenth century on) the tendency has been to try soldiers and civilians alike in home civilian courts where such courts were reasonably available and would entertain the case. Thus, no British soldier could be tried by court-martial in England for a felony after 1716, and courts-martial of civilians generally have been limited to overseas or remote areas where military operations were in progress or imminent. Conversely, common law societies have tended to condone military trial of civilians when that was the most realistic alternative.

Why this historical review? One commentator has stated that the circumstances that gave rise to *Covert* (large numbers of civilians accompanying forces in semi-permanent, peaceful occupation of foreign soil) are so unique in history that the study of past instances of military jurisdiction over civilians can shed little light on our present situation.<sup>102</sup> The purpose of this review was not so

<sup>101</sup>C. Fairman, *supra* note 89, at 39-40.

<sup>102</sup>Girard, *supra* note 38, at 487-88.

much to draw historical parallels as it was to discover our inherited attitudes toward military jurisdiction. Likewise, the purpose of this article is not to relitigate *Covert*—such an exercise would be both pointless and presumptuous—but to use an understanding of our common law heritage in formulating a solution to the problems created by *Covert*. Any effective and lasting solution must incorporate that heritage.

### C. CONSEQUENCES OF REID V. COVERT

In a report presented to Congress in 1979,<sup>103</sup> the Comptroller General identified and documented some of the problems resulting from the lack of military jurisdiction over civilians accompanying the forces overseas. The report described a jurisdictional void. Under principles of international law, citizens of a foreign nation present in a host nation are normally subject to the laws of the host nation.<sup>104</sup> This is true absent a customary practice, such as the granting by the host nation of immunity to some diplomats, or absent an agreement by the host nation to limit its jurisdiction. Criminal jurisdiction over United States troops stationed abroad is normally governed by a status of forces agreement (SOFA), an agreement between the United States and the host nation that divides jurisdiction between the two countries. The typical SOFA establishes a jurisdictional scheme defining which offenses are subject to the exclusive jurisdiction of each party and which come within the shared jurisdiction of both. Under the typical SOFA, the nation having primary jurisdiction in a given case can waive the right to assert it, thus allowing the other nation to act.<sup>105</sup>

Most SOFAs give the United States jurisdiction over "all persons subject to [its] military law" in cases in which it has primary jurisdiction or in which the host waives jurisdiction.<sup>106</sup> "All persons" is understood to include civilians accompanying the forces who are subject to United States military jurisdiction.<sup>107</sup> Article 2(a)(11), UCMJ, the current version of the Crowder article, purports to subject civilians "serving with, employed by, or accompanying the armed forces outside the United States"<sup>108</sup> to

<sup>103</sup>Comptroller General of the United States, Report to the Congress: Some Criminal Offenses Committed Overseas by DOD Civilians Are Not Being Prosecuted: Legislation Is Needed, 96th Cong., 1st Sess. (1979) [hereinafter GAO Report].

<sup>104</sup>Girard, *supra* note 38, at 464.

<sup>105</sup>See, e.g., NATO SOFA, *supra* note 74, art. VII, para. 3(c).

<sup>106</sup>*Id.* para. 1(a).

<sup>107</sup>*Id.* para. 3.

<sup>108</sup>Uniform Code of Military Justice art. 2(a)(11), 10 U.S.C. § 802(a)(11) (1962)

military jurisdiction. The *Covert* decision, in declaring such jurisdiction unconstitutional, nullified the SOFA grant to the United States of jurisdiction over civilians accompanying its forces overseas.

Without jurisdiction over these civilians, the United States may not try them in a foreign country for crimes they commit there. Like most other Americans abroad, they may only be tried in the host country by host country courts. If the host country for some reason does not exercise its jurisdiction, these civilians might still be tried in the United States for crimes committed overseas if there were statutes giving the United States extraterritorial jurisdiction over such offenses.<sup>109</sup> Currently, the United States only has extraterritorial jurisdiction within its special maritime and territorial jurisdiction and for certain individual offenses clearly extraterritorial in nature, such as treason.<sup>110</sup> The special maritime and territorial jurisdiction covers United States embassy compounds, United States ships on the high seas, and other limited locations (not including overseas military installations).<sup>111</sup> Most offenses committed by civilians accompanying our forces do not fall within this jurisdiction. The UCMJ has extraterritorial reach,<sup>112</sup> but *Covert* foreclosed its application to civilians.

The result is total reliance on host country courts to deal with civilian offenders. The consequences of this situation, according to the GAO Report, are twofold. First, American civilians accompanying our forces abroad are subject to foreign judicial systems that may not offer all the guarantees criminal defendants in the United States enjoy, and that are likely to be alien to Americans in both concept and language.<sup>113</sup> Second, if the host country does not exercise its jurisdiction, offenders will escape judicial sanction for their crimes.<sup>114</sup> Although administrative sanctions are available to military authorities—curtailment of exchange and commissary privileges, expulsion from government housing, and involuntary return to the United States, for example—the GAO Report judged these inadequate.<sup>115</sup> The Report further noted that the United States policy of "maximization" of its jurisdiction tends to

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(hereinafter UCMJ).

<sup>109</sup>Girard, *supra* note 38, at 507-08.

<sup>110</sup>GAO Report, *supra* note 103, at 5.

<sup>111</sup>18 U.S.C. § 7 (1962).

<sup>112</sup>UCMJ art. 5.

<sup>113</sup>GAO Report, *supra* note 103, at 6.

<sup>114</sup>The Report noted the likelihood of host countries to waive jurisdiction in cases involving only American victims or in which only American security is breached. *Id.* at 6-8.

<sup>115</sup>*Id.* at 13-14.

aggravate the situation. Pursuant to this policy, United States military authorities are encouraged to seek waiver of jurisdiction over American citizens by host nations, even in cases in which the United States itself can exercise no jurisdiction.<sup>116</sup>

If American tourists, businesspersons, and all others except a few diplomats are beyond the reach of United States jurisdiction, why is it significant that civilians accompanying our forces also are? One reason is the large number of civilians with the forces overseas. Another is their presence in tightly-knit, semi-permanent military communities overseas and, consequently, the great impact of their misconduct on the morale and combat readiness of the troops they accompany.<sup>117</sup>

The GAO Report stated that 343,000 civilians accompanied the forces abroad in the year ended November 1977.<sup>118</sup> This number included civilian employees of the forces, their dependents, and dependents of service members. During this time, host countries released jurisdiction to the United States in fifty-nine "serious" civilian cases and fifty-four "less serious" ones. Serious cases were defined as murder, rape, manslaughter, negligent homicide, arson, robbery and related offenses, forgery and related offenses, and aggravated assault. Less serious crimes were simple assault, drug abuse, offenses against economic control laws (contraband), disorderly conduct, drunkenness, and breach of peace.<sup>119</sup> Following are two tables breaking these figures down by offense and by country where committed.<sup>120</sup> As the charts show, the majority of offenses committed by civilians accompanying the United States forces abroad in the same year were handled by host countries.<sup>121</sup>

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<sup>116</sup>*Id.* at 6. "In all cases in which the local commanders determine that suitable corrective action can be taken under existing administrative regulations, they may request the local foreign authorities to refrain from exercising their criminal jurisdiction." Dep't of Army, Reg. No. 27-50, Status of Forces Policies, Procedures and Information, para. 1-7b(1) (1 Dec. 1984) [hereinafter AR 27-50]. This language is interpreted as directing local commanders to secure release of criminal jurisdiction over American citizens accompanying the forces in as many cases as possible. Letters from Samuel Pollack, Special Advisor, Office of the Judge Advocate, Headquarters, United States Forces, Korea (Nov. 1985) [hereinafter Pollack Letter] and Lieutenant Colonel H. Wayne Elliott, Chief, International Law Division, United States Army, Europe, and Seventh Army (Nov. 20, 1985) to the author.

<sup>117</sup>GAO Report, *supra* note 103, at 5.

<sup>118</sup>*Id.*

<sup>119</sup>*Id.* at 4-5.

<sup>120</sup>*Id.* at 33.

<sup>121</sup>*Id.* at 34.

**CASES INVOLVING U.S. CIVILIAN EMPLOYEES AND  
DEPENDENTS RELEASED TO THE UNITED STATES FOR  
DISPOSITION, DECEMBER 1, 1976 TO NOVEMBER 30, 1977**

Type of offense	Belgium	Germany	Japan	Netherlands	United Kingdom	Total
<b>Serious offenses:</b>						
Murder	—	—	—	—	—	—
Rape	—	1	—	—	—	1
Manslaughter and negligent homicide	—	—	—	—	—	—
Arson	—	—	1	—	—	1
Robbery, larceny, and related offenses	—	6	47	—	1	54
Burglary and related offenses	1	—	—	—	—	1
Forgery and related offenses	—	—	—	—	—	—
Aggravated assault	—	—	2	—	—	2
<b>Total serious offenses</b>	<b>1</b>	<b>7</b>	<b>50</b>	<b>—</b>	<b>1</b>	<b>59</b>
<b>Less serious offenses:</b>						
Simple assault	1	3	3	—	—	7
Drug abuse	—	1	11	2	—	14
Offenses against economic control laws	—	—	—	—	—	—
Disorderly conduct, drunkenness, breach of peace, etc.	4	3	—	—	—	7
Other	12	—	11	3	—	26
<b>Total less serious offenses</b>	<b>17</b>	<b>7</b>	<b>25</b>	<b>5</b>	<b>—</b>	<b>54</b>
<b>Traffic offenses</b>	<b>85</b>	<b>17</b>	<b>117</b>	<b>142</b>	<b>—</b>	<b>361</b>
<b>Total all offenses</b>	<b>103</b>	<b>31</b>	<b>192</b>	<b>145</b>	<b>1</b>	<b>474</b>



**CASES INVOLVING U.S. CIVILIAN EMPLOYEES AND  
DEPENDENTS RESERVED BY THE FOREIGN COUNTRY  
DECEMBER 1, 1976 TO NOVEMBER 30, 1977**

Type of Offense	Germany	Japan	Korea	Philippines	Spain	Turkey	United Kingdom	Other Countries	Worldwide
Serious offenses									
Murder	2	—	—	—	—	—	—	—	2
Rape	5	—	—	—	1	—	—	—	6
Manslaughter & negligent homicide	8	1	5	—	—	—	—	3	17
Arson	—	—	—	—	—	—	—	—	—
Robbery, larceny & related offenses	110	1	—	1	1	—	17	1	145
Burglary & related offenses	9	—	—	—	—	—	—	7	16
Forgery & related offenses	—	—	—	—	—	—	—	—	—
Aggravated assault	3	—	—	—	—	—	1	9	13
Total serious offenses	137	2	5	1	2	—	18	35	200
Less serious offenses									
Simple assault	12	—	11	1	2	—	1	4	31
Drug abuse	37	1	4	1	—	—	13	18	74
Offenses against economic control laws	11	18	96	—	—	—	1	4	70
Disorderly conduct, drunkenness breach of peace, etc.	16	—	—	—	10	—	—	—	26
Other	17	1	3	46	3	—	2	2	74
Total less serious offenses	93	20	54	48	15	—	17	28	275
Traffic Offenses	3240	471	121	4	30	4	65	58	3993
Total all offenses	3470	493	180	53	47	4	100	121	4468

In the GAO's opinion, the lack of United States criminal jurisdiction over civilians and the inadequacy of administrative sanctions cause serious morale and discipline problems in our overseas military communities.<sup>122</sup> Working from the premise that administrative sanctions generally do not provide credible punishment or deterrence and are often inappropriate to the offense, the report concluded that, without criminal jurisdiction, United States authorities are largely powerless to control civilians accompanying the forces overseas. The report also noted that in many cases, punishment given the soldier-offenders was considerably more severe than the administrative "slaps-on-the-wrist" given their civilian codefendants, causing morale problems among soldiers.<sup>123</sup> Another aspect of the problem is what might be called investigative triage. Like the battlefield medical system in which the most hopeless cases are treated last, military investigators tend to give civilian cases low priority, and may do inferior investigative work in such cases because there is little probability they will be handled by United States authorities.<sup>124</sup> Finally, there is the possibility of a nightmare situation such as that illustrated by a case from Berlin, where a military member and his civilian spouse plotted and carried out the murder of another American, researching in advance the improbability that the spouse would be prosecuted by United States authorities.<sup>125</sup>

The GAO Report made other observations. One was that the Department of Defense understates the jurisdiction problem by giving inaccurate figures in its annual report to Congress on crime statistics in overseas commands. The GAO Report attributed these inaccuracies to the investigative triage noted above (investigators give low priority to civilian cases and may not report them all) and to a tendency on the overseas military community level to deal with civilian misconduct administratively and not report it.<sup>126</sup> Second, the report noted the failure of Congress to pass legislation creating extraterritorial United States jurisdiction even though numerous bills designed to remedy the situation have been before Congress in the years since

<sup>122</sup>*Id.* at 13.

<sup>123</sup>*Id.* at 11-12.

<sup>124</sup>*Id.* at 10.

<sup>125</sup>*Id.* at 15-16. As noted in the GAO Report, Berlin presents a special case because the United States enjoys the status of an occupying power there. Thus, the *Covert* decision, which prohibited military jurisdiction over civilians in peacetime and not under circumstances of belligerent occupation, may not apply to Berlin.

<sup>126</sup>*Id.* at 8-10.

*Covert*.<sup>127</sup> Finally, the GAO Report echoed the oft-heard observation that many of our allies have judicial procedures for dealing with misconduct among civilians accompanying their forces overseas, implicitly questioning why the United States cannot implement similar procedures.<sup>128</sup>

Peter D. Ehrenhaft, writing in 1967, reached a somewhat less bleak conclusion based on questionable data.<sup>129</sup> He decided:

[T]he absence of effective United States criminal jurisdiction over major offenses—felonies such as personal crimes of murder, rape, assault, and robbery, or serious property crimes, such as grand larceny, or serious security offenses—has not been a numerically significant problem nor has it significantly increased the incidence of such offenses.<sup>130</sup>

According to Ehrenhaft, the problem was not with major crimes: "The major law enforcement problem for military commanders at bases overseas concerns the commission of *petty* offenses by civilians accompanying the armed forces."<sup>131</sup> The evidence used to support these statements was figures for offenses committed by all Americans connected with the United States forces overseas—military and civilian—from 1958 through 1966.<sup>132</sup> Without a breakout of figures pertaining to civilians alone, the statistics are of limited value. A survey of offenses committed by *civilians* accompanying the forces between October 1964 and March 1965 does appear in the article. It shows the vast majority of civilian offenses to be traffic violations, with 231 larcenies and 8 serious offenses.<sup>133</sup> Without a showing of how many of the last two varieties were released to United States jurisdiction by foreign authorities, the figures shed little light on the jurisdictional void, although they do give some idea of the types and numbers of offenses being committed by civilians accompanying the forces overseas.

More recent figures on jurisdiction over civilians accompanying the United States forces abroad appear in an annual Department

<sup>127</sup>*Id.* at 16-18.

<sup>128</sup>*Id.* at 18.

<sup>129</sup>Ehrenhaft, *Policing Civilians Accompanying the United States Armed Forces Overseas: Can United States Commissioners Fill the Jurisdictional Gap?*, 36 *Geo. Wash. L. Rev.* 273 (1967).

<sup>130</sup>*Id.* at 279.

<sup>131</sup>*Id.* at 280 (emphasis in original).

<sup>132</sup>*Id.* at 278-79.

<sup>133</sup>*Id.* at 279.

of Defense Report for the period ending November 1984.<sup>184</sup> The relevant statistics are displayed in the table on page 181.<sup>185</sup>

Using the GAO Report's definitions of serious and less serious offenses, the following figures can be derived:

	Total	% Jurisdiction Released to U.S.	% Jurisdiction Retained by Host
Serious Offenses	415	12.7	87.3
Less Serious Offenses	10,188	3.4	96.6

Both the GAO and DOD figures tend to confirm Ehrenhaft's conclusions. The great majority of offenses committed by civilians accompanying the forces overseas are of the less serious variety—and most of those are traffic offenses. Further, most offenses—serious and less serious—are handled by host country authorities. For purposes of this article, these figures are assumed to be accurate—it is beyond the scope of the inquiry to confirm or deny the GAO's assertions of inaccuracy in the reporting of civilian misconduct.

Is there a jurisdictional void? The fact that 12.7% of 415 serious civilian cases, or 53 cases, were released to the jurisdiction of the United States Government—which could not deal with them judicially—indicates there is at least a small void. The *potential* that an even more significant number of American civilians might escape punishment—or even trial—for serious offenses because of a combination of lack of host country interest and United States juridical impotence is another measure of the void.

The situation of the United States in Korea could be the best illustration of the potential for problems created by the jurisdictional void. Under the Korea SOFA, the United States automatically receives full jurisdiction over all its citizens attached to its forces in Korea—military and civilian—whenever the Korean Government declares martial law to be in effect.<sup>186</sup> This has occurred several times since the Korean War, and the state of

<sup>184</sup>Department of Defense, Report: Statistics on the Exercise of Criminal Jurisdiction by Foreign Tribunals Over United States Personnel 1 December 1983–30 November 1984 [hereinafter DOD Report].

<sup>185</sup>Compiled from data found *id.* at 1, 2.

<sup>186</sup>United States—Republic of Korea Status of Forces Agreement, July 9, 1966, art. XXII, para. 11, 17 U.S.T. 1677, T.I.A.S. 6127, [hereinafter Korean SOFA], and Agreed Minutes to Article XXII, para. 1(b)1.

**CASES INVOLVING CIVILIAN EMPLOYEES  
AND DEPENDENTS, 1 DECEMBER 1983—30 NOVEMBER 1984**

	Total Number of Cases: Civilians & Dependents	Released to U.S. Jurisdiction	Jurisdiction Retained by Host	% Released
Murder	4	1	3	25
Rape	10	2	8	20
Manslaughter & Negligent Homicide	24	0	24	0
Arson	10	0	10	0
Robbery, Larceny & Related Offenses	326	43	283	13
Burglary & Rel. Offenses	5	2	3	40
Forgery & Rel. Offenses	3	1	2	33
Aggravated Assault	33	4	29	12
Simple Assault	96	18	78	18
Drug Abuse	174	30	144	17
Economic Control Laws	136	2	134	1.4
Traffic Offenses	9569	247	9322	2.5
Disorderly Conduct	116	18	98	15
Other	96	36	60	38
<b>Total</b>	<b>10,603</b>	<b>404</b>	<b>10,199</b>	<b>3.8</b>

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martial law has been known to last for over one year at a time.<sup>137</sup> To date, it appears that no serious offenses have been committed by American civilians during such periods, but the potential exists for a civilian accompanying the forces in Korea to literally get away with murder.

## II. POTENTIAL SOLUTIONS

### A. INTRODUCTION

In the nearly thirty years since *Covert*, a number of proposals have been made to solve the problem of the jurisdictional void. Some of these have been made by commentators; others have been in the form of legislation proposed to Congress.<sup>138</sup> To date, Congress has not passed any statute extending jurisdiction over civilians accompanying the forces. These proposals will be discussed and criticized in this section.

The problem of the jurisdictional void has two dimensions: the need to create extraterritorial jurisdiction and the question of how best to implement that jurisdiction. Proposed bills considered by Congress have generally focused on the first issue, while the commentators have wrestled with both questions. All the ideas for implementation have drawbacks, and the question becomes, which is the least impractical to implement and administer? Many factors enter the discussion, among them the political climate in each host country, the terms of the SOFA with each host country, the expense and effort that would be required to implement a given scheme, and problems with administration, such as constituting juries and compelling attendance of witnesses.

A subsection examining two of our allies' procedures for dealing with the misconduct of civilians accompanying their forces abroad precedes the discussion of proposed solutions to the American problem. Finding out how our allies do it can be useful, both to determine why their military courts can try civilians while ours cannot, and to observe solutions to the jurisdictional void problem in actual operation. Only in that way can we anticipate some of the problems of exercising jurisdiction over civilians. Such an inquiry can also provide ideas for an American solution. Great Britain and Canada have been picked, although other allies have schemes for trying civilians accompanying their forces overseas.<sup>139</sup>

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<sup>137</sup>The last period of martial law in Korea lasted from the assassination of President Park in late 1979 until early 1981. Pollack Letter, *supra* note 116.

<sup>138</sup>See, e.g., *infra* text accompanying notes 250-57.

<sup>139</sup>France, for one, has such a scheme. GAO Report, *supra* note 108, at 18.

because those two countries share a common law heritage with the United States.

## B. HOW TWO ALLIES DO IT

### 1. Great Britain.

Before examining the British scheme for dealing with misconduct of civilians, the reader should be aware of certain facts. First, as already noted,<sup>140</sup> the Army Act of 1955 reflected a basic policy decision of Parliament: subjecting English subjects to English military jurisdiction overseas is better than allowing them to be tried by non-English courts. Our Supreme Court in *Covert* came to the opposite conclusion: anything (even no jurisdiction) is preferable to subjecting civilians to military jurisdiction in peacetime. Somehow, the British have been able to overcome their negative experiences under Cromwell, the Tudors, and the Stuarts, while Americans' colonial and labor experiences with military authority may have left a residue of bitterness. Second, given its unwritten constitution, Britain has more flexibility than we with regard to individual rights. The English subject's right to jury trial, for example, might be compared to a tradition that is commonly followed but that Parliament can abridge to meet specific circumstances.<sup>141</sup> It would take a constitutional amendment to accomplish the same task in the United States.<sup>142</sup> Third, Britain has taken the view once held by General Crowder and most American military legalists (except Winthrop) that certain constitutional rights do not necessarily follow the citizen overseas. Again taking the right to a jury as an example, the only places where an English subject has an absolute right to trial by a jury of peers are in England proper, Wales, and Scotland. The right has been partially curtailed or abolished altogether by act of Parliament for persons subject to British jurisdiction in Northern Ireland and other overseas areas.<sup>143</sup>

In view of these facts, it will not be surprising to find that the British solution to the civilian misconduct problem does not include indictment or trial by jury, which, of course, were the primary problems our Supreme Court found with military jurisdiction over civilians. The differences noted between the British and American legal systems show why the British can operate a

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<sup>140</sup>See *supra* note 77 and accompanying text.

<sup>141</sup>Interview with Captain John Lever, Army Legal Corps (U.K.) (Feb. 12, 1986) [hereinafter Lever Interview].

<sup>142</sup>*Covert*, 354 U.S. at 14.

<sup>143</sup>Lever Interview, *supra* note 141.

system of military judicial control over civilians more readily than can the United States.<sup>144</sup> Despite those differences, however, the British system gives us a model from whose features we can pick and choose in our efforts to fill our jurisdictional void.

The Army Act of 1955 brings civilians accompanying the British forces within its scope in two situations. One is when the forces are on active service.<sup>145</sup> Civilians accompanying the forces in those circumstances are subject to military jurisdiction in and outside Great Britain.<sup>146</sup> This article is not concerned with this type of jurisdiction, but with the second type, which reaches only civilians accompanying forces not on active service and outside Great Britain.<sup>147</sup> This second jurisdiction covers the following groups: (a) military members; (b) persons working with the forces, to include civil servants, teachers, broadcasters, welfare workers, and nonappropriated fund personnel, to name a few; (c) family members of persons in groups (a) and (b) who are living with them in their duty stations outside Great Britain; and (d) employees of members of groups (a) and (b) who are serving them abroad (such as domestic help), as well as family members of such employees who are living with the employees.<sup>148</sup> Thus, the military jurisdiction sweeps broadly, covering almost every type of civilian who could conceivably be attached to a military community abroad.

Misconduct committed by a person in groups (a) through (d) must be reported to that person's commanding officer (CO). A civilian's CO is an officer in the grade of lieutenant colonel or above who commands troops with whom the civilian is stationed, or who is in charge of the command in which the civilian is located.<sup>149</sup> The CO can take no action in the matter personally (except to dismiss the charge)—he can only make recommendations to the Appropriate Superior Authority (ASA).<sup>150</sup> If the offense was committed in an area where Standing Civilian Courts (SCCs) have been authorized,<sup>151</sup> the CO can recommend that no

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<sup>144</sup>The British Parliament can alter the rights of English subjects by statute, whereas the United States Congress must go through the more complicated process of amending the Constitution. See *infra* note 236 and accompanying text.

<sup>145</sup>See *supra* note 70 and accompanying text.

<sup>146</sup>Army Act, 1955, 3 & 4 Eliz. 2, ch. 18, § 209(1) [hereinafter AA 1955]; Manual of Military Law, Ministry of Defense (G.B.), pt. I, Civilian Supplement, ch. 2, para. 4 (1977) [hereinafter Civilian Supplement].

<sup>147</sup>AA 1955, *supra* note 146, § 209(2).

<sup>148</sup>*Id.* sched. 5.

<sup>149</sup>Civilian Supplement, *supra* note 146, ch. 4, para. 1.

<sup>150</sup>*Id.* para. 4.

<sup>151</sup>*Id.* para. 2; Standing Civilian Courts (Areas) Order 1977, SI 1977 No. 89.



action be taken, that the case be handled by summary disposal, or that it be tried by SCC or court-martial.<sup>152</sup>

The ASA may offer the civilian summary disposal procedures, refer the case to trial, or return the case to the CO for dismissal or further investigation.<sup>153</sup> Summary disposal is only available for certain offenses, such as misappropriation, damage, and theft of government property; disorderly behavior; resisting arrest and violence against a police officer; falsifying official documents; attempts;<sup>154</sup> and commission of "civil offenses" (any offense punishable under the laws of England by civilian courts) among others.<sup>155</sup> Under summary disposal procedures, the only punishment the ASA can give is a fine up to a maximum of 100 pounds.<sup>156</sup> Before proceeding with summary disposal, the ASA must give the wrongdoer the opportunity to elect trial, but the election can only be for trial by court-martial, not SCC.<sup>157</sup>

If the ASA decides for trial by SCC, he steps into his role as directing officer and refers the case to the appropriate court.<sup>158</sup> SCCs can entertain all offenses for which courts-martial can try civilians except contempts and civil offenses for which a magistrate's court in England or Wales could not try the defendant.<sup>159</sup> For offenders under seventeen years of age, SCCs have an expanded jurisdiction, including all offenses except homicide.<sup>160</sup> An SCC is limited in the punishments it can adjudge. For single offenses, the court can only sentence to six months' confinement; for multiple offenses the maximum is one year. The only other punishments an SCC can give are fines (up to 400 pounds). An SCC may also issue orders requiring that certain

sched. (Area 1: Federal Republic of Germany, Kingdom of Belgium, Kingdom of the Netherlands; Area 2: Berlin).

<sup>152</sup>Civilian Supplement, *supra* note 146, ch. 4.

<sup>153</sup>*Id.* para. 5.

<sup>154</sup>Only attempts to commit offenses subject to summary disposition are punishable under this provision. Army Summary Jurisdiction Regulations, 1972, reg. 20(2).

<sup>155</sup>*Id.* reg. 20.

<sup>156</sup>AA 1955, *supra* note 146, § 209(3)(b) (amend. No. 8, 1982).

<sup>157</sup>*Id.* § 209(3)(d).

<sup>158</sup>Armed Forces Act, 1976, ch. 52, sched. 3, para. 1(1) [hereinafter AFA 1976].

<sup>159</sup>*Id.* § 7; Civilian Supplement, *supra* note 146, ch. 3, para. 6 and Table of Civil Offenses That May Be Tried by Standing Civilian Courts 23-27. The offenses triable by SCC generally include arson, assaults, burglary and theft offenses, driving offenses, drug offenses, forgery, misappropriation of government property, and lesser offenses.

<sup>160</sup>Civilian Supplement, *supra* note 146, ch. 3, para. 6. Magistrates' courts have expanded jurisdiction over minors under the Children and Young Persons Act 1969, ch. 54, § 6(1). As SCC jurisdiction is coextensive with that of magistrates' courts, it is similarly broad with respect to minors.

specific actions be taken with regard to the accused. For offenses triable by magistrate court, the SCC may not imprison or fine where magistrate courts could not.<sup>161</sup>

The SCC can only try civilians, not service members, and only outside the United Kingdom.<sup>162</sup> It is essentially a magistrate's court, although it has jurisdiction over a wider variety of crimes than does such a court in the United States. For trial of adults, the SCC consists of the magistrate sitting alone. The magistrate is a civilian judge advocate who is appointed by the Lord Chancellor (head of the judiciary) rather than the Ministry of Defense.<sup>163</sup> For trial of juveniles, the magistrate sits with up to two members or assessors (the former are voting members of the court; the latter, observers and advisors to the magistrate with no vote).<sup>164</sup> The members and assessors are drawn from panels appointed by the Secretary of State in consultation with the Lord Chancellor. The directing officer chooses from these panels the persons who will sit in a particular case.<sup>165</sup> In practice, members and assessors are usually people from the overseas British military community in which the case arose, such as teachers, social workers, dependents of service personnel, or service personnel themselves acting in a nonmilitary capacity.<sup>166</sup> Members must be "suitably qualified by training and experience to sit" as such.<sup>167</sup> Thus, SCCs are genuinely civilian tribunals, although trial by SCC cannot in any sense be deemed trial by a jury of peers. In all SCCs, the directing officer must appoint a defending officer or counsel for the accused, unless the accused waives this right in writing.<sup>168</sup>

Civilians may be tried by military court-martial in several situations. First, the civilian defendant can elect court-martial

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<sup>161</sup>AFA 1976, *supra* note 158, § 8; see *infra* text accompanying note 179 for a discussion of the types of orders available to the SCC.

<sup>162</sup>AFA 1976, *supra* note 158, §§ 6(1) and 7.

<sup>163</sup>*Id.* § 6.

<sup>164</sup>*Id.* The accused must have been under 17 years of age at the time of the alleged offense.

<sup>165</sup>*Id.* § 6(6) and (15).

<sup>166</sup>Letter from Lt. Col. C.H.B. Garraway, Army Legal Corps (U.K.), Office of the Legal Advisor, Supreme Headquarters Allied Powers Europe, Belgium, to the author (Dec. 27, 1985) [hereinafter Garraway Letter].

<sup>167</sup>AFA 1976, *supra* note 158, § 8(7). Qualifications of members are not further defined. Requirements for assessors would appear to be lower—they need only be "suitable." *Id.* § 6(6).

<sup>168</sup>Standing Civilian Courts Order 1977, SI 1977 No. 88, arts. 4, 60, and 61. A "defending officer" is defined as a commissioned officer in the forces or a civilian crown servant. "Counsel" is defined as a practicing barrister, solicitor, or advocate of England, Wales, Northern Ireland, or Scotland or, in certain cases, a foreign attorney.

over other proposed dispositions of the case.<sup>169</sup> Second, the ASA may send the case to court-martial either because the offense occurred in an area where SCCs have not been authorized or because he feels the offense is too serious to be tried by SCC.<sup>170</sup> Finally, a civilian's appeal of an SCC conviction or sentence can only be to a court-martial in the first instance.<sup>171</sup> In practice, court-martial trial of civilians is extremely rare.<sup>172</sup>

Courts-martial can sentence civilians only to death, imprisonment, or payment of a fine.<sup>173</sup> A court-martial can also issue the same special orders issuable by an SCC.<sup>174</sup> The court's composition is the same as that required for a court-martial to try service members,<sup>175</sup> with the following exceptions. In a general court-martial (GCM), a maximum of two Crown Servants may be appointed by the convening authority to replace two officers on the panel. In a district court-martial (DCM), the maximum number of Crown Servants on the panel is one.<sup>176</sup> It should be noted that the Convening Authority has discretion to name Crown Servants to a court-martial panel—it is not a right of the accused. Thus, a civilian could be tried by a tribunal composed entirely of military officers. As with an SCC, the Convening Authority must appoint a defending officer or counsel for the accused unless the accused waives this right in writing.<sup>177</sup> If the

<sup>169</sup>See *supra* note 157 and accompanying text. Regarding election of court-martial over SCC, see AFA 1976, *supra* note 158, § 7(2) and sched. 3, paras. 4(1) and 12(2).

<sup>170</sup>Unlike an SCC, a court-martial can try civilians for contempts of court and "civil offenses" under AA 1955, *supra* note 146, § 70. This provision is somewhat like the Assimilative Crimes Act, 18 U.S.C. § 13 (1982) for the United States forces in that it incorporates "any act punishable by the Law of England" into military law, making it applicable to all who are amenable to that law (The Assimilative Crimes Act, however, has only domestic application.) Another reason why courts-martial are more appropriate for serious offenses is their punishment power. See *infra* note 173 and accompanying text.

<sup>171</sup>AFA 1976, *supra* note 158, sched. 3, paras. 18(1) and (2).

<sup>172</sup>Lever Interview, *supra* note 141; Garraway Letter, *supra* note 166.

<sup>173</sup>AA 1955, *supra* note 146, § 209(3)(a). There are further limitations on the sentence parameters. As with our UCMJ, the sentence impossible can also be determined by the sentence specified for the particular offense. *E.g.*, for "civil offenses" sentences are specified by AA 1955, § 70(3); for treason—death; for murder—life imprisonment; for other civil offenses—the sentence impossible for such an offense by magistrate court. Defendants under 18 cannot be sentenced to death, and those under 17 cannot be imprisoned. *Id.* § 71A(1) and (3). Finally, a court-martial hearing an appeal from an SCC can award a sentence no greater than that imposed by the SCC. AFA 1976, *supra* note 158, sched. 3, para. 18(11).

<sup>174</sup>AA 1955, *supra* note 146, sched. 5A.

<sup>175</sup>For a general court-martial, a minimum of five officers; for a district court-martial, a minimum of three officers. *Id.* §§ 87(1) and 88(1), respectively.

<sup>176</sup>*Id.* § 209(3)(fa). Crown servants can include anyone employed in government service. The term does not include nonappropriated fund employees, however. Civilian Supplement, *supra* note 146, ch. 3, para. 3, n.14.

<sup>177</sup>See *supra* note 168.

accused is under seventeen and has waived the right to counsel, the court may allow a parent or guardian to defend him.<sup>179</sup>

As mentioned, both SCCs and courts-martial can issue special orders.<sup>179</sup> One type of special order is a discharge (*i.e.*, from guilt or sentence), either expunging the conviction and sentence or suspending the sentence. A community supervision order (CSO) applies only to defendants under twenty-one years of age. It is a combination of probation, community service, and supervision in which a supervisor is appointed to oversee the accused, assuring his good behavior and his performance of certain tasks. A court will impose a CSO only with the consent of the accused (or his parents or guardians, if he is under seventeen). Reception and custodial orders can only be imposed on a person under seventeen who has been convicted of a crime for which an adult could be imprisoned. They require the wrongdoer to be placed in an appropriate institution for minor offenders in England, Scotland, Wales, or Northern Ireland. Compensation orders impose pecuniary liability on the wrongdoer or his parents or guardians for damage he has caused. A recognisance order is a type of agreement between the court and the parent of a minor wrongdoer whereby the parent guarantees the good behavior of the minor on pain of paying a fine to the court. Before a court can issue any order that directly affects the parent or guardian of a minor, that parent or guardian must be given the opportunity to make a statement and offer evidence before the court.

The findings and sentences of SCCs are subject to review by, and appeal to, courts-martial. The reviewing authority for an SCC decision is the directing officer (the officer who convened the court), or any superior officer or authority.<sup>180</sup> The reviewing authority has powers to reverse or alter the findings and sentence of the court. He may also remit, commute, or suspend a sentence.<sup>181</sup> Appeal from an SCC decision in the first instance is only to a court-martial.<sup>182</sup> An appeal of a conviction triggers a complete rehearing of the case; an appeal of sentence will result in reconsideration of the sentence alone. Appeal from a court-martial conviction or court-martial decision on review may be made to the Courts-Martial Appeal Court (CMAC) and, in some

<sup>179</sup>Civilian Supplement, *supra* note 146, ch. 6, para. 13.

<sup>179</sup>The orders are described in detail in AA 1955, *supra* note 146, sched. 5A, from which this paragraph is drawn.

<sup>180</sup>AFA 1976, *supra* note 158, sched. 3, para. 20(9).

<sup>181</sup>*Id.* para. 20(2).

<sup>182</sup>*Id.* para. 18(1) and (2).

cases, to the House of Lords.<sup>183</sup> A civilian accused may appeal findings or sentence, to include reception, custodial, or compensation orders.<sup>184</sup>

## 2. Canada.

Section 55 of the Canadian National Defence Act<sup>185</sup> makes the following subject to the Code of Service Discipline:<sup>186</sup>

(f) a person, not otherwise subject to the Code of Service Discipline, who accompanies any unit or other element of the Canadian Forces that is on service or active service in any place; . . .

(j) a person, not otherwise subject to the Code of Service Discipline, while serving with the Canadian Forces under an engagement with the Minister whereby he agreed to be subject to that Code.<sup>187</sup>

Subparagraph (f) above is read in conjunction with section 55(4) of the Act: "[A] person accompanies a unit or other element of the Canadian Forces that is on service or active service if such person . . . (c) is a dependent outside Canada of an officer or man serving beyond Canada with that unit or other element."<sup>188</sup> This provision, in turn, relies on the NATO SOFA and the Queen's Regulations and Orders (QR&O)<sup>189</sup> for a definition of "depen-

<sup>183</sup>Appeal to the House of Lords is possible if the case raises a question of general public importance. Courts-Martial (Appeals) Act, 1968, ch. 20, § 39.

<sup>184</sup>AA 1955, *supra* note 146, sched. 5A.

<sup>185</sup>Can. Rev. Stat. ch. N-4 (1970) [hereinafter National Defence Act].

<sup>186</sup>*Id.* pts. IV, V, VI, VII, VIII, and IX.

<sup>187</sup>*Id.* § 55(1)(f) and (j).

<sup>188</sup>*Id.* § 55(4). "'Man' means any person, other than an officer, who is enrolled in, or who pursuant to law is attached or seconded otherwise than as an officer to the Canadian Forces." *Id.* § 2.

Pursuant to section 12(1) of the National Defence Act and under the authority of the Governor General in Council, a complete and detailed set of regulations have been consolidated into what is familiarly known as the Queen's Regulations and Orders. These are divided into administrative, disciplinary, and financial parts. The second part, consisting of chapters 101 to 117 of the QR&O, incorporates the disciplinary, regulatory, procedural, and explanatory material relating to the Code of Service Discipline. Also included are ministerial orders and instructions from the Governor General in Council, the Minister of National Defence, and the Chief of Defence Staff as well as a number of appendices including the National Defence Act, the Military Rules of Evidence, and other agreements affecting the application of the Code. Annotations at the end of each section, although they do not have force of law, cannot be lightly disregarded.

dent." Thus, a dependent is a close relative of a member of the force or civilian component who is wholly or mainly supported by such member and lives with him in the host country. Excluded from this category are "common law spouses and other persons cohabiting with (but not legally related to) (such members), and relatives visiting [them] abroad."<sup>190</sup> This last group is not subject to the Code of Service Discipline, so is usually exclusively amenable to host country jurisdiction.

Subparagraph (j) refers to civilian employees of the Department of National Defence. These are teachers, technicians, and other civilian auxiliaries of the forces who have signed agreements submitting themselves to military jurisdiction as a condition of their overseas employment.<sup>191</sup> Excluded from this group are civilians working for the armed forces or another department of the Canadian Government who have not signed such agreements. These persons, like persons unrelated to members of the force or civilian component usually fall under host country jurisdiction. The only civilians not voluntarily subject to military jurisdiction are dependents.<sup>192</sup>

Canada extended military jurisdiction to cover civilians accompanying its forces abroad in 1950 so it could have maximum jurisdiction over its nationals within the terms of its agreements with other countries. Canadians felt that this was necessary to protect citizens overseas and to provide them a Canadian forum. Conversely, the Canadian Government felt itself bound to ensure that it could exercise jurisdiction in all cases released to Canadian authorities by host governments.<sup>193</sup> Thus, Canadian military

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Pineau, *Civilians Under Military Justice: A Canadian Study*, 25 McGill L.J. 3, 5 (1981).

<sup>190</sup>*Id.* at 10.

<sup>191</sup>*Id.* at 7.

<sup>192</sup>*Id.* at 8.

<sup>193</sup>Testifying in support of military jurisdiction over dependents in 1954, the Minister of National Defence stated in the Canadian House of Commons:

[W]e are trying to create the necessary machinery to exercise maximum jurisdiction under all existing agreements and laws that we can acquire to ourselves in regard to our people abroad.

The arrangements made by Canada with a number of the countries in which our forces are or may be stationed enable Canadian criminal law and procedures to be applied in respect of persons accompanying our forces as an alternative to having the criminal law and procedures of the country in which an alleged offence has been committed applied. In order to secure the benefits of these arrangements we must not only be in a position—I think this is the important fact about the clause—to exercise effective jurisdiction over such persons

authorities must decline jurisdiction in the cases of persons to whom the Code of Service Discipline does not apply.<sup>194</sup> Possibly as a result of this conscientious attitude, West German authorities have always waived jurisdiction in cases involving Canadian civilians subject to the Code of Service Discipline.<sup>195</sup>

Three types of offenses apply to civilians accompanying the Canadian forces overseas: service offenses,<sup>196</sup> offenses against Canadian civilian laws,<sup>197</sup> and offenses against foreign law.<sup>198</sup> A service offense is "[a]ny act, conduct, disorder or neglect to the prejudice of good order and discipline."<sup>199</sup> The act may violate the Code of Service Discipline, the Canadian Criminal Code, or any other Canadian statute, regulation, or order—it is a service offense if it prejudices good order and discipline. This broad provision applies to civilians, apparently on the theory that they form an integral part of the overseas military community and so must submit to military control.<sup>200</sup>

Civilians subject to the Code of Service Discipline are punishable for any act which, if it had been committed in Canada, would be punishable under Canadian law. The effect of this provision is to incorporate all Canadian federal civil and criminal law into the National Defence Act, and to make it applicable to most civilians accompanying the forces abroad.<sup>201</sup> Finally, such civilians may be punished for an act which is a crime in the country where it was committed, even if the act is not a crime under Canadian law.<sup>202</sup> The reason for this provision is "to ensure that offences against foreign law [are] adequately dealt with by Canadian service courts, and that service personnel [are] not . . . tried by foreign courts."<sup>203</sup>

Those civilians who are subject to the Code of Service Discipline may be tried by general court-martial (GCM) like any service person. They may also be tried by special general court-martial

but it must also be clear to the authorities of the foreign country that we have and can exercise such jurisdiction.

Quoted in *id.* at 7-8.

<sup>194</sup>*Id.* at 10.

<sup>195</sup>*Id.*

<sup>196</sup>National Defence Act, *supra* note 185, § 119.

<sup>197</sup>*Id.* § 120.

<sup>198</sup>*Id.* § 121.

<sup>199</sup>*Id.* § 119.

<sup>200</sup>Pineau, *supra* note 189, at 12.

<sup>201</sup>*Id.* at 13. Compare the National Defence Act with AA 1955, *supra* note 146, § 70 (Great Britain), and the Assimilative Crimes Act (United States), 18 U.S.C. § 13 (1982).

<sup>202</sup>Pineau, *supra* note 189, at 14; National Defence Act, *supra* note 185, § 121.

<sup>203</sup>Pineau, *supra* note 189, at 14.

(SGCM), a type of court constituted to try civilians only.<sup>204</sup> They are specifically exempted from summary trial.<sup>205</sup> A GCM is composed of a panel of not less than five officers, including a president not below the rank of colonel.<sup>206</sup> The panel is appointed by the convening authority, who must be the Minister of Defence or his appointee.<sup>207</sup> The GCM has jurisdiction over all eligible persons who have committed service offenses.<sup>208</sup> The punishments imposed by GCM for service offenses include death, imprisonment, and fine.<sup>209</sup> If the GCM convicts a defendant for an act committed overseas that is an offense under Canadian law, the court is limited, in passing sentence, to the punishments specified in the Canadian law that defines the crime.<sup>210</sup>

The SGCM is composed of one Presiding Judge, appointed by the Minister of National Defence, "who is or has been a judge of a superior court in Canada, or is a barrister or advocate of at least ten years['] standing."<sup>211</sup> The Presiding Judge is the ultimate arbiter of law and fact. His options for sentencing are death, imprisonment, and fine.<sup>212</sup> In practice, the SGCM sentencing power is limited: the Presiding Judge may only imprison a defendant for less than two years and fine him a maximum of \$500. If imprisonment in a military facility is contemplated, the permission of the Chief of the Defence Staff is required.<sup>213</sup> A civilian can be tried by SGCM for offenses "primarily of a civilian nature,"<sup>214</sup> and the provisions of the National Defence Act, so far as relevant, apply to SGCMs, as they do to GCMs.<sup>215</sup>

Only certain persons may direct trial by SGCM: the Minister of National Defence, the Chief of the Defence Staff, an officer commanding or authorized to exercise the powers of such a person, and a person appointed by the Minister.<sup>216</sup> Nevertheless, an officer who has power to direct trial by SGCM must notify the Minister, and the latter's approval is necessary before trial can proceed.<sup>217</sup> Defendants before both GCMs and SGCMs are enti-

<sup>204</sup>National Defence Act, *supra* note 185, § 155.

<sup>205</sup>QR&O, art. 102.19.

<sup>206</sup>National Defence Act, *supra* note 185, §§ 145(1) and (2).

<sup>207</sup>*Id.* § 143.

<sup>208</sup>*Id.* § 144.

<sup>209</sup>*Id.* § 125.

<sup>210</sup>*Id.* § 120(2)(b).

<sup>211</sup>*Id.* § 155.

<sup>212</sup>QR&O, art. 113.04.

<sup>213</sup>Pineau, *supra* note 189, at 17.

<sup>214</sup>*Id.* at 23. "Offenses primarily of a civilian nature" is not further defined.

<sup>215</sup>National Defence Act, *supra* note 185, § 155.

<sup>216</sup>QR&O, art. 113.06.

<sup>217</sup>*Id.* art. 113.09(4).



tled to counsel<sup>218</sup> and enjoy other rights such as confrontation<sup>219</sup> and compulsory attendance of witnesses.<sup>220</sup> The defendant has no right to choose between GCM and SGCM—this decision is the convening authority's.<sup>221</sup> There is no right to jury in either type of trial. Before 1982, there was no provision in the Canadian Constitution guaranteeing traditional common law rights, with the result that there was some flexibility in according such rights. In 1982, the Canadian Charter of Rights and Freedoms was enacted, guaranteeing the right to jury, among others. A provision in the Charter, however, specifically exempts military tribunals from its guarantee of jury trial.<sup>222</sup>

A person convicted by GCM or SGCM may appeal on one or more of three grounds: severity of sentence, legality of findings, and legality of sentence.<sup>223</sup> An appeal on the first ground is referred by the Judge Advocate General to an authority with power to mitigate, commute, or remit sentences.<sup>224</sup> That person is the Minister of National Defence or his appointee,<sup>225</sup> and he may take any action within his authority, to include dismissing the appeal.<sup>226</sup> Appeals on the last two grounds will be forwarded to the Court-Martial Appeal Court (CMAC). This is an appeal of right.<sup>227</sup> The convicted person may also petition for a new trial, but such a petition will only be successful if based on new evidence discovered after the conviction.<sup>228</sup> Finally, all persons convicted under the National Defence Act may appeal to the Supreme Court of Canada, which may accept or refuse to review such an appeal in its discretion.<sup>229</sup>

Finally, one provision of the National Defence Act creates extraterritorial jurisdiction in the civil courts in Canada.

Where a person subject to the Code of Service Discipline  
does any act or omits to do anything while outside

<sup>218</sup>National Defence Act, *supra* note 185, § 156.

<sup>219</sup>*Id.* § 161(4).

<sup>220</sup>*Id.* § 160.

<sup>221</sup>Pineau, *supra* note 189, at 25.

<sup>222</sup>Letter from Lieutenant Colonel W.J. Fenrick (Office of the Judge Advocate General, Department of National Defence, Canada), Director of International Law, National Defence Headquarters, Ottawa, Ontario, Canada to the author (January 24, 1986).

<sup>223</sup>National Defence Act, *supra* note 185, § 197.

<sup>224</sup>*Id.* § 200(1).

<sup>225</sup>*Id.* § 183.

<sup>226</sup>*Id.* § 200(1).

<sup>227</sup>*Id.* § 200(2) and (3).

<sup>228</sup>*Id.* § 211.

<sup>229</sup>*Id.* § 208. Compare UCMJ art. 69 (appellate scheme for American service members).

Canada which, if done or omitted in Canada by that person would be an offence punishable by a civil court, that offence is within the competence of, and may be tried and punished by, a civil court having jurisdiction in respect of such an offence in the place in Canada where that person is found in the same manner as if the offence had been committed in that place, or by any other court to which jurisdiction has been lawfully transferred.<sup>280</sup>

Under this provision, offenses against Canadian law by civilians accompanying the forces overseas can be tried by domestic courts even if military courts do not try the cases. Thus, Canada has the capability of trying civilians at home as well as at the overseas scene of the offense.

### *3. Some Observations.*

British and Canadian military jurisdictions over civilians abroad have several notable features. First, in both cases, the jurisdiction is truly military in that civilians can theoretically be tried (and condemned to death) by courts-martial consisting entirely of military officers. Although trial of civilians by soldiers rarely occurs on British overseas installations, two common law jurisdictions with histories and values similar to ours are willing to allow the possibility. Second, no overseas trial of civilians under the British Army Act or the Canadian National Defence Act involves a jury. Third, military jurisdiction under the British Army Act sweeps in virtually all civilians connected in any way with the overseas military community. Canadian military jurisdiction is somewhat less inclusive. In both countries' overseas installations, community commanders have substantial authority to go along with the significant responsibilities of their position—unlike their American counterparts. Fourth, the British system has a well-developed mechanism for dealing with juvenile offenders. Special orders available to the court allow it to involve parents in its decisions, place the juvenile under the supervision of an unrelated adult, or place him in a custodial setting in the home country. Judicial authority over all persons involved makes these sanctions enforceable. Fifth, Canadian and British civilian offenders are subject to the appropriate substantive provisions of the military criminal code. Only clearly military offenses do not apply to civilians accompanying the forces overseas. In addition, criminal laws in force in Great Britain and Canada apply to such civilians because of section 70 of the British Army Act and section 120 of

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<sup>280</sup>*Id.* § 231.

the Canadian National Defence Act respectively. Also, section 231 of the latter gives courts in Canada jurisdiction over offenses committed by Canadians abroad. These provisions take care of the problem of the extraterritorial application of home country law. At the same time, they make civilians "subject to military law," and so bring the systems within the terms of the NATO SOFA. Finally, British and Canadian civilians accompanying the forces are apparently in favor of these systems because they prefer a home forum, however, imperfect, to local courts.<sup>231</sup>

### **C. BYPASSING THE NEED FOR NEW LEGISLATION: CONSTITUTIONAL AMENDMENT OR CONTRACTUAL WAIVER**

A constitutional amendment would be the tidiest solution to the problem of the jurisdictional void. Such an amendment would state that United States citizens abroad, in limited and well defined situations, could be subjected to trial by court-martial, with the curtailment of constitutional rights that that involves. We would return to the pre-*Covert* situation—no legislation and no new court system would be required because the UCMJ has extraterritorial reach over all to whom it applies, and the military court system is already in place.

In this author's opinion, such a solution would not do violence to the common law tradition disfavoring military authority over civilians. Although it would be a departure from the ideal, it would be limited, clearly-defined, and justifiable. There is ample precedent for such a departure in the history of the common law.<sup>232</sup> The spirit of flexibility running throughout the common law heritage has already been noted. The limitation of Bill of Rights guarantees would apply only to those civilians who voluntarily accompany the military and form part of a military community abroad. The justification is the need to maintain

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<sup>231</sup>"I think our dependents and other civilians find it reassuring that they can be tried under a British legal system rather than some foreign system." Garraway Letter, *supra* note 166; see also F. Wiener, *supra* note 23, at 233: "[T]he very idea of turning over British subjects to German, or Japanese, or Turkish courts, for unfamiliar proceedings in a foreign tongue taking place in what might be a hostile atmosphere, and with at least a strong possibility of confinement in a foreign prison, was a very real probability that was . . . difficult to accept." Regarding Canadian sentiment on this subject, see *supra* note 193 and accompanying text.

<sup>232</sup>Examples are the British courts-martial in the field of camp followers on the European continent and in America, application of camp follower articles in Gibraltar and India, and the modern British military jurisdiction over civilians in Europe. American examples include the incidents of military trial of civilians on the western frontier and enactment of the Crowder article.

morale and security in such military communities, and assure combat readiness of our troops overseas—needs that can only be imperfectly met by maintaining the *status quo* or establishing extraterritorial United States civilian jurisdiction.

Such a solution is also justifiable in light of two twentieth century developments which are new to the military-civilian debate. One is the "civilianization" of military justice.<sup>233</sup> Although the defendant before a military court does not enjoy the full gamut of constitutional guarantees, there are few he lacks, and the old fears of summary, harsh judgment have little basis today.<sup>234</sup> The other development is the semi-permanent presence of troops of one nation on the soil of another in a noncombat, nonoccupation status. This phenomenon has forced a redefinition of military jurisdiction. Whereas, before, civilians accompanying military forces were subject to military jurisdiction pursuant to relatively well-established rules of law (*i.e.*, "in the field" or "on active service"—generally, during hostilities—and during hostile occupation, as in the allied occupation of Germany immediately after World War II), now there is a need to forge new rules. The *Covert* decision came at an early stage in both of these developments;<sup>235</sup> therefore, an argument could be made that changed circumstances justify the reversal of *Covert* by means of constitutional amendment.

Realistically, the likelihood of a constitutional amendment is remote. The Constitution prescribes two procedures for its amendment:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall prepare Amendments . . . or on the Application of the Legislatures of two thirds of the

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<sup>233</sup>Justice Black noted this trend, which began after World War II, in his opinion in *Covert*. See 354 U.S. at 37. More recent examples include the adoption of the Federal Rules of Evidence, with minor changes, for use in courts-martial in 1980 and the establishment of the Trial Defense Service independent from field commands in the same year. See Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 Mil. L. Rev. 4 (1983).

<sup>234</sup>Justice Black emphasized the absence of jury indictment and trial and of tenured, independent judges. Another right absent in a military trial is bail. *But see* Everett, *Military Jurisdiction Over Civilians*, 1960 Duke L.J. 366, 381 n.71 (discussion of how military justice both falls short of and exceeds civilian courts in according rights to the accused); Zimmerman, *Civilian v. Military Justice*, 17 Trial (No. 10) 34 (1961) (favorable comparison of military to civilian justice by a civilian attorney).

<sup>235</sup>The NATO SOFA, marking the change in status of allied forces in the Federal Republic of Germany from occupiers to guests, was signed in 1955. Many of the most significant changes in American military law have occurred in the last 30 years.

several States, shall call a Convention . . . [Amendments are then valid] when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof.<sup>236</sup>

Congress has not been motivated to legislate extraterritorial jurisdiction in the nearly thirty years since *Covert*; it is unlikely that it would be receptive to the idea of a constitutional amendment. Similarly, state legislatures, concerned primarily with governing those who live within their borders, would probably not generate a groundswell for an amendment that would extend military jurisdiction over their citizens overseas.

An alternative to constitutional amendment is contractual waiver of rights by civilians accompanying the forces. This alternative might be rationalized as follows: *Covert* found military courts constitutionally deficient in that they do not provide trial or indictment by jury; these rights are personal to the accused and may be waived;<sup>237</sup> therefore, a civilian could knowingly and voluntarily waive the rights and consent to trial by military court. Waiver could theoretically occur at either of two points in time: after the defendant has been charged<sup>238</sup> or before a civilian left the United States, as a precondition to employment or command sponsorship by the military overseas.<sup>239</sup>

Depending on how broadly the waiver were construed, it could preclude the need for legislation creating extraterritorial jurisdiction. Thus, if a civilian waived his right to civilian trial, he could be said to be voluntarily subject to the UCMJ. A narrower construction would only allow a civilian to waive certain rights (e.g., trial by jury), but he would still be subject to civilian law, so extraterritorial jurisdiction would be required. In the case of consent after charging, the defendant's motivation to consent to military jurisdiction would be the alternative of trial in a foreign court. Of course, if the host country declined jurisdiction, the

<sup>236</sup>U.S. Const. art. V.

<sup>237</sup>*Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942); *Barkman v. Sanford*, 162 F.2d 592 (5th Cir.), cert. denied, 332 U.S. 816 (1947); Fed. R. Crim. P. 7(a), 7(b), and 23(a).

<sup>238</sup>This idea is well presented in Note, *Criminal Jurisdiction Over Civilians Accompanying American Armed Forces Overseas*, 71 Harv. L. Rev. 712, 721 (1958) [hereinafter Harvard Note].

<sup>239</sup>Everett & Hourcle, *Crime Without Punishment—Ex-Servicemen, Civilian Employees and Dependents*, 13 JAG L. Rev. 184, 197 (1971) Compare the contractual agreements entered into by civilian employees of the Canadian Department of National Defence submitting themselves to military jurisdiction, *supra* text accompanying note 191.

defendant would have no motivation to consent.<sup>240</sup> The primary argument against waiver in both cases is that the thrust of Justice Black's opinion in *Covert* was to declare trial by military court of civilians unconstitutional *per se*, regardless of what constitutional rights are absent or present in such trials.<sup>241</sup> Because the decision in *Covert* was by a plurality, with only four justices signing the lead opinion, a plausible argument can be made that the Court did not intend so broad a ruling.<sup>242</sup> In any event, a further objection to prospective waiver of the jury right (*i.e.*, as a condition to accompanying the forces) is that the right is too fundamental for a person to give up before he knows with what offense he is charged.<sup>243</sup> Indeed, cases in which the principle of waiver of the jury right was upheld have been instances of waiver *after* charging.<sup>244</sup>

#### D. ESTABLISHING EXTRATERRITORIAL JURISDICTION

Absent a constitutional amendment or waiver and consent to military jurisdiction, Congress must pass legislation creating extraterritorial jurisdiction if the United States is to deal judicially with its civilians who commit offenses overseas. There is constitutional authority for such congressional action. Article I, section 8 of the Constitution provides one possible source of authority.<sup>245</sup> Congress' power to raise and support armies is another.<sup>246</sup> Finally, Congress derives the power to legislate extraterritorial jurisdiction over citizens as an incident of its power to regulate foreign relations and commerce.<sup>247</sup>

Congress derives the authority to give federal district courts venue to adjudicate offenses committed overseas by United States

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<sup>240</sup>Harvard note, *supra* note 238, at 721-22.

<sup>241</sup>Girard, *supra* note 38, at 515-16: "I suspect that a majority of the Court, faced with the realities of the situation, would interpret [*Covert* and its progeny] as holding simply that military trial was forbidden, not that jury trial was mandatory—that the gist of the decisions was anti-military, not pro-jury, not even anti-military because pro-jury."

<sup>242</sup>Harvard Note, *supra* note 238, at 722.

<sup>243</sup>Everett & Hourcle, *supra* note 239, at 225-26. Another argument against requiring prospective waiver by Department of Defense civilians as a condition of employment overseas is that it might discourage people from applying for such jobs.

<sup>244</sup>See *supra* note 237.

<sup>245</sup>Girard, *supra* note 38, at 508. *Contra* Harvard Note, *supra* note 238, at 723 n.70.

<sup>246</sup>Harvard Note, *supra* note 238, at 723 n.70.

<sup>247</sup>*Id.*; Girard, *supra* note 38, at 508.

citizens from article III, section 2 of the Constitution.<sup>248</sup> Congress has in fact legislated such venue. Offenders can be tried in the federal district court in the district where they are apprehended or into which they are first brought.<sup>249</sup>

### ***E. TRIAL OF OVERSEAS OFFENDERS IN THE UNITED STATES***

Bills considered by Congress since *Covert* have purported to create extraterritorial jurisdiction, presuming trial in the United States. S. 2007, introduced in 1967,<sup>250</sup> would have made some civilians accompanying the forces overseas subject to some of the substantive provisions of the UCMJ. The bill applied to "any citizen, national, or other person owing allegiance to the United States . . . serving with, employed by, or accompanying the armed forces outside the United States."<sup>251</sup>

The Criminal Justice Reform Act of 1975<sup>252</sup> would have applied to all United States citizens overseas if they were not subject to the "general jurisdiction of the United States" and if their crime fell within one of nine categories. These categories included violent crimes against public servants of the United States performing official duties abroad; treason, espionage, or release of classified information; fraud against the United States; manufacture or distribution of drugs for import into the United States; and offenses committed by or against United States nationals (except those committed by service members, who are subject to the UCMJ).<sup>253</sup>

H.R. 255,<sup>254</sup> before the House Judiciary Committee in 1986, would have expanded the special maritime and territorial jurisdiction of the United States to cover nationals or citizens of the United States "serving with, employed by, or accompanying the Armed Forces outside the United States."<sup>255</sup> Those crimes listed in Title 18, United States Code, which by their terms have effect only within the special maritime and territorial jurisdiction would have applied to some civilian offenders accompanying the forces

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<sup>248</sup>"The trial of all crimes . . . shall be held in the State where . . . committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by law have directed."

<sup>249</sup>18 U.S.C. § 3238 (1982).

<sup>250</sup>S. 2007, 90th Cong., 1st Sess. (1967).

<sup>251</sup>*Id.* § 951.

<sup>252</sup>S. 1, 94th Cong., 1st Sess. (1975).

<sup>253</sup>*Id.* § 204.

<sup>254</sup>H.R. 255, 99th Cong., 1st Sess. (1985) [hereinafter H.R. 255].

<sup>255</sup>*Id.* § 16.

abroad who committed offenses in circumstances not normally within the special maritime and territorial jurisdiction. These circumstances would have been: commission of a crime outside any existing United States jurisdiction (1) while engaged in the performance of official duties; (2) within a United States military installation abroad or the area of operations of a unit in the field; or (3) against a United States service member or another civilian accompanying the forces.<sup>255</sup> H.R. 255 also would have authorized the apprehension and detention of civilian offenders in the host country and their transportation to the United States for trial.<sup>257</sup>

There are several problems with these proposals. First, they contemplate trial in the United States but do not deal with the difficulties of implementing such a scheme.<sup>258</sup> Second, the standard language "persons serving with, employed by, or accompanying the armed forces outside the United States," could create interpretation problems. Are persons accompanying the forces only those who are "command sponsored,"<sup>259</sup> for instance, or does the provision include noncommand sponsored dependents? The need to maintain order in the military community would favor including all people in any way linked to that community, but the tendency of courts might be to narrowly define a new and untried jurisdiction. Perhaps we could learn from the British scheme and more specifically define jurisdiction in terms of persons living with service members and civilian employees at their overseas station.

A second criticism of the proposals is their failure to deal with the diplomatic problems of arrest of offenders in a foreign country and the return of those offenders to the United States. A country cannot arrest and extradite persons in a foreign country without the latter's consent. Thus, even H.R. 255, which attempts to define the details of arrest and return, does not mention the vital issue of coordination with the host country. Third, each proposed bill continues to exclude the Canal Zone from the coverage of the

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<sup>255</sup>*Id.*

<sup>256</sup>*Id.* §§ 981, 982.

<sup>257</sup>These difficulties are discussed *infra* text accompanying notes 264 and 265.

<sup>258</sup>"Command sponsorship" is relevant primarily to family members of service members stationed overseas. It describes the particular service's commitment to transport members of a service member's family to his or her overseas duty station at government expense, and to provide such family members military housing or an allowance to procure housing in the host country. Noncommand sponsored dependents are entitled to neither transportation to the overseas station nor housing at government expense. They also may be denied other privileges because of the applicable SOFA.



new extraterritorial jurisdiction.<sup>260</sup> The assumption obviously is that the Canal Zone is still a federal district where a United States district court sits. This has not been the case since the Panama Canal Treaty took effect in 1979.<sup>261</sup> Currently, the status of the 9,000 service members<sup>262</sup> and accompanying civilians serving the United States armed forces in Panama is similar to that of their counterparts in Germany, Korea and elsewhere—they are members of a visiting force subject to the terms of a treaty. Therefore, any establishment of extraterritorial jurisdiction should not exclude the now nonexistent Canal Zone.

Going beyond the technical problems with each bill, is the alternative of trial in the United States feasible at all? It would bypass the problems of creating new courts to try cases where they arise.<sup>263</sup> There would be no worry about transporting courts and all their attendant paraphernalia (counsel for the accused, juries, and court reporters, for example) to a foreign country. The possibility of insulting a host country by operating a United States court in its territory would not arise.

On the other hand, arrest and return to the United States of civilian accuseds could create international law problems. The need to transport personnel and evidence to the United States from an overseas duty station could disrupt overseas military operations.<sup>264</sup> Most significantly, securing attendance of foreign witnesses at trial could be difficult. The United States has no means to compel foreign witnesses to appear at a trial in a United States court.<sup>265</sup> Trial by deposition is a possibility if key foreign witnesses could not be procured, as will be discussed later.

### F. TRIAL IN THE HOST COUNTRY

Trial of civilian offenders in the country where the offense occurred would solve some problems, but create others. The difficulties of moving the trial to the United States would be circumvented. It should be easier, for instance, to compel attendance of foreign witnesses at a trial in their home country—there is little difficulty in doing this in overseas courts-martial of U.S. service members. Still, host country cooperation is necessary for

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<sup>260</sup>H.R. 225, *supra* note 254, § 16.

<sup>261</sup>Panama Canal Treaty, Sept. 7, 1977, United States-Panama, T.I.A.S. 10030 (entered into force Oct. 1, 1979).

<sup>262</sup>Association of the United States Army, Special Report: The Search for Peace—A Year-End Assessment 53 (1985).

<sup>263</sup>For a discussion of these problems, see *infra* text accompanying notes 265-85.

<sup>264</sup>*Contra* Girard, *supra* note 38, at 509.

<sup>265</sup>*Id.* at 509-10.

compulsory process, and if the host does not condone foreign civilian trials on its soil it will certainly not cooperate in procuring witnesses.

This brings us to the central dilemma of trial of civilians accompanying the forces overseas—can a scheme be devised which satisfies United States constitutional requirements but at the same time does not infringe upon host country sovereignty? The answer may be no, for two reasons. First, as we have seen, the splintered decision in *Covert* gives unclear guidance as to what the constitutional requirements are. Does *Covert* condemn military trial of civilians *per se*, or only those military trials that do not include all the Bill of Rights guarantees? Would the Court condone trial of civilians by military authorities if the constitutional infirmities were corrected? What degree of military involvement makes a trial a forbidden "military trial" in the Court's eyes? Use of panels of officers and judges appointed by a military commander clearly would, but would use of the UCMJ to provide a code of offenses for civilian defendants, mandatory appeal in the first instance to the Court of Military Appeals, or use of judge advocate officers as appointed defense counsel? As the degree of military involvement decreases, so does the likelihood of compliance with the SOFA provision allowing trial of persons "subject to military law" in the host country, and the chance of host opposition increases. This is the second reason why trial of our civilians in a foreign country may be impossible as matters now stand. There may be no point at which the demands of both our Constitution and host sovereignty can be satisfied.

Appropriately, those who have proposed schemes for trial of civilians abroad have based their ideas on their personal perceptions of both the meaning of *Covert* and the probable reactions of host nations. One commentator suggests making the substantive provisions of the UCMJ applicable to civilians accompanying the forces ("excluding the harsh or vague articles") for the purpose of defining crimes and offenses.<sup>266</sup> This scheme contemplates civilian judges appointed by the President with the advice and consent of the Senate, indictment and trial by civilian juries, and use of the Federal Rules of Criminal Procedure. However, it also would include use of military prosecutors, direct appeal to the Court of Military Appeals, and incorporation of the whole scheme into the military justice system through amendment to the UCMJ to assure compliance with the SOFAs.<sup>267</sup> The author of this scheme

<sup>266</sup>Harvard Note, *supra* note 238, at 727.

<sup>267</sup>*Id.* at 726-27.

acknowledges that Justice Black's opinion in *Covert* disfavors any military authority over civilians and probably would require a pure article III court to try civilians. He notes that Justices Frankfurter's and Harlan's opinions may leave room for an article I court, as they would probably recognize Congress' authority to control civilians accompanying the forces as part of its power to make rules for the governing of the land forces.<sup>268</sup>

Another commentator states that the thrust of *Covert* was not to require all Bill of Rights guarantees in every instance, but to strike down all military authority over civilians.<sup>269</sup> He suggests that *In re Ross* and the *Insular Cases* may still be valid to the extent that they hold that "constitutional safeguards are not required when trial outside the United States appears essential if circumstances are such that these guarantees are meaningless, infeasible, or prejudicial to the accused."<sup>270</sup> Based on this, he says that Congress could establish legislative courts "with Article III powers" to try civilians abroad. Such rights as jury trial might be curtailed if found to be "infeasible" to implement. Although he acknowledges that "further agreements [with the host nations] seem necessary," this commentator also does not see host country opposition as a problem. This, he reasons, is because the proposed legislative courts can be distinguished from the old consular courts in that they would be supplementary to—not in lieu of—host country jurisdiction.<sup>271</sup>

A third unofficial scheme, originating in the United States Department of Defense (DOD),<sup>272</sup> attempts to reconcile the opposing demands of constitutionality and diplomacy. This scheme would establish a system of "military district courts" (MDC) at the overseas areas of greatest American troop concentration.<sup>273</sup> The scheme would be "military" in that (1) it would be included in the UCMJ by amendment and established under Congress' article I authority;<sup>274</sup> (2) trial would be triggered by a general court-martial convening authority's request for an indict-

<sup>268</sup>*Id.*

<sup>269</sup>See *supra* note 241.

<sup>270</sup>Girard, *supra* note 38, at 516.

<sup>271</sup>*Id.* at 519. The legislative courts would only take jurisdiction when the host country could not or would not do so.

<sup>272</sup>Letter from Mr. Andrew Effron, Office of the General Counsel, Department of Defense, to the author (Jan. 27, 1986) containing draft DOD proposal for establishing United States criminal jurisdiction over civilians accompanying the United States armed forces overseas [hereinafter DOD Proposal].

<sup>273</sup>*Id.* § 943(a).

<sup>274</sup>*Id.* § 943(a)(2).

ment;<sup>275</sup> (3) some of the substantive offenses and punishments would be provided by the UCMJ;<sup>276</sup> (4) procedural rules would be drawn from the Rules for Courts-Martial;<sup>277</sup> (5) appointed defense counsel could be military judge advocates;<sup>278</sup> and (6) appeal in the first instance would be to the Court of Military Appeals.<sup>279</sup> On the other hand, civilian judges would be appointed by the President with Senate confirmation for fifteen-year terms,<sup>280</sup> civilian juries would be provided for indictment in serious cases<sup>281</sup> and for trial in all cases where over six months' confinement was possible, and civilian codes would provide some of the substantive offenses and punishment.<sup>282</sup> Other "civilian" rights such as bail would be provided.<sup>283</sup>

Jurisdiction under the DOD scheme would be based on the status of the offender and the circumstances of the offense. Only civilians "serving with, employed by, or accompanying the armed forces outside the United States" would be amenable. Further, this jurisdiction would attach only in the absence of other forms of jurisdiction over the accused. For instance, only if the host country either had primary jurisdiction over a case and waived it or had no jurisdiction at all could the appropriate MDC entertain the case. Finally, trial by MDC would be possible only if the accused had committed his offense (1) under color of official duties; (2) under color of duties related to military contract; (3) on a military base; or (4) against the United States forces or a United States service member, employee, or dependent.<sup>284</sup>

All three of the schemes reviewed hinge on speculation about what *Covert* requires and what host countries would tolerate. As a result, the feasibility of each scheme is highly speculative. In implementing a plan for trial of civilians abroad, this author believes that it would be less risky to experiment with our constitutional requirements than with host country reactions. At

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<sup>275</sup>*Id.* §§ 946(d) and (e). The convening authority would be able to convene a grand jury and suspend punishments, but would have no other powers.

<sup>276</sup>*Id.* § 942. A hierarchy of offenses and punishments would be implemented, with the appropriate provisions of the UCMJ applied first, and provisions from the United States Code and the District of Columbia Code applied (in that order) in the absence of appropriate provisions in the UCMJ.

<sup>277</sup>*Id.* § 946(a).

<sup>278</sup>*Id.* § 946(b)(6).

<sup>279</sup>*Id.* § 944(a).

<sup>280</sup>*Id.* § 943.

<sup>281</sup>*Id.* § 946(b)(3).

<sup>282</sup>*Id.* § 942. (These civilian codes would be the United States and District of Columbia Codes.)

<sup>283</sup>*Id.* § 946.

<sup>284</sup>*Id.* § 941.

worst, the former could result in another *Covert*; the latter in disruption of our foreign relations. Regardless of the degree of military involvement or the likelihood of conflict with host country jurisdiction, each of the three schemes results in trial of American civilians by a United States civilian court in a foreign country. This is a key factor in international relations. Speculating that a given host will accept such an arrangement because the jurisdiction is nominally "military" or because our allies do it is naive. As we have seen, those of our allies with common law traditions are willing to accept trial of civilians with fewer constitutional guarantees than we, and, in certain cases, even court-martial of civilians. In this author's opinion, minimal compliance with *Covert* requires importation of much of the paraphernalia of our federal courts into the host country, to include tenured civilian judges, juries (both grand and petit), and government-supported civilian counsel. Such machinery operating in a foreign country is bound to be more conspicuous than the British or Canadian forces' civilian courts. If host countries would be insulted by the presence of full-blown article III courts on their soil, they would likely take offense at these hybrid models.

Another factor distinguishing the United States from its allies in this regard is its identity as the foremost power in the free world. It is common knowledge that the United States is subjected to closer scrutiny and criticism in its activities overseas than other nations because of its world leadership role. Even if friendly governments in host countries might be willing to interpret the terms of SOFAs liberally, they are often constrained by pressure groups within their constituencies. Thus, the political climate in a given host country can have a strong impact on the method the United States uses to deal with its civilian offenders abroad. Because of this, we should move cautiously—and preferably in close consultation with the host government—in implementing a scheme for trial of civilians abroad. Above all, we should not use what could be perceived as subterfuge.<sup>265</sup>

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<sup>265</sup>Two proposed schemes not discussed in text are trial by commissioners (without jury) in the host country and militarization of civilians accompanying the forces to make them amenable to military jurisdiction. See Ehrenhaft, *supra* note 129. The first scheme is based on the assumption that the jurisdictional void is essentially a problem involving minor offenses rather than serious felonies and that the jury right is limited in trials of the former. To handle the numerous petty offenses that bedevil commanders, the proponent suggests appointment of commissioners to try and sentence civilian offenders at military installations overseas. Not only are the basic assumptions questionable (given the actual and potential problems with serious offenses already discussed), commissioners' courts would raise the same diplomatic issues as would any system of United States courts operating on foreign soil. The militarization idea raises constitutional

### III. RECOMMENDATIONS FOR FILLING THE VOID

What can be done about the jurisdiction void? To answer this question, we must first define the jurisdiction void. Numerically, it consists of 50 to 60 serious cases (murder, rape, manslaughter and negligent homicide, arson, robbery and related offenses, forgery and related offenses, and aggravated assault) and between 50 and 350 less serious cases (simple assault, drug abuse, contraband, disorderly conduct, and traffic offenses) released annually to United States authorities who are impotent to resolve them judicially.<sup>286</sup> Add to that the potential for a sensational civilian case being released to American jurisdiction or a rash of felonies committed by American civilians accompanying the forces in Korea during a period of martial law. Finally, what if key civilian employees of our armed forces overseas abandoned their posts at a time of national emergency not amounting to declared war? Controlling such employees could be difficult, as few host nations would be interested in prosecuting offenses against United States security, and the United States Government could rely on neither its war powers nor extraterritorial jurisdiction to assert its authority.<sup>287</sup>

Any solution to the jurisdictional void must steer between the Scylla of diplomacy and the Charybdis of constitutionality. No scheme will be workable if it violates the letter or spirit of international agreements or arouses significant resentment in host countries. Likewise, *Covert* made clear that direct military judicial power over civilians in peacetime, especially absent juries and tenured judges, will not pass constitutional muster. The paramount consideration, in this author's opinion, is to avoid a solution that might be perceived by host nations as violating our agreements with them. While citizens have recourse to the courts for violations of their constitutional rights, damage to our relations with allies can be hard to repair. Therefore, the United States should move cautiously and in full consultation with a host government before implementing a scheme that could be perceived as infringing upon host nation sovereignty.

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statutory, and practical issues, especially with regard to dependents. See Everett & Hourcle, *supra* note 239, at 197 and Ehrenhaft, *supra* note 129, at 280-81 for some objections to militarization.

<sup>286</sup>See *supra* text accompanying notes 103-37. The terms "serious cases" (or offenses) and "less serious cases" (or offenses) will be used throughout this section as defined here.

<sup>287</sup>United States v. Averette, 19 C.M.A. 363, 41 C.M.R. 363 (1970).

Nevertheless, the solution must not run against the grain of our common law heritage, for if it does, it will be short-lived and open to constitutional attack. It must incorporate the traditional common law values of vigilance against excessive military power and flexibility regarding the use of that power when circumstances so demand. Under the American interpretation of the common law heritage (although not the British or Canadian), this means that military trial of civilians in peacetime is prohibited, but that some military control over civilians who choose to live in military communities abroad is permissible.

Finally, any proposed solution must deal with reality. The probability of a constitutional amendment reversing *Covert* is remote. Legislation creating extraterritorial jurisdiction is less improbable, but is not likely in the immediate future—Congress is still considering it after thirty years. Because of these realities, this author proposes a three-part solution covering the short-, mid-, and long-term. The immediate action the United States can take to fill the jurisdictional void is a combination of making effective use of administrative sanctions and encouraging host countries to make maximum use of their jurisdiction over American civilians accompanying the forces. Mid-term, the United States should establish extraterritorial jurisdiction of federal courts over civilians accompanying the forces to assure that United States authorities can deal with serious cases not adjudicated by host nations. Long-term, renegotiation of SOFAs is desirable, with a view to securing host country approval for on-site trials of American civilian offenders. Only then, when United States authorities have means to effectively exercise their jurisdiction, should they actively seek release of jurisdiction in serious cases as a matter of policy.

### ***A. STRENGTHEN ADMINISTRATIVE SANCTIONS AND ENCOURAGE EXERCISE OF HOST JURISDICTION***

The GAO Report cited in section IC above concluded that administrative sanctions available to commanders are largely ineffectual in dealing with civilian misconduct in overseas commands. The report stated, for example, that sending dependents back to the United States before the end of the sponsor's tour may actually be an incentive to dependent misconduct.<sup>288</sup> While this is certainly true in some cases, it is not in most. In this

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<sup>288</sup>GAO Report, *supra* note 103, at 13.

author's experience as both an enlisted legal clerk and a judge advocate officer in overseas commands, "early return of dependents"—with its consequences of family separation and the economic hardship of maintaining two households—is a strong deterrent to misconduct. The same is true for Department of the Army civilian employees, who often compete for overseas jobs and do not want to shorten their tours.<sup>289</sup> Lesser sanctions—loss of the Basic Allowance for Quarters (BAQ), loss of exchange and commissary privileges, termination of post housing, and exclusion from post—can also be devastating in a foreign country. In many host nations expenses on the local economy are high, and when the buffers of low exchange prices and free housing are removed, life on a military income can be hard indeed.

Administrative sanctions are concededly inadequate to cope with serious offenses. Revoking a rapist's exchange privileges is inappropriate, although requiring him to leave the host country at least removes him from the society he victimized. An imaginative arsenal of administrative sanctions firmly and consistently applied, however, can be effective in dealing with less serious offenses. Combined with a policy of encouraging assertion of host jurisdiction, such sanctions could help solve the problem of the jurisdictional void.

Less serious offenses comprise roughly 96% of all offenses committed by civilians accompanying the forces overseas. In 96% again of those cases (and in 87% of cases involving serious offenses), host countries already retain jurisdiction.<sup>290</sup> If this is the situation at a time when United States policy is to "maximize" its own jurisdiction, the jurisdictional void should be considerably narrowed by a policy encouraging the exercise of host jurisdiction.

How can United States authorities ensure maximum effectiveness of administrative sanctions? One way is to provide a good repertoire of sanctions to the official charged with deciding how to punish civilian offenders. For most civilians accompanying the forces, the military community and military benefits are "lifelines" to the home country. Administrative sanctions sever these economic and social lifelines; therein lies their punitive and deterrent value. United States Army, Europe, Regulation 27-3<sup>291</sup>

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<sup>289</sup>For Department of the Army civilian employees, overseas employment often means career advancement and privileges not available to them in the United States. See Ehrenhaft, *supra* note 129, at 274-75.

<sup>290</sup>See text accompanying notes 135-36.

<sup>291</sup>U.S. Army, Europe, Reg. No. 27-3, Misconduct by Civilians Eligible to Receive



contains a comprehensive scheme of sanctions by means of which authorities can suspend or revoke almost any benefit a civilian enjoys by virtue of his connection to the overseas military community. This includes access to the installation and all its facilities, except medical facilities. It also includes community activities and use of check cashing and ration privileges. Of course, civilians may also be sent back to the United States, and civilian employees of the Department of Defense may receive adverse employment actions from their supervisors if their misconduct has some connection of their duties.

As in the British system, juvenile offenders may be put under the supervision of an unrelated adult and be restricted or compelled to perform community services or to reimburse victims of their misconduct. Under USAREUR Reg. 27-3, compliance with such community supervision arrangements must be voluntary because American authorities lack their British counterpart's judicial powers of coercion. Nevertheless, the threat of early return to the United States or referral of the matter to host country courts can be persuasive in inducing juveniles to adhere to supervision orders. The United States could conceivably introduce a sanction similar to Britain's custodial order (return of the minor to a youthful offenders' facility in the home country for a specified period). This would be less practical for American authorities, however, because in the United States juvenile programs are usually managed by state governments. There are benefits in being able to place youthful offenders in appropriate programs at home rather than simply excluding them from the military community and releasing them into civilian society. These benefits, however, may be outweighed by the cost to the federal government of making and financing agreements with state juvenile agencies, which would be necessary to implement such a scheme.

USAREUR Reg. 27-3 provides the tools necessary for an effective system of administrative control over civilians accompanying the forces. The next step is to use the tools effectively. In this regard, American authorities should change current concepts of proportionality. Commanders often hesitate to revoke exchange privileges, for example, for misconduct other than abuse of those particular privileges. Indeed, many of the appropriate regulations make this "linkage" a requirement.<sup>292</sup> More generalized use of the

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Individual Logistic Support (5 Jan. 1982) [hereinafter USAREUR Reg. 27-3].

<sup>292</sup>Examples of such regulations are Dep't. of Army, Reg. No. 60-20, Army and Air Force Exchange Service (AAFES) Operating Polices (1 Aug. 1984), and Dep't.

sanctions could be more effective, and would not violate due process if regulations were amended to eliminate the linkage requirement.<sup>293</sup> Civilians are allowed to accompany the forces overseas and enjoy certain privileges on the understanding that they will abide by the law.<sup>294</sup> When they commit misconduct, they may lose any or all of the privileges, or even the right to accompany the forces overseas. The argument is strengthened by the fact that misconduct by persons connected with the United States forces in a foreign country not only disrupts the military community; it can weaken the community's position vis-a-vis the host government and even damage our national security. Civilians should be required to sign documents acknowledging these facts and accepting the *quid pro quo* (privileges for good behavior) before accompanying the forces overseas.

In the unlikely event federal courts were to adjudicate the constitutionality of such a system, standards of review would be deferential. In reviewing military administrative determinations, courts normally examine them to ensure that they are supported by substantial evidence and are not arbitrary or capricious.<sup>295</sup> A system that allowed revocation of any or all privileges for any significant act of misconduct should meet this standard, and would have greater deterrence value than a system straight-jacketed by an exaggerated appropriateness concept.

Another way to make administrative sanctions more effective is to introduce a recidivist provision. For example, three-time

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of Army, Reg. No. 80-19, Army Commissary Store Operating Policies (1 June 1980) (Cl. 15 Oct. 1982).

<sup>293</sup>The linkage requirement would have to be removed, as the services are bound to follow their own regulations, even if they are more stringent than constitutional guidelines. See *infra* note 295.

<sup>294</sup>This principle is already expressed in NATO SOFA:

It is the duty of a force and its civilian component and the members thereof as well as their dependents to respect the law of the receiving State, and to abstain from any activity inconsistent with the spirit of the present Agreement, and, in particular, from any political activity in the receiving State. It is also the duty of the sending State to take necessary measures to that end.

NATO SOFA, *supra* note 74, art. III.

<sup>295</sup>In addition to the characteristic hesitancy of federal courts to review exercises of military administrative discretion, see McDaniel, *The Availability and Scope of Judicial Review of Discretionary Military Administrative Decisions*, 108 Mil. L. Rev. 89, 117-19 (1985), there is the added factor here of the tenuous basis for federal court jurisdiction over military administrative decisions taken overseas. As to the scope of review, see Greer v. Spock, 424 U.S. 828 (1976); Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886 (1961); Heisig v. United States, 719 F.2d 1153, 1157 (Fed. Cir. 1983); Grieg v. United States, 640 F.2d 1261, 1266-1267 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 907 (1982).

committees of certain offenses during a sponsor's single overseas tour of duty would be automatically returned to the United States, absent unusual circumstances. This might be inappropriate for minor traffic offenses, but would not be for acts that could affect community morale or national security, such as chronic drug involvement or assaultive behavior. For purposes of such a provision, "less serious offenses" could be further subdivided into major and minor offenses, with the recidivist provision applying only to the former. Such a scheme would not unduly interfere with a community commander's discretion, but would assure removal of chronic troublemakers and provide an additional element of deterrence.

As already noted, current United States policy is to request jurisdiction in cases involving its citizens overseas, even when it cannot try the defendants. Community and theater commanders are encouraged, at least officially, to seek custody and jurisdiction of all United States citizens in the military community who commit offenses overseas.<sup>296</sup> The potential result of this policy is to increase the number of Americans who escape punishment for their offenses overseas (*i.e.*, widen the void created by *Covert*). Presumably, this policy is based on a desire to save as many of our citizens as possible from trials in foreign courts that may not offer all the rights available under our Constitution. Another rationale may be our perceived need to preserve our position under the SOFA—by asserting its rights under a treaty, a nation prevents the erosion of those rights through waiver or nonuse. In many of the countries where United States troops are stationed, these concerns are probably less significant than the need to assure that justice is done. If offenders escape trial and punishment, morale and community order will suffer. On the other side of the coin, the problem of unfair trials of Americans in foreign courts has probably been overstated.<sup>297</sup> Finally, the means for preserving our rights under the SOFAs is to renegotiate them so they will reflect reality.

To reduce or to eliminate the jurisdictional void, the United States must use administrative sanctions in coordination with a policy of encouraging the exercise of host jurisdiction in all cases in which administrative sanctions are inadequate. Expanded recourse to host jurisdiction would thus have two purposes: first, it would assure that serious cases—cases that American authorities are now unable to handle—would be adjudicated, and serious

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<sup>296</sup>See *supra* note 118.

<sup>297</sup>Girard, *supra* note 38, at 506-07.

offenders punished; second, the threat of release of less serious cases to host country tribunals would put "teeth" into American administrative sanctions.

This policy would require close liaison and cooperation with host authorities. Its justification is the principle that we should not seek jurisdiction in cases we are not adequately equipped to handle. A new counter to the criticism that we would be abandoning our citizens to alien trials is a recent policy directive authorizing use of government funds to pay for legal representation for civilians accompanying the forces when they must face trial in a foreign country.<sup>298</sup> This, plus the generally enlightened nature of host judicial systems and the availability of American trial observers,<sup>299</sup> goes a long way toward assuring our citizens fair trials abroad. Of course, there are still some host nations whose judicial systems do not provide some basic guarantees essential to our concept of fair trial. In those cases, the United States should continue its policy of "maximizing" its jurisdiction.

### ***B. ESTABLISH EXTRATERRITORIAL JURISDICTION***

While expanded use of administrative sanctions and a policy of encouraging maximum host country jurisdiction should take care of most cases of civilian misconduct, there will still be some that escape the system. Such a situation could arise if a host country waived jurisdiction in a serious case, or if the act of an accused, although an offense under United States law, did not constitute an offense under host law. Of even greater significance is the potential for crime committed by American civilians in Korea during a period of martial law or in any overseas area during a national emergency. For such cases, there will be a "safety net" if the United States establishes extraterritorial jurisdiction over civilians accompanying its forces overseas.

This next step, of course, is up to Congress. We can only speculate why Congress has not yet acted. One theory is that the problem of the jurisdictional void is not as serious as it was once thought to be.<sup>300</sup> Possibly its seriousness is not well enough

<sup>298</sup>Dep't of Army Message 261803Z Feb. 86, subject: Legal Representation of Civilians Overseas.

<sup>299</sup>For a good discussion of the enforcement of fair trial standards in foreign courts and the role of trial observers in this process, see Dean, *An International Human Rights Approach to Violations of NATO SOFA Minimum Fair Trial Standards*, 106 Mil. L. Rev. 219 (1984).

<sup>300</sup>Everett & Hourcle, *supra* note 239, at 196.

documented.<sup>301</sup> In this author's opinion, the available statistics (especially the number of serious cases released by host countries to United States jurisdiction) document a problem which does not appear to be significant enough for congressional action; hence Congress' long-term paralysis. Given the potential for more serious consequences, the statistical picture is deceptive. Legislation creating extraterritorial jurisdiction is necessary, if only to forestall these potential consequences.

Any legislation should deal first with the extraterritoriality question, and bypass the problem of implementing that jurisdiction overseas for the time being. One reason for this is that no steps should be taken to expand our military court system overseas or to set up an article III court system until the host nation assents. Any attempt to create a questionable "military" court system to try civilians might be viewed as a subterfuge. Especially in host countries with strong pressure groups disfavoring closer ties with the United States, such a perception could be very damaging. Another reason to defer the issue of overseas courts is to make the proposed legislation more palatable to Congress. Congress is more likely to enact a simple bill extending extraterritorial jurisdiction than a ponderous piece of legislation creating a new court system. Once extraterritorial jurisdiction is enacted and new agreements are negotiated with host countries, the details of setting up extraterritorial courts could probably be worked out administratively rather than legislatively. Finally, the technical problems with current proposed legislation must be corrected. The standard wording subjecting persons "serving with, employed by, or accompanying" the forces should be made more specific. The exclusion of the Canal Zone should be dropped. The body of substantive criminal law to be applied must be identified (*i.e.*, UCMJ, title 18, United States Code, etc.).

In this interim between the creation of extraterritorial jurisdiction and the negotiation of agreements allowing the United States to operate civilian courts abroad, serious cases arising overseas can only be tried in the United States. Due to three Supreme Court decisions handed down since *Covert*, this alternative is now less problematic than it was. As already noted, the main difficulty with trial in the United States would be procurement of foreign witnesses. This problem could be circumvented by deposing such witnesses in their home countries and using their recorded testimony at trial in the United States.

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<sup>301</sup>The Comptroller General intimated this in his report. See *supra* text accompanying note 126.

*Mancusi v. Stubbs*,<sup>302</sup> *California v. Green*,<sup>303</sup> and *Ohio v. Roberts*<sup>304</sup> established the right of the prosecution in a criminal case to use prior recorded testimony if the declarant is unavailable for trial and if the defense had an opportunity to confront and cross-examine him at the time his testimony was recorded. The witness' "reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception [such as prior recorded testimony]."<sup>305</sup> In *Mancusi*, where the declarant was unavailable because he was abroad, the Court held his testimony, given at an earlier trial of the defendant, to be admissible at the defendant's retrial on the same charges. In *Roberts*, a key government witness had testified at a hearing but could not be located for trial. The Court found that the government had made a good faith effort to procure the witness by sending five subpoenas to her last-known address, even though her parents had told government investigators she no longer lived there. The witness had been called by the *defense* at the pre-trial hearing, and the defense's examination of her was therefore technically direct rather than cross-examination. Nevertheless, the Court found that the defense had in fact exercised its confrontation right, as the witness' testimony was adverse and the defense attorney had tried to elicit testimony favorable to his client using a number of leading questions.

Although no Supreme Court cases specifically deem prior recorded *deposition* testimony admissible at a subsequent trial, the setting of a deposition can be made so similar to a voir dire hearing (*Roberts*) or other pre-trial hearing (*Green*) that the Court would probably uphold the admissibility of such testimony. The thrust of *Roberts* is to favor admissibility if unavailability is clearly established and the testimony is taken "under circumstances closely approximating those that surround the typical trial."<sup>306</sup> In the case of a civilian accompanying the forces, letters should be sent to individual foreign witnesses and their governments requesting the witness' presence at trial. If the requests are not honored, no means exists to compel attendance, and, as in *Mancusi*, the foreign witnesses are unavailable. At the deposition, the defendant would of course have full counsel rights, full knowledge of the charges against him, and ample opportunity to examine the witnesses under oath.

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<sup>302</sup>408 U.S. 204 (1972).

<sup>303</sup>399 U.S. 149 (1970).

<sup>304</sup>448 U.S. 56 (1980).

<sup>305</sup>*Id.* at 66.

<sup>306</sup>*Green*, 399 U.S. at 165.

The other difficulties of trial in the United States—extradition of the defendant and transportation of evidence and witnesses at government expense—have already been mentioned. They are not insurmountable, especially as the number of cases in which United States trial would be necessary would probably be low.<sup>307</sup> Trial in the United States would only apply in serious cases when the host country could not try a case or chose not to do so.

The United States would still have to secure host country cooperation to bring foreign witnesses to depositions and to extradite American defendants. Host countries would probably be more willing to cooperate in these endeavors than to grant concessions allowing the United States to operate courts on their soil. Providing witnesses and extradition rights involves a minor surrender of sovereignty, and could be done within the framework of existing treaties.<sup>308</sup>

### C. NEGOTIATE NEW AGREEMENTS

Trial of civilian offenders at the overseas situs of the crime is a desirable long-range goal. It is necessarily long-range because it cannot occur without extraterritorial jurisdiction and should not be attempted without host country agreement. It is desirable because it would be convenient. Witnesses and evidence would be fresh and readily available, the accused would have full confronta-

<sup>307</sup>This assumption is based on the low number of serious cases presently released to United States jurisdiction and the expected decrease in that number resulting from further encouragement of the exercise of host jurisdiction.

<sup>308</sup>

The authorities of the receiving and sending States shall assist each other in the arrest of members of a force or civilian component or their dependents in the territory of the receiving State and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.

NATO SOFA, *supra* note 74, art. VII 5(a).

The authorities of the receiving and sending States shall assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offense. The handing over of such objects may, however, be made subject to their return within the time specified by the authority delivering them.

*Id.* art. VII 6(a). Another problem raised by the scheme is the expense of implementing it. Holding depositions abroad and transporting evidence and personnel to the United States could be costly. This is particularly relevant in light of current budgetary restraints. Should the defendant be required to pay the expenses occasioned by his witness/evidence requirements? Considerations of justice would appear to preclude this. The projected small number of these cases suggests that the overall expense of implementing the scheme would not be great.

tion opportunities, and the court would be able to observe all the witness' demeanors rather than depending on deposition testimony (although videotaped depositions would allow the court to observe witness' demeanors even in a deposition setting). The presence of all elements necessary for the trial in one place would minimize delay, and there would be deterrence value in holding speedy trials of offenders in or near the victimized communities.

Would it be prudent to reopen negotiations on SOFA matters with host countries? Since the NATO SOFA became effective in 1955, it has done its job of regulating relations between host nations and visiting forces well. The United States has negotiated SOFAs with non-NATO allies that are similar to the NATO original.<sup>309</sup> Why tamper with a successful instrument? Reworking one of its provisions might open a Pandora's box of changes that could ultimately kill the effectiveness of the document as a whole.

These arguments are persuasive and can only be answered at a policymaking level. This author will not presume to prescribe an across-the-board solution. Any renegotiation must be approached cautiously and might best be done country-by-country. It might be advisable to amend each SOFA by memorandum of understanding rather than rewriting the language of the basic document. Much can be accomplished by means of informal diplomatic agreements.

Trial in the host country is not absolutely necessary. If Congress enacts extraterritorial jurisdiction, trial in the United States will be a satisfactory solution, given the small number of serious cases that host countries release to American authorities. Possibly the best argument for trial by United States courts abroad is that it would allow maximum exercise of United States jurisdiction. With this expanded jurisdiction, the United States could take greater responsibility for the control of its citizens abroad, and it would be in a better position to protect its citizens. These are important considerations to both Britons and Canadians, but the *Covert* decision and Congress' delay at enacting remedial legislation seem to indicate that they are less important to Americans.

#### IV. CONCLUSION

In *Covert*, the Supreme Court struck down court-martial jurisdiction over civilians and their amenability to the UCMJ in peacetime. The result was to eliminate United States extraterrito-

<sup>309</sup>See, *inter alia*, Panama Canal Treaty, *supra* note 261.



rial jurisdiction over civilians accompanying its forces overseas. Recourse to host country courts and administrative measures applied by American authorities are the only means presently available to deal with misconduct by these civilians. The inability or reluctance of host governments to accept jurisdiction in some cases involving American civilians creates the possibility of offenders receiving inappropriate punishment or no punishment at all. The United States policy of seeking waiver of host jurisdiction in as many cases as possible aggravates this situation. The number of cases actually released to United States authorities by host governments is small, but the potential for more serious problems exists. The search for a solution to the problem has been hampered by the Court's failure to clearly define constitutional guidelines, Congress' failure to enact legislation creating extraterritorial jurisdiction, and uncertainty about host nations' reactions to the implementation of any given solution. The three-stage solution proposed in this article takes these problems and our common law heritage into consideration. Pending congressional action on extraterritorial jurisdiction, the jurisdictional gap can be narrowed or eliminated through a policy of aggressive application of administrative sanctions coupled with encouraging the exercise of host jurisdiction. When extraterritorial jurisdiction is enacted, the above policy should be continued, but serious cases not adjudicated in host courts should be tried in the United States pending negotiation of agreements allowing the United States to try its citizens in host countries. Trial of offenders at the situs of their crimes is the most desirable long-range goal, but it is not essential to the elimination of the jurisdictional void. Above all, the United States should avoid solutions that could be perceived as deceptive means to operate United States courts on foreign soil without host country consent.



# GOVERNMENT CONTRACTOR LIABILITY IN MILITARY DESIGN DEFECT CASES: THE NEED FOR JUDICIAL INTERVENTION

by Commander George E. Hurley, Jr.\*

## I. INTRODUCTION

The liability of government contractors for damages as the result of injury or death to military service personnel from allegedly defective military equipment continues to receive inconsistent judicial treatment. Government contractors have sought to share the federal government's sovereign immunity from tort liability. Supported by important holdings in *McKay v. Rockwell International Corp.*,<sup>1</sup> government contractors have obtained several recent successes. The results, however, have been noticeably inconsistent. In the four years since *McKay*, there have been several decisions to test the *McKay* criteria, as well as one applicable Supreme Court decision, *United States v. Shearer*.<sup>2</sup> Numerous law review articles in this area<sup>3</sup> have been unable to

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\*United States Navy (retired). Commander Hurley retired from the Navy on October 1, 1985, having reached the rank of Captain, USN. His active duty tours included service as the Chief Test Pilot, Rotary Wing Aircraft Test Directorate, Naval Air Test Center, Patuxent River, Maryland; Commanding Officer, Helicopter Anti-Submarine Squadron SIX (deployed aboard USS Constellation); Assistant Program Manager for Material Acquisition, LAMPS MKIII/SH-60B Program, Naval Air Systems Command; and Flight Instructor, U.S. Naval Test Pilot School, Naval Air Test Center. B.S., United States Naval Academy, 1965; M.S.A., The George Washington University, 1973. Graduate, Naval War College, 1974; U.S. Naval Test Pilot School, 1970. Commander Hurley is now a student at the University of San Diego School of Law.

<sup>1</sup>704 F.2d 444 (9th Cir. 1983), cert. denied, 406 U.S. 1043 (1984).

<sup>2</sup>105 S. Ct. 3039 (1985).

<sup>3</sup>See generally Miller, *Liability and Relief of Government Contractors for Injuries to Service Members*, 104 Mil. L. Rev. 1 (1984); Note, *Government Contractor Defense: Sharing the Protective Cloak of Sovereign Immunity After McKay v. Rockwell International Corporation*, 37 Baylor L. Rev. 181 (1985); Note, *Liability of a Manufacturer for Products Defectively Designed by the Government*, 23 B.C.L. Rev. 1025 (1982); Note, *The Essence of the Agent Orange Litigation: The Government Contract Defense*, 12 Hofstra L. Rev. 983 (1984); Note, *The Government Contractor Defense and Manufacturers of Military Equipment: McKay v. Rockwell International Corporation*, 21 Hous. L. Rev. 855 (1984); Note, *The Government Contract Defense: Should Manufacturer Discretion Preclude Its Liability?*, 37 Me. L. Rev. 187 (1985); Note, *McKay v. Rockwell International Corp.: No Compulsion Required for Government Contractor Defense*, 28 St. Louis U.L.J. 1061 (1984); Note, *The Government Contractor Defense: Preserving the Government's Discretionary Design Decisions*, 57 Temp. L.Q. 697 (1984); Note, *The Government Contract Defense in Strict Liability Suits for Defective Design*, 48 U. Chi. L. Rev. 1030 (1981); Comment, *Agent Orange and*

keep pace with this persistent problem. The Supreme Court recently agreed to decide the issue in *Boyle v. United Technologies Corp.*<sup>4</sup> This comment updates the most recent law in this area prior to the Supreme Court's hearing of *Boyle* and offers a proposed scheme to help resolve this complex problem.

## II. GOVERNMENTAL IMMUNITY

### A. SOVEREIGN IMMUNITY

The government contractor defense is an outgrowth of the doctrine of sovereign immunity, which precludes suits against the government without its prior consent.<sup>5</sup> Government contractors attempt to assert this immunity under the government contractor defense.<sup>6</sup>

With the expansion of activities by the federal government, its agents caused an increasing number of wrongs that would have been actionable if inflicted by an individual or a corporation, but which were remediless under the doctrine of sovereign immunity.<sup>7</sup> As the volume of federal activity increased, there were efforts to obtain relief through private bills in Congress.<sup>8</sup> Finally, in 1946, Congress enacted the Federal Tort Claims Act (FTCA),<sup>9</sup> which constituted at least a partial waiver of the government's sovereign immunity.

### B. FEDERAL TORT CLAIMS ACT

The FTCA allowed injured parties to sue the government for the negligent acts of its employees.<sup>10</sup> The Act pierced the shield

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*the Government Contract Defense: Are Military Manufacturers Immune from Products Liability?*, 36 U. Miami L. Rev. 489 (1982).

<sup>4</sup>792 F.2d 413 (4th Cir. 1986), cert. granted, 56 U.S.L.W. 1108 (U.S. Jan. 13, 1987) (No. 86-492).

<sup>5</sup>*Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1821); *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

<sup>6</sup>See *Johnston v. United States*, 568 F. Supp. 351, 356 (D. Kan. 1983); Note, *Liability of a Manufacturer for Products Defectively Designed by the Government*, 23 B.C.L. Rev. 1048-49 (1982).

<sup>7</sup>*Feres v. United States*, 340 U.S. 135, 139-40 (1950).

<sup>8</sup>For example, Congress waived the government's immunity in breach of contract actions against the government. *Id.* at 140.

<sup>9</sup>28 U.S.C. §§ 1346(b), 2671-2680 (1982) [hereinafter FTCA].

<sup>10</sup>28 U.S.C. § 1346(b) (1982). Section 1346(b) provides that claims against the United States may be brought:

[F]or 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

of government immunity that had existed since 1821; the FTCA, however, contained important exceptions that limited the government's liability. Among these were the exception excluding claims arising out the combatant activities of the armed services during time of war, and the important "discretionary function" exception.<sup>11</sup> The "discretionary function" exception, based on the separation of powers doctrine, was provided to allow military leaders and policymakers to make decisions without fear of reprisal in courts of law.<sup>12</sup> These concerns also underlaid subsequent Supreme Court holdings in cases concerning military discipline (officer/enlisted relationships), operations, training, and readiness.<sup>13</sup> The Court did not decide, however, nor has it since decided, any case involving design decisions by military personnel.

### C. FERES-STENCEL DOCTRINE

Court holdings subsequent to the enactment of the FTCA significantly narrowed the scope of the government's liability. In *Feres v. United States*,<sup>14</sup> the Court held that the United States, under the FTCA, is not liable to members of the armed forces for injuries sustained while on active duty resulting from the

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the place where the act or omission occurred.

<sup>11</sup>28 U.S.C. §§ 2680(j), 2680(a) (1982). Section 2680(a), the "discretionary function" exception, provides that the government's assumption of liability under the FTCA does not apply to:

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

See also *Dalehite v. United States*, 346 U.S. 15 (1953), in which the court interpreted the "discretionary function" exception (exercise of discretion could not be abused without negligence or a wrongful act). The "discretionary function" exception was considered weakened in subsequent Court holdings. See *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957); *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

<sup>12</sup>*Payton v. United States*, 636 F.2d 132, 143 (5th Cir. 1981) (separation of powers concept embodied in discretionary function exception).

<sup>13</sup>See *Chappell v. Wallace*, 462 U.S. 296, 304-05 (1983); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *United States v. Brown*, 348 U.S. 110, 112 (1954).

<sup>14</sup>340 U.S. 135, 146 (1950). The Court considered three separate cases in their one opinion. *Feres* was a negligence action involving the death of a serviceman in a barracks fire caused by a defective heating plant. *Jefferson* was a negligence action against military doctors who left a towel 30 inches long in the plaintiff's abdomen during surgery (the towel was found eight months later during a second operation). *Griggs* was a negligence action involving the death of a serviceman during medical treatment by military surgeons.

negligence of others in the armed forces. The Court construed the FTCA as fitting into the entire statutory system of remedies against the government, including the then-existing veterans compensation system. The Court stated that the FTCA was not "an isolated and spontaneous flash of congressional generosity. It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit."<sup>15</sup>

Despite persuasive considerations supporting liability in *Feres*, the Court upheld the government's immunity. Nevertheless, the Court acknowledged that the FTCA "does contemplate that the government will sometimes respond for negligence of military personnel" in cases not clearly falling under the exceptions provisions.<sup>16</sup>

In *Stencel Aero Engineering Corp. v. United States*,<sup>17</sup> the Court broadened the scope of the government's immunity. In *Stencel*, the plaintiff was a National Guard officer who had been permanently injured when the ejection system of his fighter aircraft malfunctioned during ejection. The plaintiff sued both the United States and the Stencel Aero Engineering Corporation, the manufacturer of the ejection system. Stencel, in turn, cross-claimed against the United States Government in an indemnity action. The Court held that the FTCA precludes the United States from indemnifying a third party (Stencel) for damages paid by the third party to a member of the armed forces who is injured during military service.<sup>18</sup> In reviewing its decision in *Feres*, the Court found three determinative factors: the distinctive federal character of the relationship between the government and members of the armed services; the availability of the Veterans' Benefit Act, which places an upper limit of liability on the government for service-connected injuries; and the effect that a suit by a member of the armed services against the government would have on discipline.<sup>19</sup>

Thus, *Feres* precluded service members from suing the government for injuries sustained incident to service; *Stencel* extended the government's immunity to third party indemnity claims. In an intermediate decision, *Laird v. Nelms*,<sup>20</sup> the Court held that

<sup>15</sup>*Id.* at 139.

<sup>16</sup>*Id.* at 138.

<sup>17</sup>431 U.S. 666 (1977).

<sup>18</sup>*Id.* at 673-74.

<sup>19</sup>*Id.* at 672-73.

<sup>20</sup>*Laird v. Nelms*, 406 U.S. 797 (1972). In *Laird*, the plaintiff sued for damages caused by the sonic boom of a military fighter, basing his claim on a theory of strict tort liability for ultrahazardous activities. The Court concluded that the

the FTCA does not authorize claims against the United States based on strict liability. With these decisions, the government in effect declared itself out of the game, leaving the injured service member or his survivors and the government contractors as the remaining participants.

#### D. UNITED STATES V. SHEARER

In *United States v. Shearer*,<sup>21</sup> the administratrix of the estate of an Army private brought an action against the government for negligently causing the death of her son, who was kidnapped and murdered, while off-duty, by another serviceman. The accused had been convicted previously of manslaughter but had been allowed to remain on active duty. The Court in *Shearer* stated explicitly that the first two factors on which the *Feres* decision was based were no longer controlling.<sup>22</sup> Rather, the Court focused on the third factor,<sup>23</sup> which involved two questions: whether the suit requires the court to second-guess military decisions, and whether the suit might impair essential military discipline.<sup>24</sup>

The first question—a separation of powers argument—concerns the role of the judiciary in military matters. The Court stated: "The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially military judgments, subject *always* to civilian control of the Legislative and Executive Branches."<sup>25</sup> The courts have attached great importance to the separation of powers argument in suits brought by military service personnel against government contractors. There has been no specific Supreme Court holding on whether military design decisions which result in injury or death to service members should be immune from judicial review, however.

The second question—a "military discipline" argument—concerns suits brought by service personnel against their superiors. These suits would threaten the basic structure of authority in the military by: (1) allowing subordinates to challenge superiors in a civilian court, and (2) compelling members of the military to

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FTCA permits recovery only for a "negligent or wrongful act or omission," and thus precluded strict liability. *Id.* at 799.

<sup>21</sup>106 S. Ct. 3039 (1985).

<sup>22</sup>*Id.* at 3043-44 n.4; see *supra* note 19 and accompanying text.

<sup>23</sup>See *supra* note 19 and accompanying text.

<sup>24</sup>*Id.* at 3043.

<sup>25</sup>*Chappell v. Wallace*, 462 U.S. 296, 302 (1983) (emphasis in original) (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)).

testify against one another in a civilian court.<sup>26</sup> The "military discipline" argument would not appear to be applicable to suits brought by service personnel against government contractors. Although the assertion of a government contractor defense might result in the introduction of potentially conflicting military testimony, this danger is considered, at least by some courts, to be remote.<sup>27</sup>

## II. BASES FOR LIABILITY

With the government having declared itself immune from liability from suits by injured service members or their survivors under *Feres-Stencel*, plaintiffs were required to sue government contractors directly. Initially, these cases were brought in actions for negligence, and less often for breach of express or implied warranty. After *Greenman v. Yuba Power Products, Inc.*,<sup>28</sup> actions were also brought in strict liability.

Today, causes of action are often brought on all these grounds.<sup>29</sup> As one of the elements in the negligence cases, the plaintiff has to establish that the defendant contractor owes a duty to the plaintiff.<sup>30</sup> The 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. The foreseeability factor requires the contractor to anticipate the uses to which the product may be put.<sup>31</sup>

The negligence actions have had mixed results. In *McKay v. Rockwell International Corp.*,<sup>32</sup> the court declined to impose a duty on a Navy contractor to test for latent defects because imposition of such a duty would make the contractor a virtual guarantor of the proper performance by the Navy of its inspection duties.<sup>33</sup> This holding appears contrary to the same court's opinion in *Boeing Airplane Co. v. Brown*<sup>34</sup> that the government's

<sup>26</sup>*Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 743 (11th Cir. 1985).

<sup>27</sup>*Id.* at 742.

<sup>28</sup>59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

<sup>29</sup>*See, e.g.*, *Bynum v. FMC Corp.*, 770 F.2d 556, 558 (5th Cir. 1985); *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 738 (11th Cir. 1985).

<sup>30</sup>An injured plaintiff pleading under a theory of negligence must establish four elements to recover: (1) that defendant owed a duty to plaintiff; (2) that defendant breached that duty; (3) that plaintiff suffered damages; and (4) that the breach was the proximate cause of the damages. *See* W. Prosser, *Law of Torts* § 30 (4th ed. 1971).

<sup>31</sup>*Brown v. Chapman*, 304 F.2d 149 (9th Cir. 1962).

<sup>32</sup>704 F.2d 444 (9th Cir. 1983), *cert. denied*, 406 U.S. 1043 (1984).

<sup>33</sup>*Id.* at 454.

<sup>34</sup>291 F.2d 310 (9th Cir. 1969).



alleged intervening negligence in failing to discover and correct a defect which resulted in the fatal crash of a B-52 bomber did not relieve the contractor of its liability for the negligent manufacture of the aircraft.<sup>35</sup>

In breach of warranty actions, an injured plaintiff pleading product liability has to establish that the seller made a representation about the product; that the plaintiff, a buyer, relied on the representation; that the representation was erroneous; and that the plaintiff was injured because of his or her reliance on the representation.<sup>36</sup> Causes of action for breach of warranties also met with mixed results, especially with regard to the requirement of privity of contract. Although there have been few recent breach of warranty cases,<sup>37</sup> the reinstatement of express warranties in some military procurement programs may make this form of redress more important in the future.<sup>38</sup>

With the acceptance of strict liability for products defects in many jurisdictions after *Greenman*, plaintiffs have a third prong of attack. Under strict liability theory, the plaintiff does not have to prove negligence on the part of the defendant. The plaintiff has to prove, however, that the design defect was attributable to the defendant, and that the design defect was the proximate cause of the plaintiff's injury.<sup>39</sup> When a manufacturer of military

<sup>35</sup>*Id.* at 317.

<sup>36</sup>The breach of warranty actions are based either on strict liability in tort or on breach of contract under the Uniform Commercial Code. See Restatement (Second) of Torts § 402A comment m (1965); U.C.C. §§ 2-313 to 2-318. (1983).

<sup>37</sup>See *Montgomery v. Goodyear Tire and Rubber Co.*, 231 F. Supp. 447, 453 (S.D.N.Y.), *aff'd*, 392 F.2d 777 (2d Cir. 1964), *cert. denied*, 393 U.S. 841 (1968). See also *Brown v. Caterpillar Tractor Co.*, 696 F.2d 246, 253 (3d Cir. 1982), in which the court determined that the government contractor defense should not be limited to negligence causes of action, but should also apply to strict liability and breach of warranty actions.

<sup>38</sup>See Miller, *Liability and Relief of Government Contractors for Injuries to Service Members*, 104 *Mil L. Rev.* 1, 36-37 (1984).

<sup>39</sup>Restatement (Second) of Torts § 402A (1965) defines strict product liability as follows:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to 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.

equipment exercises discretion over a product's design and that exercise of discretion leads to a design defect, the manufacturer may be held strictly liable.<sup>40</sup> Courts have seen the doctrine of strict liability as a means of distributing the risks of accident losses and reducing the level of accidents below that which would exist under a negligence standard of liability.<sup>41</sup>

### III. BASES FOR DEFENSE

#### A. GOVERNMENT AGENCY DEFENSE

This defense against liability of government contractors originated in the government construction cases. In *Yearsley v. W.A. Ross Construction Co.*,<sup>42</sup> the Court ruled that a contractor working for improvement of river navigation, in conformity with a contract with the government, was not liable for the damage to the plaintiff's riparian land.<sup>43</sup> This decision was an important foundation for the government contractor defense. The defense

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<sup>40</sup>The design defect cases must be distinguished from the manufacturing defect cases, in which a defective product is not manufactured like the rest of the line. In the latter cases, strict product liability has obvious application. Consequently, the government contractor defense has not been successfully applied in manufacturing defect cases. See *Foster v. Day & Zimmerman*, 502 F.2d 867, 874 (8th Cir. 1974); *Whitaker v. Harvell-Kilgore Corp.*, 418 F.2d 1010, 1014-15 (5th Cir. 1969); *Montgomery v. Goodyear Tire & Rubber Co.*, 231 F. Supp. 447, 449 (S.D.N.Y. 1964).

<sup>41</sup>These primary justifications of strict liability were articulated in *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963). Justice Traynor, writing for a unanimous court, stated: "The purpose of such liability is to ensure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." Later cases reemphasized the economic incentives for product safety. See, e.g., *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 129, 501 P.2d 1153, 1159, 104 Cal. Rptr. 433, 439 (1972). Courts have seen strict liability as a means of providing financial incentives for manufacturers to reduce the level of accidents where the cost of avoidance is less than the cost of potential accidents. See Ursin, *Strict Liability for Defective Business Premises: One Step Beyond Rowland and Greenman*, 22 UCLA L. Rev. 820, 829-30 (1975).

One further justification for strict liability is that, even when negligence is present, it may be difficult to prove because of the complexity of modern manufacturing processes. See, e.g., *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 467, 150 P.2d 436, 443 (1946) (Traynor, J., concurring). Thus, in practice, strict liability is better suited to create safety incentives. See Ursin, *supra*, at 829. See also *McKay*, 704 F.2d at 451-53, in which the court reiterated four principal policy reasons for imposing strict product liability: enterprise liability; market deterrence; compensation; and implied representation of safety. *McKay*, however, concluded that these policy reasons were not appropriate for military members.

<sup>42</sup>309 U.S. 18 (1940).

<sup>43</sup>*Id.* at 20-21.

was actually a government agency defense because the contractor was simply acting as an agent, or officer, of the government acting on the government's behalf. The holding was not a particularly venturesome one for the Court since, no matter what the decision, the plaintiff still had a remedy.<sup>44</sup> This situation is different from current government contractor cases where, if the contractor is found not liable, the plaintiff is left without a judicial remedy.

This agency relationship has been found infrequently in contracts between the government and military manufacturers. For example, in *Whitaker v. Harwell-Kilgore Corp.*,<sup>45</sup> a case involving an action against defendant manufacturers of grenades and fuses, the court held that the manufacturers were independent contractors, separate from the government, and not entitled to sovereign immunity.<sup>46</sup> Nonetheless, *Yearsley* and its companion construction cases have served as important precedents for all types of suits against government contractors.<sup>47</sup>

### **B. CONTRACT SPECIFICATION DEFENSE**

Closely aligned with the government agency defense is the contract specification defense, which had been introduced even before *Yearsley*.<sup>48</sup> This defense, which is based on negligence principles, provided that a contractor would not be liable for damages incurred from complying with specifications provided by another unless those specifications were so obviously defective and dangerous that a contractor of ordinary (reasonable) prudence would be put on notice that the work was dangerous and likely to cause injury.<sup>49</sup> In other words, the contractor could not proceed blindly while ignoring an obvious hazard, but, on the other hand,

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<sup>44</sup>The government had impliedly promised to compensate the plaintiff landowner for what amounted to a taking of his land by the government. *Id.* at 21.

<sup>45</sup>418 F.2d 1010 (5th Cir. 1969).

<sup>46</sup>*Id.* at 1015. The court held that the manufacturer was not the agent (or alter ego) of the government even though the fuses manufactured under contract by one defendant were inspected by the government on government-provided and government-certified x-ray equipment. The second defendant manufactured the grenades from the fuses and other government-owned material in a government-owned plant.

<sup>47</sup>See *Tozer v. LTV Corp.*, 792 F.2d 403, 405 (4th Cir. 1986); *Koutsoubos v. Boeing Vertol*, 755 F.2d 352, 354 (3d Cir. 1985); *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 448 (9th Cir. 1983); *Myers v. United States*, 323 F.2d 580 (9th Cir. 1963); *In re "Agent Orange" Product Liability Litigation*, 534 F. Supp. 1046, 1055 n.2 (E.D.N.Y. 1982). *But see Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 739-40 (11th Cir. 1985), and *Bynum v. FMC Corp.*, 770 F.2d 556, 564 (5th Cir. 1985), in which the courts refused to apply the government agency defense.

<sup>48</sup>*Ryan v. Feeney & Sheehan Building Co.*, 239 N.Y. 43, 145 N.E. 321 (1924).

<sup>49</sup>*Id.* at 321-22; see also Restatement (Second) of Torts § 404 comment a (1965).

he could not be expected to have the design expertise of the owner. Special knowledge and expertise could subject the contractor to a higher standard of care, however.<sup>50</sup>

The contract specification defense was successfully advanced in *Sanner v. Ford Motor Co.*<sup>51</sup> and *Casabianca v. Casabianca*.<sup>52</sup> In these cases, the court found that the manufacturer had no discretion in the design specifications submitted by the government.<sup>53</sup> These cases bore strong similarity to the construction cases, which were cited in both opinions.<sup>54</sup>

The contract specification defense applies to products for which specifications have been drawn up solely by the government. The occasions for its application are becoming less frequent because the military now relies more on private contractors to formulate detailed design specifications. When they occur, however, the contract specification argument provides an effective defense based on strong legal precedent.

### C. TRADITIONAL DEFENSES

Not only did contractors typically advance the contract specification defense, but they also asserted traditional defenses of assumption of risk, contributory negligence, and lack of privity of contract. Today, the effectiveness of these defenses will vary depending on the jurisdiction and the type of action brought. The defenses of assumption of risk and contributory negligence can be brought in both negligence and strict liability actions. However, these defenses have been limited by some courts. For example, in *Montgomery v. Goodyear Tire & Rubber Co.*,<sup>55</sup> a case involving the death of service members in the crash of a Navy dirigible, the court held that, although the service members had volunteered for such duty, it could not be said, as a matter of law, that they had assumed the risk of the crash. All the elements of assumption of risk had not been met; specifically, the court determined that the

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<sup>50</sup>*Johnston v. United States*, 568 F. Supp. 351, 354 (D. Kan. 1983).

<sup>51</sup>*Sanner v. Ford Motor Co.*, 144 N.J. Super. 1, 364 A.2d 43 (1976), *aff'd*, 154 N.J. Super. 407, 381 A.2d 805 (1977), *cert. denied*, 75 N.J. 616, 384 A.2d 846 (1978).

<sup>52</sup>*Casabianca v. Casabianca*, 104 Misc. 2d 348, 428 N.Y.S.2d 400, *aff'd*, 79 A.D.2d 1117 (1981).

<sup>53</sup>In both cases, the court granted summary judgment to the defendant government contractors.

<sup>54</sup>*Sanner*, 144 N.J. Super. at 8, 364 A.2d at 46; *Casabianca*, 104 Misc. 2d at 350, 428 N.Y.S.2d at 402.

<sup>55</sup>*Montgomery v. Goodyear Tire & Rubber Co.*, 231 F. Supp. 447 (S.D.N.Y.), *aff'd*, 392 F.2d 777 (2d Cir. 1964), *cert. denied*, 393 U.S. 841 (1968). The crash was attributed to defects in the seams of the dirigible's structure.

plaintiffs' knowledge of the risk could not be assumed.<sup>56</sup> Similarly, some jurisdictions do not apply contributory or comparative negligence to strict products liability claims, typically on the formal ground that strict liability is not negligence.<sup>57</sup>

*MacPherson v. Buick Motor Co.*<sup>58</sup> abandoned the defense of lack of privity in negligence actions, and foreshadowed its abandonment in strict liability actions. In some jurisdictions, lack of privity is still a defense in breach of express warranty actions; courts have held, however, that lack of privity is not a defense to a charge of breach of implied warranty.<sup>59</sup>

### D. GOVERNMENT CONTRACTOR DEFENSE

In the vast majority of present day cases, contractors exercise some discretion or a great deal of discretion over the design of the military product. In these cases, the contractors have asserted a broad affirmative defense—the government contractor defense—to acquire the same immunity that the government enjoys under *Feres*.<sup>60</sup>

The key elements of the government contractor defense are a wide variety of public policy arguments.<sup>61</sup> Some courts have considered these public policy arguments to be so compelling that they have denied recovery under strict liability causes of action, even when all the elements of strict liability were apparently met.<sup>62</sup>

The government contractor defense has become confused by some courts with the negligence-based contract specification defense. The confusion is becoming even more widespread because causes of action for military product liability are now commonly brought in both negligence and strict liability. In addition, there has been a growing trend to assert the government contractor defense as a defense for breach of warranty, strict liability, and negligence actions. In *Tozer v. LTV Corp.*,<sup>63</sup> the court held that

<sup>56</sup>*Id.* at 451.

<sup>57</sup>4 F. Harper, F. James & O. Gray, *The Law of Torts* 313 (1986).

<sup>58</sup>217 N.Y. 382, 111 N.E. 1050 (1916).

<sup>59</sup>*Montgomery v. Goodyear Tire & Rubber Co.*, 231 F. Supp. at 451.

<sup>60</sup>At the same time, government contractors will also argue the contract specification defense which, in effect, becomes a subset of the government contractor defense.

<sup>61</sup>See *infra* text accompanying notes 84-89.

<sup>62</sup>See *Tozer*, 792 F.2d at 406; *McKay*, 704 F.2d at 649-50; *In re "Agent Orange" Product Liability Litigation*, 534 F. Supp. 1046, 1054 n.1 (E.D.N.Y. 1982).

<sup>63</sup>792 F.2d, 403, 405-09 (4th Cir. 1986) (citing *Tillett v. J.I. Case Co.*, 756 F.2d 591, 597 n.3 (7th Cir. 1985)).

the government contractor defense applies to design defect cases based on negligence and/or breach of warranty claims, as well as to strict liability claims.

## IV. CURRENT GOVERNMENT CONTRACTOR DEFENSE STANDARDS

### A. GENERAL

The various standards the courts have used to determine whether to allow the government contractor defense have caused considerable confusion. These standards have been extremely inconsistent, with little apparent consideration for very different fact patterns. In other cases, the courts have shown a lack of understanding of the military weapons procurement process, or an inability to keep up with the numerous changes in that process.

### B. *IN RE "AGENT ORANGE" PRODUCT LIABILITY LITIGATION STANDARD*

In the complex *In re "Agent Orange" Product Liability Litigation*,<sup>64</sup> one of the significant issues before the court was whether the contractors could properly invoke the government contractor defense. The case was a class action by Vietnam veterans and members of their families against defendant-chemical companies. The plaintiffs asserted claims in negligence, breach of warranty, and strict liability. In the first litigation, the court, although denying the defense's motion for summary judgment, ruled that the government contractor defense could be raised in future phases of the litigation, on the basis that the defendants were forced to manufacture "Agent Orange" under circumstances carefully controlled by the government.<sup>65</sup> Citing the construction cases, the court also addressed considerations of fairness and public policy that would oppose the imposition of liability on "the otherwise innocent contractor."<sup>66</sup> An additional policy argument was that imposition of liability would render the government's immunity meaningless since the contractor would just increase prices to cover his risk of loss.<sup>67</sup> According to the court, these policy considerations would take on increased significance when dealing with products such as military ordnance in wartime where, as in this case, the manufacturers were (or claim to have

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<sup>64</sup>506 F. Supp. 762 (E.D.N.Y. 1980).

<sup>65</sup>*Id.* at 794.

<sup>66</sup>*Id.* at 793.

<sup>67</sup>*Id.* at 794.

been) compelled to produce the product without the ability to negotiate specifications.<sup>68</sup>

This government contractor defense was essentially a contract specification defense, because the contractor, although an expert in the field, apparently had no discretion in formulating the specifications.<sup>69</sup> The entire risk was assumed by the government. Interestingly, this defense has been proffered in many cases since, where the contractor has had enormous discretion in the design and specifications process and where wartime scenarios have not been involved.

In the next major phase of the litigation,<sup>70</sup> the court held that the chemical company defendants would be entitled to a judgment dismissing all claims if they established that: (1) the government established the specifications for "Agent Orange"; (2) the contractor complied in all material respects with the specifications; and (3) the government's knowledge of the hazards of the finished product was at least equal to that of the contractor.<sup>71</sup>

These elements caused immediate consternation in the *Agent Orange* case and forecast certain problems for future cases. Plaintiffs argued that, with respect to the first element, the defendants had the burden of showing that they had neither direct nor indirect responsibility for formulating the product specifications, and that the government had sufficient expertise to exercise independent judgment with respect to the dioxin contamination of "Agent Orange."<sup>72</sup> The court rejected the argument and held that the defendant need only prove that the product it supplied was a particular product specified by the government.<sup>73</sup> Instead of limiting the discussion to the particular nature of the product, the wartime environment in which the product was being used, and the extent of government compulsion invoked on the contractor to manufacture the product, the court established broad criteria that could be used in future cases of an entirely

<sup>68</sup>*Id.*

<sup>69</sup>The manufacturer's innocence has been questioned. Because of the manufacturer's expertise, there was some evidence that the manufacturer knew more, or at least as much as, the government about the manufacturing, production, handling, and marketing of the product. See Note, *The Essence of the Agent Orange Litigation: The Government Contract Defense*, 12 Hofstra L. Rev. 1005-06, 1006 nn.180-82 (1984).

<sup>70</sup>*In re "Agent Orange" Product Liability Litigation*, 534 F. Supp. 1046 (E.D.N.Y. 1982).

<sup>71</sup>*Id.* at 1055.

<sup>72</sup>*Id.* at 1056.

<sup>73</sup>*Id.*

different nature.<sup>74</sup> The court finally acknowledged, in almost an afterthought, that the government contract defense would be more restricted "if it should appear that the contract set forth merely a "performance specification," as opposed to a specified product."<sup>75</sup> This statement was inconsistent with the burden of proof standard that the court had just promulgated.

The court treated the single most controversial issue—whether the government contractor defense can be applied in a strict products liability action—in a single footnote.<sup>76</sup> The court stated that the policies behind the government contractor defense override considerations which might otherwise impose liability on a manufacturer. "Considerations of cost, time of production, risks to participants, risks to third parties, and any other factors that might weigh on the decisions of whether, when, and how to use a particular weapon, are uniquely questions for the military and should be exempt from review by civilian courts."<sup>77</sup> The court then concluded that as long as the contractor fulfills two duties—the duty to comply with the government specifications, and the duty to warn the government of risks or hazards related to the weapon of which the contractor has knowledge—then the contractor is exempt from liability whether the theory be negligence or strict liability.<sup>78</sup> The imposition of "duty" requirements in a strict liability context further confused this already entangled area.

### ***C. McKAY V. ROCKWELL INTERNATIONAL CORP. STANDARD***

*McKay*<sup>79</sup> has been much discussed.<sup>80</sup> Nevertheless, viewing the

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<sup>74</sup>See *Black v. Fairchild Industries*, No. 84-C-2923 (E.D.N.Y. Jan. 17, 1986), reprinted in part in 5 *Lloyd's Aviation Law* 2 (Apr. 1, 1986). This case involved the fatal crash of an Air Force A-10 aircraft due to an alleged design defect in the flight control system. Applying the *Agent Orange* test, the court found that the contractor was not liable because: (1) the Air Force had provided the contractor with detailed design specifications and had retained strict control over the contractor's work, (2) the contractor had complied with the specifications, and (3) the government's knowledge about the hazards was at least equal to that of the contractor. With respect to the last element, the evidence showed that the Air Force had had previous concerns about the flight control system; the contractor had submitted an engineering change proposal which the Air Force had rejected; and the Air Force (and presumably the contractor) was aware of at least 33 incidents involving the flight control system, resulting in several fatalities.

<sup>75</sup>*Agent Orange*, 534 F. Supp. at 1056.

<sup>76</sup>*Id.* at 1054 n.1.

<sup>77</sup>*Id.*

<sup>78</sup>*Id.*

<sup>79</sup>*McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (9th Cir. 1983), cert. denied, 406 U.S. 1043 (1984).

<sup>80</sup>See *Miller, Liability and Relief of Government Contractors for Injuries to*



case four years after the decision, in the context of later cases,<sup>81</sup> sheds additional perspective. *McKay* pronounced the applicability of the government contractor defense to strict liability actions.<sup>82</sup> In *McKay*, the widows of two Navy pilots killed in separate crashes of their RA-5C aircraft brought actions against the manufacturer of the aircraft and its ejection system. The court held that a supplier of military equipment is not liable for a design defect where: the United States is immune from liability under the *Feres* doctrine; the supplier proves that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment; the equipment conformed to those specifications; and the supplier warned the United States about patent errors in the government's specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States.<sup>83</sup>

The court introduced several policy arguments to support its holdings. First, the court said that holding contractors liable without regard to the extent of government involvement would subvert the *Feres-Stencel* doctrine because military suppliers would pass on the costs to the government.<sup>84</sup> Judge Alarcon argued in dissent that neither *Feres* nor *Stencel* addresses, limits,

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*Service Members*, 104 Mil. L. Rev. 1 (1984); Note, *Government Contractor Defense: Sharing the Protective Cloak of Sovereign Immunity After McKay v. Rockwell International Corporation*, 37 Baylor L. Rev. 181 (1985); Note, *The Essence of the Agent Orange Litigation: The Government Contract Defense*, 12 Hofstra L. Rev. 983 (1984); Note, *The Government Contractor Defense and Manufacturers of Military Equipment: McKay v. Rockwell International Corporation*, 21 Hous. L. Rev. 855 (1984); Note, *The Government Contract Defense: Should Manufacturer Discretion Preclude Its Liability*, 37 Me. L. Rev. 187 (1985); Note, *McKay v. Rockwell International Corporation: No Compulsion Required for Government Contractor Defense*, 28 St. Louis, U.L.J. 1061 (1984); Note, *The Government Contractor Defense: Preserving the Government's Discretionary Design Decisions*, 57 Temp. L.Q. 697 (1984).

<sup>81</sup>See *Boyle v. United Technologies Corp.*, 792 F.2d 413 (4th Cir. 1986), cert. granted, 55 U.S.L.W. 1108 (U.S. Jan. 13, 1987) (No. 86-492); *Dowd v. Textron Inc.*, 792 F.2d 409 (4th Cir. 1986); *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 741-45 (11th Cir. 1985) (court acknowledged the *McKay* standard but refused to apply it); *In re Air Crash Disaster at Mannheim, Germany*, 769 F.2d 115, 122 (3d Cir. 1985); *Koutsoubos v. Boeing Vertol*, 755 F.2d 352, 355 (3d Cir. 1985) (court acknowledged the *McKay* standard but applied the *Agent Orange* standard); *Tillet v. J.I. Case Co.*, 756 F.2d 591, 597 (7th Cir. 1985); *McLaughlin v. Sikorsky Aircraft*, 148 Cal. App. 3d 203, 210-12, 195 Cal. Rptr. 764, 768 (1983) (*McKay* standard applied).

<sup>82</sup>See also *Brown v. Caterpillar Tractor Co.*, 696 F.2d 246, 253 (3d Cir. 1982), where the court upheld the use of the government contractor defense in a strict liability claim by a serviceman injured while operating a bulldozer manufactured by the defendant.

<sup>83</sup>*McKay*, 704 F.2d at 451 (emphasis added).

<sup>84</sup>*Id.* at 449. This was the same argument made in *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 770-71 (E.D.N.Y. 1980).

or precludes contractor liability to military personnel who are injured while using defectively designed equipment. The *Feres-Stencel* doctrine, he reiterated, is concerned exclusively with government, not contractor, liability. In fact, the language in *Stencel* implies recognition of causes of action by service members against a military contractor.<sup>85</sup>

Secondly, the court felt that holding military suppliers liable for defective designs where the government had set or approved the design specifications would thrust the judiciary into the making of military decisions. Citing *Stencel*, the court argued that trials on design defects where government specifications are at issue would involve second-guessing military orders, and would often require members of the armed services to testify in court as to each other's decisions and actions, thereby adversely affecting discipline.<sup>86</sup> The dissent discounted the effect on military discipline, citing the hypothetical offered in Justice Marshall's *Stencel* dissent in which a contractor, sued by a civilian, might cross-claim against the government. In such a case, there would be the same chance that the trial would involve second-guessing of military orders and testimony by military members as to their actions.<sup>87</sup>

Thirdly, the court noted that, in setting specifications for military equipment, the United States is required by the exigencies of its defense effort to push technology to its limits and thereby to incur risks beyond what would be acceptable for ordinary consumer goods.<sup>88</sup> Finally, the court argued that a government contractor defense provides incentives for suppliers of military equipment to work closely with the military in the development and testing of military equipment. The court, however, did not explain its position that such close cooperation would encourage "fixing the locus of responsibility for military equipment design with more precision than is possible under a system where the government contractor rule [defense] is not allowed."<sup>89</sup> It could be argued that such a position doesn't fix the responsibility on anyone, leaving the injured party with no judicial remedy.

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<sup>85</sup>704 F.2d at 456-57 (citing *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 874, n.8 (1977)).

<sup>86</sup>*Id.* at 449 (citing *Stencel*, 431 U.S. at 673).

<sup>87</sup>*Id.* at 460 (citing *Stencel*, 431 U.S. at 676-77 (Marshall, J., dissenting)).

<sup>88</sup>*Id.* at 449-50. *But see Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 743 (11th Cir. 1985).

<sup>89</sup>704 F.2d at 450.

The crux of the strong dissent by Judge Alarcon is that the government contractor defense would too easily allow contractors to shift to the government the responsibility for the safety of their designs. With the test proposed by the majority, any contractor who secures approval for design specifications would be immune from unsafe design liability. The dissent argues that the element of compulsion must exist before the government contract defense is available.<sup>90</sup>

In *Bynum v. FMC Corp.*,<sup>91</sup> a National Guardsman, injured in a training mission, brought an action against the manufacturer of a military cargo carrier. The plaintiff made three objections to the adoption of the *McKay* test: first, that the government contractor defense should be limited to those circumstances in which the contractor had been compelled to manufacture the product; second, that the government contractor defense should be limited to products that incorporate the newest technology, or when the formulation of the designs requires special military expertise; and third, that the military contractor should have to demonstrate that it warned the government about all defects or dangers of which the contractor *knew or should have known*.<sup>92</sup> In finding for the defendant-manufacturer, the court rejected plaintiff's arguments and applied the *McKay* standard.<sup>93</sup> The court reasoned that the increased standard of care imposed by the plaintiff's warning requirement proposal would compel the contractor to conduct a much more extensive evaluation of the design specifications furnished by the government and to engage in testing not required by the government contract, resulting in increased cost and time delays.<sup>94</sup> The court also noted that the type of accident involved in this case had never been known to have occurred previously. This fact presumably contributed to the court's determination that the contractor had met the *McKay* warning criterion, which required the contractor to warn the government

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<sup>90</sup>*Id.* at 458; see *Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co.*, 295 F.2d 14 (9th Cir. 1961); *In re "Agent Orange" Product Liability Litigation*, 506 F.2d 762, 794 (E.D.N.Y. 1980).

<sup>91</sup>770 F.2d 556 (5th Cir. 1985).

<sup>92</sup>*Id.* at 574-76 (emphasis added).

<sup>93</sup>*But see Trevino v. General Dynamics Corp.*, 626 F. Supp. 1330 (E.D. Tex. 1986), in which the court held that the government contractor defense is not available where the contractor had the ultimate responsibility for establishing reasonably precise specifications. Specifically, the court found that the defendant contractor had failed to prove the last three elements of the *McKay* standard. See *supra* text accompanying note 83. The court further stated that the design decision about defects in a diving hangar aboard a Navy submarine was "purely a non-military decision requiring no military expertise." *Id.* at 1334.

<sup>94</sup>770 F.2d at 576.

of dangers known to it but not to the government.<sup>95</sup>

Three recent Fourth Circuit cases, *Tozer v. LTV Corp.*,<sup>96</sup> *Dowd v. Textron, Inc.*,<sup>97</sup> and *Boyle v. United Technologies Corp.*<sup>98</sup> strongly reaffirmed the *McKay* test. In *Tozer*, a Navy pilot was killed during a high speed, low altitude fly-by of the aircraft carrier USS Kitty Hawk when a panel came off in flight, causing him to lose control of his RF-8G aircraft. Tozer's wife and children brought a negligence and strict liability action against LTV Corp. alleging that the death occurred because of a defective design of the panel, which was a modification to the airplane. The Fourth Circuit reversed the district court and held that the government contractor defense applied.<sup>99</sup> The court emphasized, in strong terms, the benefits of the defense in advancing the separation of powers and safeguarding the military procurement process.<sup>100</sup>

With respect to the separation of powers thesis, the court stated: "It is difficult to imagine a more purely military matter than that at issue in this case—the design of a sophisticated reconnaissance craft that was flying, on the day of Tozer's death, some 50 to 75 feet above the surface of the water at a speed of 500-550 nautical miles per hour. . . . Here, however, the jury was invited to 'second-guess military decisions' and to judge the design of a Navy-approved aircraft. . . . These are judgments, however, which lay men and women are neither suited nor empowered to make. . . . While jurors may possess familiarity and experience with consumer products, it would be the rare juror—or judge—who has been in the cockpit of a Navy RF-8G off the deck of a carrier on a low level, high speed fly-by maneuver."<sup>101</sup>

The court was also concerned that permitting recovery for design defects, under any theory of liability, would risk altering the nature of the procurement process. Specifically, the court felt that, in the absence of the government contractor defense, there would be a decrease in contractor participation in design, an increase in the cost of military weaponry and equipment, and diminished efforts in contractor research and development.<sup>102</sup>

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<sup>95</sup>*Id.* at 577.

<sup>96</sup>792 F.2d 403 (4th Cir. 1986).

<sup>97</sup>792 F.2d 409 (4th Cir. 1986).

<sup>98</sup>792 F.2d 413 (4th Cir. 1986), cert. granted, 55 U.S.L.W. 1108 (U.S. Jan. 13, 1987) (No. 86-492).

<sup>99</sup>See *supra* note 63 and accompanying text.

<sup>100</sup>*Tozer*, 792 F.2d at 405.

<sup>101</sup>*Id.* at 406.

<sup>102</sup>*Id.* at 407.

Thus, the court held that the defense contractor's participation in design, or even its origination of specifications, does not constitute a waiver of the government contractor defense so long as government approval of design "consists of more than a mere rubber stamp."<sup>103</sup>

*Dowd v. Textron, Inc.*<sup>104</sup> involved the crash of an AH-1S helicopter at the Naval Air Test Center, Patuxent River, Maryland, and the death of its two pilots. The design defect that allegedly caused the mishap is known as "mast bumping," a phenomenon that occurs during certain flight conditions where the hub of the rotor may strike the mast. In the worst case, the result is catastrophic; the rotor severs the mast and separates from the helicopter and the helicopter can no longer fly. The "mast bumping" phenomenon had been documented in the H-1 series helicopters since 1967.<sup>105</sup> The *Dowd* accident occurred in 1981—over 20 years after the introduction of this rotor system into the military's inventory. In the meantime, numerous design fixes had been proposed and evaluated to correct the problem, short of redesigning the entire system; none of these proposed corrective actions were incorporated, however. The Fourth Circuit, in reversing the lower court, reiterated that it was not the province of the judiciary to question the military's judgment in the matter:

The . . . installation of the 540 rotor system in the AH-1S helicopter may reflect the Army's judgment that, despite the defects alleged in this tort suit, the equipment had largely accomplished its mission and proved its military worth. It may reflect the Army's view that any alteration of the rotor system entailed increased risks or costs. It may simply reflect the Army's disinclination to tinker with a system that had over time worked well enough. Whatever reasons, it is not up to the jury to second-guess this military judgment.<sup>106</sup>

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<sup>103</sup>*Id.* at 407-08 (citing *Schoenborn v. Boeing [In re Air Crash Disaster at Mannheim Germany]*, 769 F.2d 115, 122 (3d Cir. 1985)).

<sup>104</sup>792 F.2d 409 (4th Cir. 1986).

<sup>105</sup>*Id.* at 411. In 1973, the Army prepared a report of 46 instances of mast bumping (not all these instances resulted in catastrophic mishaps) between 1967 and 1972. The report concluded that the teetering rotor system had unstable characteristics, and recommended further study of the problem. *Id.*

<sup>106</sup>*Id.* at 412. Following two more fatal accidents caused by mast bumping, the U.S. Naval Test Pilot School at the Naval Air Test Center replaced the AH-1 helicopters with UH-60A helicopters—helicopters without teetering rotor systems—for use in the instruction of test pilot techniques during dynamic maneuvering tests.

In *Boyle v. United Technologies Corp.*,<sup>107</sup> the family of a Marine Corps aviator who drowned after the crash of his CH-53D helicopter brought suit against the manufacturer, alleging negligence and breach of warranty in the design of the co-pilot's escape hatch and the rework of the helicopter's flight control system. The Fourth Circuit again reversed a lower court's finding for the plaintiffs and reaffirmed the applicability of the military (government) contractor defense as reiterated in *Tozer*. The court determined that the back-and-forth discussions between the manufacturer and the Navy during the design of the helicopter, and the Navy's review and approval of a mock-up design of the cockpit with all the instruments, flight controls, and emergency escape hatches installed, constituted sufficient government approval of the design to meet the *Tozer (McKay)* criteria.<sup>108</sup>

The accident was most probably caused by the introduction of a metal chip into the pilot valve of the hydraulic servo that actuates the flight controls. The court did not, however, consider whether the military (government) contractor defense would apply to negligent manufacture or overhaul of the flight control servo system because the manufacturer's liability could not be established.<sup>109</sup>

#### D. THE MCKAY/AGENT ORANGE HYBRID

Armed with the controversial guidelines from *Agent Orange* and *McKay*, other federal district courts and courts of appeal tried to refine the criteria by applying their own modifications. In *Koutsoubos v. Boeing Vertol*,<sup>110</sup> the Third Circuit combined the standards of *McKay* and *Agent Orange*. In *Koutsoubos*, the administrator of the estate of a Navy crewman killed in a helicopter crash brought a wrongful death action against the manufacturer, alleging that the death was caused by design defects in the helicopter. Boeing Vertol contended that the government contractors who supply products made to government specifications are shielded from liability to third parties.<sup>111</sup> The court adopted the three standards of *Agent Orange*, but also recognized the *McKay* government approval exception.<sup>112</sup>

<sup>107</sup>792 F.2d 413 (4th Cir. 1986), cert. granted, 55 U.S.L.W. 1108 (U.S. Jan. 13, 1987) (No. 86-492).

<sup>108</sup>*Id.* at 414-15; see *supra* note 83 and accompanying text.

<sup>109</sup>*Id.* at 415.

<sup>110</sup>755 F.2d 352 (3d Cir. 1985).

<sup>111</sup>*Id.* at 353.

<sup>112</sup>*Id.* at 355. In *Koutsoubos*, the court recognized the *McKay* "established or approved" standard; the court did not feel, however, that the facts of the case required adoption of the standard.

In *In re Air Crash Disaster at Mannheim Germany*, the same court went ever further.<sup>113</sup> The court now construed the first prong of the *Agent Orange* test—that the government must have “established” contract specifications for the product—to mean that the government must have “established or approved” the contract specifications, even if the majority of the product’s specifications originated with the contractor.<sup>114</sup> Thus, the *Agent Orange* criteria, which were originally established for wartime ordnance under conditions in which manufacturers were “compelled” to supply the products, were now applied, with a modification from *McKay*, to aircraft design defect cases. The court readily acknowledged the problem of interpreting the requirement that the government “establish” the specification.<sup>115</sup> But by first recognizing and then adopting the *McKay* “established or approved” standard, the court failed to provide any specific guidelines at all. The government will always finally approve the detailed specifications. Thus, by the court’s logic, the contractor would never be liable.

### ***E. THE MILITARY CONTRACTOR DEFENSE TEST OF SHAW V. GRUMMAN AEROSPACE CORP.***

The *McKay* standards were applied with varying degrees of success by other courts.<sup>116</sup> However, some of the real problems with applying such a general set of standards to different fact situations were brought out in *Shaw v. Grumman Aerospace Corp.*<sup>117</sup> In *Shaw*, the survivors of a Navy pilot killed during a night catapult launch from the aircraft carrier USS Constellation brought a wrongful death action against the government contractor that had manufactured the A-6E aircraft and its allegedly defective stabilizer system. The plaintiff brought actions in negligence, breach of warranty, and strict liability. *Shaw* criticized the *McKay* criteria and their underlying public policy rationale.<sup>118</sup> The court recognized the government contractor defense (termed

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<sup>113</sup>769 F.2d 115 (3d Cir. 1985). This case involved the crash of an Army CH-47C “Chinook” helicopter near Mannheim, Germany, killing all 46 crew members and passengers. The mishap was caused by a failure of the synchronization shaft which connects the two rotor systems of the tandem rotor helicopter. Investigators determined that the failure was caused by insufficient lubrication of a pinion assembly to the forward main rotor transmission.

<sup>114</sup>*Id.* at 122.

<sup>115</sup>*Koutsoubos*, 755 F.2d at 355.

<sup>116</sup>See *supra* note 81.

<sup>117</sup>778 F.2d 736 (11th Cir. 1985).

<sup>118</sup>*Id.* at 741-45.

the military contractor defense by the court).<sup>119</sup> The court, however, carved out a narrow exception to its application to product liability law<sup>120</sup> and offered a modification of the *McKay* rule.

The court's criticisms of the policy rationales of *McKay* were similar to those expressed by Judge Alarcon in the *McKay* dissent.<sup>121</sup> The court argued that holding a contractor liable in these cases would not subvert *Feres-Stencel*; even if some of the contractor's costs were passed through to the government, the net costs to the government might be less if the tort incentives resulted in better-designed aircraft that would be involved in fewer costly accidents.<sup>122</sup>

The court also noted that the limitation of government liability rationale behind the *Feres-Stencel* doctrine may no longer be controlling after *United States v. Shearer*.<sup>123</sup> In addition, suits by military personnel against government contractors would not impair essential military discipline. *Feres* and *Shearer* involved suits by military subordinates against their superiors. In government contractor cases, there is no challenge of a superior officer by a subordinate, and there is a negligible risk of conflicting military testimony in such suits.<sup>124</sup>

After an in-depth discussion of the design specifications problem<sup>125</sup>—an area that previous courts had seemed to evade—the

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<sup>119</sup>The court recognized the government contractor defense exclusively on the theory that the constitutional separation of powers compels the judiciary to defer to military decisions to use a weapons system designed by an independent contractor, despite the risks to service members. *Id.* at 741.

<sup>120</sup>*Id.*

<sup>121</sup>*McKay*, 704 F.2d at 456-61 (Alarcon, J., dissenting); see *supra* text accompanying notes 84-90. The *Shaw* court criticized three of the four *McKay* policy rationales, agreeing only with the separation of powers argument that compels the judiciary to defer to military decisions about the use of weapons systems.

<sup>122</sup>*Shaw*, 778 F.2d at 741-42.

<sup>123</sup>See *supra* text accompanying notes 22-26. The significance of *Shearer* to government contractor defense cases is unclear. On the one hand the Court seems to suggest that the government's limitation of liability is no longer sacrosanct. Whether this would help or hurt government contractors is arguable. With a reduced shield of immunity, the contractor's shield could also be lessened. On the other hand, the government might be willing to accept liability in disputed cases where the contractor might otherwise be held liable. Because of the particular facts in *Shearer*, however, which involved only military parties and clear issues of military discipline and authority, the comparisons with government contractor liability cases are too tenuous. See *infra* notes 134-38 and accompanying text.

<sup>124</sup>*Shaw*, 778 F.2d at 742-43; see *supra* note 24 and accompanying text.

<sup>125</sup>The court divided specifications into two types: (1) detailed, precise and typically quantitative specifications for manufacture of a particular military product; and (2) more general and more qualitative specifications, such as performance or mission criteria. *Id.* at 745.



court offered a new standard. As a general rule, the court held that the military contractor will be liable to service personnel injured by defects in products for which it provides detailed (type one) specifications. A contractor may escape liability only if it affirmatively proves one of the following: (1) that it did not participate, or participated only minimally, in the design of those products or parts of products shown to be defective; or (2) that it timely warned the military of the risks of the design and notified the military of alternative designs reasonably known by the contractor, and that the military, although forewarned, clearly authorized the contractor to proceed with the dangerous design.<sup>126</sup> This process, the court felt, does not violate the separation of powers doctrine because the court merely determines whether the military actually made a decision to use a product that it knew to be dangerous to service members.<sup>127</sup> If the contractor proves, under either of the two tests, that the military made the decision to go ahead with a dangerous design, then the contractor is absolved from judicially-imposed liability. Otherwise, the contractor is subject to liability.

The court in *Shaw* found that the defendant-contractor did not prove either element. Thus, although the Navy had formally approved Grumman's A-6 aircraft specifications and design changes, that approval did not constitute the sort of informed military decision to accept the risk of a dangerous product to which the court felt it had to defer under the separation of powers doctrine.<sup>128</sup>

## V. JUDICIAL TRENDS

The courts have been inconsistent in their treatment of cases involving the government contractor defense. The Third, Fourth, Fifth, Seventh, and Ninth Circuits have supported the defense.<sup>129</sup> The Eighth and Eleventh Circuits have rejected or severely limited its application.<sup>130</sup> There have also been wide disparities

<sup>126</sup>*Id.* at 745-46.

<sup>127</sup>*Id.* at 745.

<sup>128</sup>*Id.* at 747.

<sup>129</sup>*See, e.g.,* *Tozer v. LTV Corp.*, 792 F.2d 403 (4th Cir. 1986); *Bynum v. FMC Corp.*, 770 F.2d 556 (5th Cir. 1985); *Tillett v. J.I. Case Co.*, 756 F.2d 591 (7th Cir. 1985); *Koutsoubos v. Boeing Vertol*, 755 F.2d 353 (3d Cir. 1985); *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (9th Cir. 1983).

The Fifth Circuit's position adopting the government contractor defense as a matter of federal common law contrasts with its position in *Challoner v. Day & Zimmerman, Inc.*, 512 F.2d 77 (5th Cir. 1975) (holding that the contract specification defense could not be applied in strict liability actions), *vacated on other grounds*, 423 U.S. 3 (1975).

<sup>130</sup>*See, e.g., Foster v. Day & Zimmerman, Inc.*, 502 F.2d 867 (8th Cir. 1974); *Shaw*

among federal district courts and state courts. The trend, especially at the court of appeals level, appears to favor a broader use of the government contractor defense.

There are two major issues underlying this divergence of opinion: first, the extent to which the courts are willing to intervene in military-related matters; and, second, the extent to which courts are willing to apply strict products liability, especially in cases where the contractor was merely following the design specifications of the government. Courts seem to agree that the primary justification for a government contractor defense should be to preserve the separation of powers, which protects against unwarranted judicial infringement into military decision-making.<sup>131</sup> However, there has been a lack of consensus as to what types of decisions are "military decisions." Until these fundamental issues are resolved more uniformly, there will continue to be large variances in judicial opinion.

Some courts have gone even further by declaring that matters such as the composition, training, equipping, and management of our military forces are exclusively federal matters that should be governed by federal law.<sup>132</sup> The court in *Bynum v. FMC Corp.* held that, in areas deemed to be of uniquely federal interest, if adoption of state law would frustrate federal policies or otherwise interfere with the authority and duties of the United States, then federal common law must be applied irrespective of state interests.<sup>133</sup> Other federal and state courts have argued to the contrary in asserting that tort claims, which have traditionally been matters for state law, should remain so.<sup>134</sup> In *Brown v. Caterpillar Tractor Co.*,<sup>135</sup> the court found that there was no need for uniformity in suits by service members against government

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v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985).

<sup>131</sup>See *Bynum*, 770 F.2d at 562; *Tozer*, 792 F.2d at 405; *McKay*, 704 F.2d at 449; *Shaw*, 778 F.2d at 740.

<sup>132</sup>*Bynum*, 770 F.2d at 569; *McLaughlin v. Sikorsky Aircraft*, 148 Cal. App. 3d 207, 211, 195 Cal. Rptr. 764, 769 (1983).

Several suits involving Navy personnel have been brought under the Death on the High Seas Act and federal admiralty law, thus mandating the use of federal law. 46 U.S.C. §§ 761-767 (1982).

<sup>133</sup>*Bynum*, 770 F.2d at 568.

<sup>134</sup>See *Brown v. Caterpillar Tractor Co.*, 696 F.2d 246 (3d Cir. 1982); *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); *McLaughlin v. Sikorsky*, 148 Cal. App. 3d 207, 212, 195 Cal. Rptr. 764, 769 (1983) (Wiener, J., dissenting).

<sup>135</sup>696 F.2d at 246. *Brown* was a suit by an Army reservist injured during weekend training 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, who sued the contractor under Pennsylvania law for failing to equip the bulldozer with a protective structure around the passenger seat.

contractors. The court felt that the underpinnings of *Feres-Stencel* did not apply to these types of suits, which do not necessitate the second-guessing of military decisions envisioned in *Feres* and *Stencel*. Therefore, the application of federal law was not required. In supporting the application of state law, the court reasoned that manufacturers are already subjected to different standards of liability in different jurisdictions.<sup>136</sup>

Thus, in addition to the disagreement among the courts about the applicability and extent of the government contractor defense, there has also been disagreement about whether state or federal law should be applied. These factors have made the Supreme Court's decision to grant certiorari in *Boyle v. United Technologies Corp*<sup>137</sup> a welcome one.

## VI. PROPOSED SOLUTION

The standards that the courts have established and that other commentators have proposed do not fit every type of fact pattern presented by cases of this nature. Nor can any one standard or proposal be expected to govern every case in the future. Nevertheless, in the maze of current standards exists a coherent judicial framework to resolve these disputes. As a starting point, however, courts must reverse their current trend against intervening in suits by military personnel against government contractors. Those courts that have liberally construed the government contractor defense have stretched the meaning of both the Supreme Court's holdings and the pertinent provisions of the FTCA. Both *Feres* and *Shearer* involved suits by military personnel against the government, for alleged negligent acts by others in the armed forces. These suits posed direct threats to the foundations of military authority and discipline. The Court was concerned with unwarranted judicial intervention in the types of military decisions that involve the "discipline, supervision, and control of a servicemember."<sup>138</sup> "In the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the [Federal] Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.'<sup>139</sup>

<sup>136</sup>*Id.* at 249.

<sup>137</sup>792 F.2d 413 (4th Cir. 1986), cert. granted, 55 U.S.L.W. 1108 (U.S. Jan. 13, 1987) (No. 86-492).

<sup>138</sup>*United States v. Shearer*, 105 S. Ct. 3039, 3043 (1985).

<sup>139</sup>*Id.* (quoting *United States v. Brown*, 348 U.S. 110, 112 (1954)).

Some courts have used the "discretionary function" exception<sup>140</sup> as the basis for their reluctance in intervening in these types of cases. This rationale is unfounded. First of all, there is no indication that Congress intended the "discretionary function" exception to allow government contractors to obtain the same immunity as the government in suits by government (military) personnel. Secondly, subsequent Court decisions have recognized boundaries that limit the "discretionary function" exception.<sup>141</sup> Design decisions in which government contractors are intimately involved should not be considered discretionary decisions that would shield government contractors from tort liability.<sup>142</sup>

Generally, there are three categories of cases with which the courts will be dealing: government agency defense cases; contract specification defense cases; and government contractor defense cases. By clearly identifying the appropriate category, the courts can then apply the proper law.

### A. GOVERNMENT AGENCY DEFENSE CASES

The first category involves those increasingly rare cases where the contractor is serving as the agent or officer of the government. Under these conditions, the government agency defense of *Yearsley v. W.A. Ross Construction Co.* would apply.<sup>143</sup> In the agency cases, the government contractor must be merely an extension of the government and, thus, entitled to the same immunity as that afforded the government. The parties must clearly manifest their intent that the contractor will act on behalf of the government and that the government will retain the right to control the contractor in the performance of the contract.<sup>144</sup> The government agency defense could have potential applications

<sup>140</sup>See *supra* notes 11-13 and accompanying text.

<sup>141</sup>See *supra* note 13.

<sup>142</sup>See *Smith v. United States*, 375 F.2d 243, 246 (5th Cir. 1967), in which Judge Goldberg, in recognizing that there have to be some limits to the "discretionary function" exception, stated:

The description of a discretionary function in *Dalehite* permits the interpretation that any federal official vested with decision-making power is thereby invested with sufficient discretion for the government to withstand suit when those decisions go awry. Most conscious acts of any person, whether he works for the Government or not, involve choice. Unless government officials (at no matter what echelon) make their choices by flipping coins, their acts involve discretion in making decisions.

<sup>143</sup>See *supra* notes 42-47 and accompanying text.

<sup>144</sup>*Johnson v. Bechtel Associates Professional Corp.*, 545 F. Supp. 783, 785 (D.D.C. 1982).

in research and development contracts where the degree of governmental control tends to be much greater than in other contracts. Most large government contractors will not, however, be willing to relinquish their discretionary control to the government.

### ***B. CONTRACT SPECIFICATION DEFENSE CASES***

The second category involves those cases in which the government contractor has followed a detailed set of design specifications formulated by the government, with no participation by the contractor in the formulation of those specifications. Under these circumstances, the contract specification defense should apply, provided that the contractor complied "in all material respects" with the government's specifications.<sup>146</sup> This category would also include those cases in which the government possessed design expertise greater than the contractor's. The contractor would not be liable for injuries caused by the defective design specifications unless the specifications were so obviously defective that a contractor of reasonable prudence would be put on notice that the product was dangerous and likely to produce injury.<sup>146</sup>

This defense, which is based on negligence principles, should not apply to strict liability and warranty actions.<sup>147</sup> In jurisdictions that support strict liability for design defects, the contract specification defense should not be allowed. It might seem harsh

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<sup>146</sup>See *supra* note 71 and accompanying text.

<sup>147</sup>See *supra* note 49 and accompany text.

<sup>148</sup>One confusion in this area is that several strict liability tests are infused with elements of negligence. The Restatement (Second) of Torts defines strict product liability, in part, as: "(1) One who sells any product in a defective condition unreasonably dangerous to the consumer or to his property is subject to liability . . ." Restatement (Second) of Torts § 402A (1965); see *supra* note 39.

California's test to determine whether to impose strict liability for design defects also contains elements of negligence. The *Barker* test consists of two elements:

(1) the "ordinary consumer expectation" element which states that a product may be found defective in design if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or, alternatively: (2) the "excessive preventable danger" element which states that, even if a product satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies excessive preventable danger, or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design, then the design may be found defective.

*Barker v. Lull Engineering Co.*, 20 Cal. 3d 413, 429-30, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236 (1978).

to hold a contractor strictly liable for a defect in the government's design. Nevertheless, there are several options available to protect the contractor. First, the contractor can refuse to contract with the government. Second, the contractor can insure himself against potential liability.<sup>148</sup> Third, the contractor can establish an agency relationship with the government. This arrangement might deprive the contractor of control in the execution of the contract, but it would relieve the contractor of any future liability.

Under strict liability principles, the contractor's liability is not automatic. The plaintiff must prove the elements of strict liability according to the laws of the jurisdiction. Traditional affirmative defenses are available in most jurisdictions.<sup>149</sup> In cases where the imposition of liability on the manufacturer might be too harsh, the government can waive its immunity and agree to be sued. In these contract specification defense cases, there are enough options available to guard against gross inequities to the contractor resulting from strict liability causes of action.

### C. GOVERNMENT CONTRACTOR DEFENSE CASES

The third category of cases—those in which the government and the contractor have participated jointly in the formulation of the detailed specifications—includes most of the military design defect cases before the courts today. In the acquisition process, the government typically has originated a set of performance specifications based on its mission requirements. These specifications state only the government's actual minimum needs so as to promote innovation by contractors in the development of military weapons systems.<sup>150</sup> After various design reviews and mockups in which the contractor and the government jointly participate, the contractor submits the final detailed specifications. These detailed specifications require the approval of the government. There is

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<sup>148</sup>The majority in *McKay* was concerned that manufacturers would pass on increased costs to the government through cost overruns. *McKay*, 704 F.2d at 449. Even the Supreme Court in *Stencel*, however, recognized that most military equipment contracts already include the costs of such risks as part of the costs of doing business. *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 674 n.8 (1977).

<sup>149</sup>See *supra* notes 55-59 and accompanying text.

<sup>150</sup>Federal Acquisition Regulation, §§ 34.002, 34.005-2 (3 July 1985). For example, mission requirements for an aircraft—subsequently reflected in performance specifications—might include such factors as maximum combat range, maximum endurance, airspeed and altitude requirements for various mission profiles, and weapons payload.

continuous dialogue between the government and the contractor throughout the specification formulation phase. Nonetheless, where once the government actually designed much of its own equipment and provided the contractor with a set of detailed specifications, the government now relies substantially, and sometimes totally, on the design expertise of the contractor, with the government assuming more of an advisory or monitor role. In almost all cases, the contractor has the greater technical expertise. Although the military has final approval authority, the contractor has had a major role in formulating the detailed specifications.<sup>151</sup>

Because of the nature of this acquisition process, the *McKay* standards do not provide adequate protection for military personnel injured or killed as the result of defective designs. Not only is the "established or approved" element faulty,<sup>152</sup> but the warning criterion is too lenient.<sup>153</sup> A manufacturer should not be able to escape liability for a defective design just by warning the government of defects or dangers known to the manufacturer but not to the government. If such defects have a high risk of causing injury or death to service members, the manufacturer should have a responsibility, not just for warning, but also for correcting these defects.

Because of the close involvement by government contractors in the formulation of the detailed specifications, the imposition of tort liability is logical and fair. A contractor should be absolved from liability only in exceptional circumstances, such as during wartime or in national emergencies,<sup>154</sup> or in any other circumstances in which the contractor is compelled to execute the contract.<sup>155</sup>

In normal peacetime conditions, application of the government contractor defense should be limited specifically to those instances where military order and discipline would be adversely affected by judicial interference. Such instances would include military decisions affecting discipline, training, readiness, and the use of

<sup>151</sup>As with the contract specification cases, the potential costs of such liability can be negotiated as part of the overall costs of doing business. See *supra* note 148.

<sup>152</sup>See *supra* notes 83 and 90 and accompanying text.

<sup>153</sup>See *supra* note 83 and accompanying text.

<sup>154</sup>*In re "Agent Orange" Product Liability Litigation*, 534 F. Supp. 1046, 1054 (E.D.N.Y. 1982).

<sup>155</sup>See *McKay*, 704 F.2d 444, 458 (9th Cir. 1983) (Alarcon J., dissenting) (citing *Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co.*, 295 F.2d 14 (9th Cir. 1961)).

military forces and equipment. However, design decisions that result in the preventable death or injury of service members should not fall within the penumbra of those military decisions that deserve special immunity from judicial review.<sup>156</sup> These types of decisions are not the types of military decisions that Congress and the Supreme Court have been careful to protect.<sup>157</sup>

The interests of the service members or their survivors should be protected by the law. In some cases, such as *Boyle v. United Technologies Corp.*, the burden of proof on the plaintiffs is already so great<sup>158</sup> that providing further judicial protection to the defendants in the form of the government contractor defense makes the process far too one-sided. Such a system does not fix responsibility for design defects that cause injuries or death to service members. Typically, the government and the contractor disclaim responsibility. Meanwhile, the injured plaintiff is left without judicial remedy.

The fact that military personnel are exposed to greater risks than ordinary consumers should not deny them the full protection of the law. Contrary to the opinion of the majority in *McKay*,<sup>159</sup> the reasonable safety expectations of military personnel are not lower than those of ordinary consumers. When a military pilot ejects from an aircraft, he has a reasonable expectation that the ejection system will work as designed. A pilot launched by catapult from the deck of an aircraft carrier at night has a reasonable expectation that the flight controls will not malfunction at this critical period. A helicopter pilot has a reasonable

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<sup>156</sup>See *Moyer v. Martin Marietta Corp.*, 481 F.2d 585, 598 (5th Cir. 1973), in which the court found that the Air Force's decision to select a particular aircraft is discretionary, but not the acceptance of the aircraft with a negligently designed pilot's ejection seat. *Moyer* was an action by the widow of a civilian test pilot who was killed when the ejection seat of his B-57A aircraft activated while the aircraft was still on the ground.

<sup>157</sup>See *supra* notes 134-138 and accompanying text.

<sup>158</sup>In *Boyle*, the court applied Virginia law, which stated:

When there is substantial evidence introduced which tends to prove that plaintiff's injuries may have resulted from one of two causes, for one of which the defendant is responsible and for the other of which he is not responsible, such defendant is entitled to have the jury told that the plaintiff must fail if his evidence does not prove that his damages were produced by the negligence of defendant; and he must also fail if it appears from the evidence just as probable that damages were caused by one as by the other because the plaintiff must make out his case by a preponderance of the evidence.

*Boyle v. United Technologies Corp.*, 792 F.2d 413, 415-16 (4th Cir. 1986), cert. granted, 55 U.S.L.W. 1108 (U.S. Jan. 13, 1987) (No. 86-492) (citing *Cape Charles Flying Service, Inc. v. Nottingham*, 187 Va. 444, 47 S.E.2d 540 (1948)).

<sup>159</sup>*McKay*, 704 F.2d at 453.



expectation that when he conducts a certain dynamic maneuver the rotor system won't catastrophically depart from the hub, leaving the aircraft uncontrollable.

In addition to protecting the individual interests of all service members, imposition of liability on government contractors, when proved, would result in improvements in the designs of military equipment and weapons systems. Recent improvements in the safety records in military aviation show clearly that safety can be greatly enhanced by improved design.<sup>160</sup> Most of these improvements, however, have been realized in new aircraft; there is a need for increased pressures to improve the design not just of new aircraft, but of the entire range of military systems.<sup>161</sup> This will reduce loss of life and, at the same time, increase operational readiness. Even more so today, where the goal of the Department of Defense is to increase competition, will the strict liability theories of enterprise liability and market deterrence have their most therapeutic effect. As manufacturers increase prices to reflect the cost of accidents caused by their products, these products will become less competitive. The imposition of strict liability will further deter manufacturers from marketing products with serious safety-related design defects. Not only will the manufacturers feel the pressure from this system, but the military, in attempting to control costs of procurement systems, will be further encouraged to optimize safety features in current and future designs.

The other arguments for imposing strict liability—compensation and implied representation—although important, are less compelling because military service members or their survivors receive some benefits from the Veterans' Benefits Act,<sup>162</sup> and thus are not wholly without compensation. Nevertheless, this compensation, although beneficial, could hardly be construed as adequate compensation for the tragic loss of a spouse or parent under these circumstances.<sup>163</sup> Thus, it is equitable that the government

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<sup>160</sup>The nation's military services set an aviation safety record in FY86. The Pentagon attributed the record to the introduction of new planes and helicopters "which have proven to be safer and more maintainable than their predecessors." *San Diego Union*, Dec. 12, 1986, at A-13, col. 2.

<sup>161</sup>The Army set a new safety record in FY86. The Army experienced 33 Class A accidents (Class A is defined as one that involves a fatality or property damage to a plane or helicopter greater than \$500,000). Thirteen of the Class A mishaps involved the Army's older UH-1 helicopters—more than double any other aircraft. *Id.*

<sup>162</sup>38 U.S.C.A. §§ 401-423 (West 1979 & Supp. 1986).

<sup>163</sup>*Id.* §§ 411, 414. A widow of a Navy Lieutenant Commander killed in an aircraft mishap would receive compensation of \$725 per month. Dependent

contractor, if liable, should be subject to the full tort damages award system of the particular jurisdiction.

Even without the government contractor defense, contractors are not left unprotected. The traditional affirmative defenses<sup>164</sup> available in most jurisdictions will provide adequate protection to the contractor against inequitable results. Government contractors, however, have reason for concern about the manner in which some courts have applied the law in strict liability cases involving military products. Some courts have seemed to ignore valid defenses offered by the contractor and have applied strict liability as more of an absolute liability. There is hardly any question that any military design can be improved; there are many designs, however, that when properly operated and maintained are perfectly safe.

In *McLaughlin v. Sikorsky Aircraft*,<sup>165</sup> the pilots of a Navy HH-3A helicopter brought a strict liability action against the manufacturer for personal injuries suffered when their helicopter crashed because of a failure in the flight control system. The post-mishap investigation revealed that military maintenance personnel had not replaced a cotter pin in the fore and aft flight control linkage, permitting the nut to back off and allowing the bolt to come out of the linkage, resulting in loss of control of the longitudinal axis of the aircraft. The defendant was not able to assert the contributory negligence of the maintenance personnel as a defense, although with proper maintenance, the mishap would not have occurred. Plaintiffs asserted that the design was defective and that the contractor should have used redundant self-locking fasteners.<sup>166</sup> This latter design would have prevented this accident. However, was the original design, which complied with Navy specifications, really defective? It certainly could have been if there had been other incidents caused by similar maintenance errors. Without previous occurrences, however, it would be unfair to hold the contractor liable.

Likewise, in cases where the plaintiff has misused the product, the contractor should be protected from liability. In short, contractors, even in strict liability actions, should not be held liable for every accident attributed to a design defect that was

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children between the ages of 18-22, who are pursuing a course of education at an approved institution, receive \$126 per month.

<sup>164</sup>See *supra* notes 55-59 and accompanying text.

<sup>165</sup>*McLaughlin v. Sikorsky Aircraft*, 148 Cal. App. 3d 203, 195 Cal. Rptr. 764 (1983).

<sup>166</sup>*Id.* at 207, 195 Cal. Rptr. at 765.

caused as much by some other contributing factor. The contractor deserves the same protection of tort law as the plaintiffs.

## VII. CONCLUSIONS

The liability of government contractors for damages suffered by injured military personnel as the result of defectively designed products continues to receive inconsistent judicial treatment. Recently, many courts have shown an increasing reluctance to interfere with military decisions and, accordingly, have permitted government contractors to share liberally in the government's immunity from liability. In some cases, this shared immunity is justified. In most cases, however, the need for judicial intervention to protect the interests of injured service members or their survivors far outweighs the need to protect military design decisions that result in the preventable injury or loss of life from unsafe designs.

Depending on the relationship between the contractor and the government, there are three distinct defenses available to the contractor in design defect cases involving military products. If the courts properly apply the principles behind these defenses, there will be adequate safeguards for plaintiffs and defendants.

When a contractual agency relationship exists, the contractor can claim immunity under the government agency defense, which gives the contractor the same complete tort immunity enjoyed by the government in suits by injured service members. These agency relationships are now rare; they may have greater application in the future, however.

The contractor's second defense—the contract specification defense—is a negligence-based defense that provides that a contractor is not liable for damages incurred from a defective product when the contractor has fully complied with the specifications provided by the government, unless those specifications were so obviously defective and dangerous that a contractor of reasonable prudence would be put on notice that the product was dangerous and likely to cause injury. The premise of this defense is that the contractor has not participated in formulating the design specifications. This defense cannot be asserted in strict liability or breach of warranty actions.

The contractor's third defense—the government contractor defense—is based on public policy considerations that are of such an exceptional nature that the contractor should be granted the same immunity as the government. The cases in which this defense

have been asserted involve design specifications that have been formulated jointly by the government and the contractor. Unlike many recent decisions that have permitted this defense because of judicial reluctance to interfere with a wide range of military decisions, including design decisions, the courts should construe this defense much more narrowly to cover exceptional circumstances such as wartime, national emergencies, or other circumstances where the contractor is compelled by the government to manufacture the product. Design decisions that cause the preventable injury or loss of life of service members should not be protected under the penumbra of the separation of powers doctrine and the government contractor defense.

The Supreme Court's decision to decide the issue of government contractor liability in *Boyle v. United Technologies Corp.*<sup>167</sup> is a welcome one. One hopes the Court will encourage further judicial intervention in this area to provide much-needed remedies to injured service members or their survivors.

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<sup>167</sup>792 F.2d 413, 415-16 (4th Cir. 1986), cert. granted, 55 U.S.L.W. 1108 (U.S. Jan. 13, 1987) (No. 86-492).

# EXPEDITED PROCEDURES FOR RESEARCH AND DEVELOPMENT CONTRACTING

by Colonel Maurice J. O'Brien\*

## I. INTRODUCTION

The use of the Government contract poses many difficult problems for research and development contractors. The wide and nebulous range of research requirements and projects; the variety of research contractors—commercial, non-profit laboratories, academic institutions, large business, small business, individual researchers—contribute to the complex problem of procuring research under contracts predicated primarily on standard supply contract laws and regulations. . . .

There is support for the belief that research and development contracts should be substantially different from the 'standard procurement' contract and that the authorities and procedures for implementing the contract should be broad and flexible. . . .<sup>1</sup>

This language was written by Edwin P. Bledsoe and Harry I. Ravitz, from the Office of Naval Research, in their 1957 article—*The Evolution of Research and Development as a Procurement Function of the Federal Government*<sup>2</sup>—in which they traced the history and growth of the research and development (R&D) contracting function in the government. They asked, in doing so, if the then-existing rules furnished sufficient authority and flexibility for government support of R&D. Though they recog-

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\*Judge Advocate General's Corps, United States Army. Currently assigned as Chief, Contract Law Division, Office of The Judge Advocate General. Formerly assigned as Chief Counsel, Army Laboratory Command and Electronics Research and Development Command, 1984 to 1986; Army Legal Member, Defense Acquisition Regulatory (DAR) Council, 1981 to 1984; Contract Law Division, Headquarters, United States Army, Europe, 1977 to 1980; Contract Appeals Division, United States Army Legal Services Agency, 1978 to 1977. B.A., Loras College, 1963; J.D., University of Notre Dame, 1966. Graduate, Industrial College of the Armed Forces, 1987; Armed Forces Staff College, 1981; Judge Advocate Officer Advanced Course, 1973. Member of the bars of the state of Iowa, the United States Court of Military Appeals, and the United States Court of Claims.

<sup>1</sup>Bledsoe and Ravitz, *The Evolution of Research and Development as a Procurement Function of the Federal Government*, 17 Fed. B.J. 189, 212-13 (1957), reprinted in 1 Y.P.A. 441, 466-67 (1966).

<sup>2</sup>*Id.*

nized there was considerable difficulty, they concluded that the rules at the time did.<sup>3</sup>

The situation, however, has changed, and the issue has become more important and complex. Military research and development has become increasingly vital. The Department of Defense (DOD) now spends over twenty-five billion dollars a year for R&D and the amount is increasing.<sup>4</sup> DOD research, development, test and evaluation (RDT&E) exceeded twenty-six billion dollars for fiscal year 1984, thirty-one billion dollars for 1985, thirty-five billion dollars for 1986, and was projected to be over forty-one billion dollars in 1987.<sup>5</sup> The importance of R&D for the U.S. defense also follows from our reliance on technological superiority in equipment (while the Soviet Union has the numerical advantage in materiel); it is only through effective R&D that we can maintain our technological advantage.<sup>6</sup>

At the same time, increased complexity, oversight and control have been added to the procurement process. This has been for two reasons: the increased emphasis on competition, as set forth in the Competition in Contracting Act,<sup>7</sup> and expanded efforts to eliminate fraud, waste, and abuse. A paper from the Office of Naval Research described the resulting problems for R&D contracting:

Processing times for competitive R&D acquisitions are now taking an average of 150-220 days. . . .

The acquisition of research and development (R&D) and services related to R&D is taking too long. Both government users of R&D and contractors have voiced their strong concern and frustration. . . .

*What is causing the problem?*

Much time has been added by the complex nature of recent controls and procedures. These have been placed on the entire acquisition process by law, resulting regula-

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<sup>3</sup>*Id.* at 211, where the article states, "A review of statutory authorities leads to the conclusion that existing legislation provides adequate authority and sufficient flexibility for Federal support of research and development."

<sup>4</sup>Gansler, *The US Technology Base: Problems and Prospects*, in *Technology, Strategy and National Security* 105, 106 (National Defense University Press 1985).

<sup>5</sup>Report of the Secretary of Defense, Casper W. Weinberger, to the Congress on the FY 1987 Budget, FY 1988 Authorization Request, FY 1987-1991 Defense Programs 313 (Feb. 5, 1986).

<sup>6</sup>Gansler, *supra* note 4, at 107-08.

<sup>7</sup>Competition in Contracting Act of 1984, Pub. L. No. 98-369, § 2701, 98 Stat. 1175 (1984).

tion, and agency convention, in an effort to enhance competition and eliminate fraud, waste and abuse.

Agency rules related to the process are designed to control and oversee the total acquisition program. R&D represents less than 10% of all acquisition. The system, however, that controls this 10% is designed around the other 90%, which is much more complex and difficult to manage.<sup>8</sup>

The role of R&D contracting and its differences from other procurement need to be recognized. The "research" in research and development means the effort of scientific study and experimentation directed toward increasing scientific knowledge and understanding;<sup>9</sup> "development" means the use of scientific and technical knowledge in the design, development, testing, or evaluation of a potential new or improved product or service.<sup>10</sup> The Federal Acquisition Regulation (FAR) states generally:

The primary purpose of contracted R&D programs is to advance scientific and technical knowledge and apply that knowledge to the extent necessary to achieve agency and national goals. Unlike contracts for supplies and services, most R&D contracts are directed toward objectives for which the work or methods cannot be precisely described in advance . . . . The contracting process shall be used to encourage the best sources from the scientific and industrial community to become involved in the program and must provide an environment in which the work can be pursued with reasonable flexibility and minimum administrative burden.<sup>11</sup>

Procurement contracting is the firmly established process for obtaining research support: the great majority of all military R&D requirements are accomplished through contracts.<sup>12</sup> But

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<sup>8</sup>Office of the Chief of Naval Research, *A Test of a Streamlined R&D Acquisition Process* (Mar. 6, 1986) [hereinafter *Streamlined R&D*]. This material comprises a one-page Executive Summary, a three-page Discussion of the test, and a four-page Procedure for Testing. The quoted language is taken from the Executive Summary and the first page of the Discussion.

<sup>9</sup>DOD Federal Acquisition Regulation Supplement § 35.001 (6 Jan. 1986) [hereinafter *DFARS*] (definition of "research").

<sup>10</sup>Federal Acquisition Reg. § 35.001 (Apr. 1, 1984) [hereinafter *FAR*] (definition of "development").

<sup>11</sup>*FAR* § 35.002.

<sup>12</sup>Bledsoe and Ravitz, *supra* note 1, at 211, where they stated (in 1957) that, "The contract process is so firmly established that little thought is given to any other method of research support. Approximately three-fourths of all military research and development requirements are accomplished through contracts." The

there is a need for expedited and simplified R&D contracting procedures—particularly for research early on in the process.

There are such procedures and they are being further developed and refined. This article will discuss those procedures, examine their use, and evaluate the extent to which they meet R&D needs. It will first consider the widely used process of the unsolicited proposal. It then will compare and discuss in detail the general solicitation procedures of the broad agency announcement (BAA) and the Small Business Innovation Research (SBIR) program, which are quite similar in practical application to the unsolicited proposal. These procedures, however, are much more workable and expeditious—the BAA holds the greatest promise for accomplishing efficient research contracting in the future. The article next will consider procedures for expediting the competitive request for proposals (RFP) process: the streamlined competitive R&D test (which is intended to expedite procurements) and the four-step source selection procedure (which has other purposes). It will also consider certain other procedures before concluding with an overall evaluation of the available procedures for expediting the process.

## II. UNSOLICITED PROPOSALS

An unsolicited proposal is a written proposal submitted to an agency (1) on the initiative of the submitter, (2) for the purpose of obtaining a contract with the government, and (3) which is not in response to a formal or informal request (other than a publicized general statement of agency needs).<sup>13</sup> Unsolicited proposals can be for any type of supplies or services, but they are often used for R&D. They have been a valuable means for government agencies to obtain meritorious research proposals.

Nevertheless, a contract cannot be awarded to the submitter of an unsolicited proposal just because it receives favorable government consideration. The requirements of the Competition in Contracting Act must be met first. The Act requires competitive opportunity for all prospective offerors except in limited circumstances. In addition, synopsis (publication in the Commerce

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description of when to use a procurement contract is at 31 U.S.C. § 6303 (1982), while explanations of when to use grants and cooperative agreements are at 31 U.S.C. §§ 6304 and 6305 (1982). One member of Congress has expressed concern that grants and cooperative agreements not be used to avoid the competitive requirements for contracts. Cohen, *The Competition in Contracting Act*, 14 Pub. Cont. L.J. 1, 38-39 (1983).

<sup>13</sup>FAR §15.501 (definition of "unsolicited proposal").



Business Daily) of contract actions, including prospective sole source awards, is required except in limited situations.

The primary general exception from the competition requirements is where the supplies or services are available from only one responsible source and no other type of supplies or services will satisfy the Government's needs.<sup>14</sup> This exception includes specific language concerning unsolicited "research" proposals. It states that supplies or services may be considered to be available from only one source if the source submitted an unsolicited "research" proposal that demonstrates a "unique and innovative" concept, the substance of which is not otherwise available to the government, and does not resemble a pending competitive acquisition.<sup>15</sup>

The availability of this exception does not necessarily reduce the administrative burden. The agency must undertake a formal evaluation of the proposal<sup>16</sup> and obtain the necessary certifications, justifications, and approvals under the Competition in Contracting Act.<sup>17</sup>

The requirements concerning an unsolicited proposal for "development" work and other services and supplies are even more burdensome.<sup>18</sup> There is further requirement for additional approvals for any sole source contract for studies, analyses, or consulting services resulting from an unsolicited proposal—whether the work is research, development or in another category.<sup>19</sup>

The requirement to synopsise proposed contract awards in the Commerce Business Daily (CBD) applies to awards based on unsolicited proposals. The purpose is to give other prospective offerors the opportunity to express their interest in the work. It has the effect of bringing out additional sources and thereby enhancing competition. Synopsis, however, requires publication of some description of the work contemplated. There is concern that innovative contractors will not submit their best ideas as unsolicited proposals because they will be synopsized and thereby furnished to competitors.<sup>20</sup>

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<sup>14</sup>10 U.S.C. § 2304(c)(1) (Supp. III 1985) (implemented in the procurement regulations at FAR § 6.302-1(a)(2)).

<sup>15</sup>*Id.* § 2304(d)(1)(A) (implemented at FAR § 6.302-1(a)(2)(i)).

<sup>16</sup>Procedures for receipt, review, and evaluation of unsolicited proposals are discussed at FAR § 15.506.

<sup>17</sup>10 U.S.C. 2304(f) (Supp. III 1985) (implemented at FAR §§ 6.303 and 6.304).

<sup>18</sup>See FAR § 6.302-1.

<sup>19</sup>See DFARS § 15.507(b)(70).

<sup>20</sup>Short Form Research Contract Ad Hoc Subcommittee, Memorandum for the Director, DAR Council, Subject: "DAR Case 86-61; R&D Simplified Procurement

To solve this problem, an exception to the synopsis requirement applies to unsolicited "research" proposals that demonstrate a "unique and innovative" research concept. If publication of any nature would improperly disclose the originality of thought or innovativeness of the proposed research, or would disclose proprietary information associated with the proposal, then the agency need not synopsisize.<sup>21</sup>

The exceptions to the competition and the synopsis requirements for unsolicited "research" proposals depend heavily on the meaning of a "unique and innovative" concept—as this is the initial requirement for each exception.<sup>22</sup> What do "unique" and "innovative" mean? The Defense Acquisition Regulatory (DAR) Council has developed proposed definitions, which have not yet been finally approved.<sup>23</sup> Under these definitions, an "innovative" proposal will contain "meritorious new, novel or changed concepts, approaches or methods."<sup>24</sup> A "unique" research proposal is the product or original thinking submitted in confidence, not previously submitted by another, and not otherwise available within the government. "Unique" does not mean that only the submitter can do the work.<sup>25</sup> These definitions are reasonable; they are not overly restrictive and do not further unduly encumber the process.

Nevertheless, it is clear that the overall procedures for contracting based on unsolicited research proposals are very restrictive and encumbering; those for development work are even more burdensome. This restrictiveness results largely because the procurement regulations treat the unsolicited proposal process as noncompetitive.<sup>26</sup>

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Procedures," at 1 (26 June 1986).

<sup>21</sup>FAR § 5.202(a)(8).

<sup>22</sup>At one time, the unsolicited proposal only needed to be unique "or" innovative; the Competition in Contracting Act changed this requirement to unique "and" innovative. See 10 U.S.C. § 2304(c)(1) (Supp. III 1985).

<sup>23</sup>Proposed Revisions to FAR Parts/Subparts, SUBJECT: "DAR Case 86-61; R&D Simplified Procurement Procedures." [hereinafter proposed addition to FAR § \_\_\_\_]. In September 1986, the DAR Council forwarded the proposed revisions to the Civilian Agency Acquisition Council for its consideration. They must also be furnished for public comment before inclusion in the regulation.

<sup>24</sup>Proposed addition to FAR § 6.003 (definition of "Innovative").

<sup>25</sup>Proposed addition to FAR § 6.003 (definition of "Unique").

<sup>26</sup>See Cohen, *supra* note 12, at 30, where Senator Cohen describes the Senate Governmental Affairs Committee's conclusions concerning unsolicited proposals:

The committee realizes that unsolicited proposals are often the source of innovative ideas, and recognizes that the incentive for contractors to submit unsolicited proposals may be lessened by subjecting them to the competitive procedures prescribed in S. 338. The committee's

There are other procedures, however—under the broad agency announcement (BAA) and the Small Business Innovation Research (SBIR) program—that are quite similar, but avoid much of the restrictiveness. They are considered competitive, so that sole source justifications and approvals are not necessary, and they do not require synopsis of individual contracts before award. Also it is not necessary that proposals submitted under these procedures be “unique and innovative.” We will consider these two general solicitation procedures next.

### III. GENERAL SOLICITATION PROCEDURES

#### A. BROAD AGENCY ANNOUNCEMENTS

The broad agency announcement (BAA) permits an agency to use a general solicitation, under competitive procedures, while retaining the wide latitude needed for R&D proposals. “This procedure is advantageous in that it permits flexibility and responsiveness in the procurement of high technology research as well as decreasing the time from solicitation to contract award.”<sup>27</sup>

The statutory basis for the BAA procedure is in the Competition in Contracting Act. It states that competitive procedures include the competitive selection for award of “basic research proposals resulting from a general solicitation and the review or scientific review (as appropriate) of such proposals.”<sup>28</sup> The Federal Acquisition Regulation (FAR) authorizes the competitive selection of basic research proposals under: “(i) A broad agency announcement that is general in nature identifying areas of research interest, including criteria for selecting proposals, and soliciting the participation of all offerors capable of satisfying the Govern-

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concern, however, is that unsolicited proposals often actually are solicited by the agencies. In these cases, awarding a sole-source contract to a contractor which ostensibly submitted an ‘unsolicited’ proposal would violate regulations and not be fair to potential competitors. Furthermore, the committee believes that truly meritorious unsolicited proposals should prevail in a competitive award.

*See also Keyes, Competition and Sole-Source Procurements—A View Through the Unsolicited Proposal Example*, 14 Pub. Cont. L.J. 284 (1984), for a detailed discussion of this area.

<sup>27</sup>Letter from Senators Goldwater, Quayle, Bingaman, and Wilson, and Congressmen Brooks, Fuqua, Horton, Dickinson, and Aspin to Secretary of Defense Weinberger (Apr. 15, 1986) [hereinafter Congressional Letter] (discussing the application of the BAA procedure).

<sup>28</sup>10 U.S.C. § 23022(B) (Supp. III 1985).

ment's needs; and (ii) A peer or scientific review."<sup>29</sup>

The legislative history concerning the procedure is in a single paragraph of the Conference Report on the Competition in Contracting Act:

The conferees also recognize the competitive selection of basic research, which is directed toward increasing knowledge of a subject apart from any clear or necessary practical application of that knowledge, to be a competitive procurement procedure. These basic research procurements are unique in that the agency's solicitations are general in nature, identifying areas of research interest, criteria for selecting proposals (including scientific merit), and the method of evaluating proposals. Proposals received are then competitively evaluated through a peer review process before contracts are awarded. By recognizing such procurement of basic research as competitive, the conferees intend to promote the participation of all individuals or companies capable of supporting the government's needs in this important area.<sup>30</sup>

The BAA provision acknowledges that there are research efforts, unrelated to a specific weapon system or hardware solution, for which it is impossible to draft an adequate, detailed request for proposals without limiting the technical response—thereby limiting competition.<sup>31</sup>

There are many questions concerning the proper application of the BAA. The initial issues are: When can it be used?—When does it apply? The statute refers to "basic research" proposals. The Conference Report language refers to the selection of "basic research, which is directed toward increasing knowledge of a subject apart from any clear or necessary practical application of that knowledge." This definition of "basic research" closely corresponds to the definition of the 6.1 budget category under the Research, Development, Test and Evaluation appropriation.<sup>32</sup>

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<sup>29</sup>FAR § 6.102(d)(2).

<sup>30</sup>H.R. Con. Rep. No. 861, 98th Cong., 2d Sess. 1423, reprinted in 1984 U.S. Code Cong. & Ad. News 1445, 2111.

<sup>31</sup>Preston, *Congress and the Acquisition Process: Some Recommendations for Improvement*, 20 Nat'l Cont. Mgmt. J. 1, 6 (1986). Ms. Preston is the Counsel for Procurement Policy, House Armed Services Committee.

<sup>32</sup>To manage the RDTE appropriation, the Army divided it into seven categories, numbered 6.1 through 6.7. Dep't of Army, Reg. No. 37-112, Financial Administration—Management Accounting for the RDTE Appropriation, para. 2-5c(1) (15 Apr. 1982), defines the 6.1 category, "research": "This research includes experimentation and scientific study in the physical, biological, and behavioral sciences. Such

Thus, most DOD personnel interpreted the "basic research" obtainable under a BAA as limited to that available under the 6.1 budget category.

In a letter of 15 April 1986 to the Secretary of Defense, however, the chairmen of the cognizant congressional committees indicated a broader application was intended.<sup>33</sup> They stated that the statute left basic research undefined because of the difficulty of drafting a definition that would apply in all instances, and to afford some flexibility. They indicated the Department of Defense had been unduly restrictive in limiting the BAA to the 6.1 budget category, and proposed an expanded definition of "basic research":

To resolve this dilemma and establish a consistent, workable procedure for procuring defense research, the department should be allowed to apply the general solicitation procedure or broad agency announcement to any basic or exploratory research efforts not related to the development of a specific weapon system or hardware procurement. This should be limited, however, to those research procurements for which it would be impossible to draft an adequate request for proposals in sufficient detail without restraining the technical response, and thus hindering competition rather than expanding it.<sup>34</sup>

The DAR Council has drafted FAR amendments that will incorporate this definition.<sup>35</sup> The amendments will permit use of the BAA to procure "basic and applied research and that part of development not related to the development of a specific system or hardware procurement."<sup>36</sup> Under the proposed amendments, the BAA procedure may be used to fulfill requirements for scientific study and experimentation directed toward advancing

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research is to increase knowledge and understanding of science as related to national security needs. This research provides part of the scientific-technological base for later development."

The 6.2 budget category, "applied research and exploratory development," is defined at para. 2-5c.(2): "The 6.2 R&D includes all efforts directed to solving specific military problems short of major development efforts." See also Dep't of Army, Reg. No. 37-100-87, Financial Administration—Appropriations and Funds Available for Obligation, Expense and Expenditure, para. E.3.b.(1) and (2) (1 Oct. 1986). These definitions of the 6.1 and 6.2 categories indicate that the 6.1 category is "directed toward increasing knowledge of a subject apart from any clear or necessary practical application of that knowledge" but that the 6.2 category is not.

<sup>33</sup>Congressional Letter, *supra* note 26.

<sup>34</sup>*Id.*

<sup>35</sup>Proposed additions to FAR, *supra* note 23.

<sup>36</sup>*Id.* proposed addition to FAR § 35.016(a).

the state-of-the-art or increasing knowledge or understanding rather than focusing on a specific system or hardware solution. The technique "shall only be used when meaningful proposals with varying technical/scientific approaches can be reasonably anticipated."<sup>37</sup>

The draft amendments also furnish guidance for use of the procedure. A BAA is to describe the agency's research interest—which may either be for broadly defined areas of interest covering the full range of the agency's interests or "for an individual program requirement."<sup>38</sup> The Office of the Chief of Naval Research (OCNR) policy guidance on use of the BAA specifies that an announcement should be as detailed as possible in describing the research goals, but should otherwise be in general terms; it should not define specific research methods or procedures as would be found in a statement of work in an RFP.<sup>39</sup> This conforms with the congressional direction that the procedure be limited to procurements for which it is impossible to draft an adequate request for proposals (in sufficient detail) without restraining technical responses and thereby hindering competition.

The draft amendments further state that a BAA shall describe the criteria for selecting proposals, their relative importance, and the method of evaluation.<sup>40</sup> The primary bases for selecting proposals are to be technical merit, importance to agency programs, and fund availability. Cost realism and reasonableness should also be considered to the extent appropriate.<sup>41</sup> Agencies are to evaluate proposals through a peer or scientific review process.<sup>42</sup>

The proposed FAR amendments require written evaluation reports on individual proposals, but state that proposals need not be evaluated against each other because they are not submitted in accordance with a common work statement.<sup>43</sup> There is no advance commitment to fund any particular research topic or area. Rather, all submissions compete with each other against the full range of

<sup>37</sup>*Id.*

<sup>38</sup>*Id.* proposed addition to FAR § 35.016(b)(1). For a discussion of the use of the BAA procedure to fulfill an individual or specific requirement, see *infra* text accompanying notes 68-72.

<sup>39</sup>J. Bolos, OCNR Acquisition Policy for the Use of Broad Agency Announcements (BAA), at 2, para. a (18 Apr. 1986). Mr. Bolos is the Director of Acquisition at OCNR.

<sup>40</sup>Proposed addition to FAR § 35.016(b)(2), *supra* note 23.

<sup>41</sup>*Id.* proposed addition to FAR § 35.016(e).

<sup>42</sup>*Id.* proposed addition to FAR § 35.016(d).

<sup>43</sup>*Id.*

the agency's research needs to determine which will be funded.

Once a proposal is received, communication between the agency's scientific or engineering personnel and the offeror's personnel is only permitted for purposes of clarification.<sup>44</sup> The OCNR policy guidance states that technical offices should make selection decisions based on the existing proposal and not their personal knowledge.<sup>45</sup>

The availability of a BAA is to be synopsized initially in the Commerce Business Daily.<sup>46</sup> Later synopsis of individual contract actions based on proposals received under the BAA is not required—the initial publication fulfills the synopsis requirement.<sup>47</sup>

The BAA will set out the period of time during which proposals submitted in response to it may be accepted.<sup>48</sup> It can call for proposals to be submitted by a common date or leave submission dates open. In the latter case, the notice must be published at least annually.<sup>49</sup>

The BAA must also contain instructions for the preparation and submission of proposals.<sup>50</sup> The agency may also announce its availability in scientific, technical, or engineering periodicals, as well as the CBD.<sup>51</sup>

## ***B. THE SMALL BUSINESS INNOVATION RESEARCH PROGRAM***

The Small Business Innovation Research (SBIR) program is generally similar to the BAA procedure. The SBIR program, of course, applies only to small businesses, while the BAA is available for contracting with businesses of all sizes.

The Small Business Innovation Development Act of 1982<sup>52</sup> established the SBIR program; the Small Business Administration (SBA) has implemented the program in a policy directive.<sup>53</sup> The Act required federal agencies to establish an SBIR program

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<sup>44</sup>*Id.* proposed addition to FAR § 35.016(f).

<sup>45</sup>J. Bolos, *supra* note 37, at 4, para. c.

<sup>46</sup>Proposed addition to FAR § 35.016(c), *supra* note 23.

<sup>47</sup>*Id.* proposed addition to FAR § 35.016(g).

<sup>48</sup>*Id.* proposed addition to FAR § 35.016(b)(3).

<sup>49</sup>*Id.* proposed addition to FAR § 35.016(c).

<sup>50</sup>*Id.* proposed addition to FAR § 35.016(b)(4).

<sup>51</sup>*Id.* proposed addition to FAR § 35.016(c).

<sup>52</sup>Pub. L. No. 97-219, 96 Stat. 217 (1982), 15 U.S.C. § 638 (Supp. III 1985).

<sup>53</sup>SBA Small Business Innovation Research Program Policy Directive (Sept. 30, 1984) [hereinafter SBIR Directive].

if their fiscal year 1982 "extramural" (meaning contract) budget for research and development exceeded \$100 million. If so, an agency must expend at least certain specified percentages of its "extramural" R&D budget in the years after fiscal 1982 with small business concerns under an authorized SBIR program. The initial requirement for DOD for fiscal 1983 was .1% increasing to 1.25% for fiscal year 1987 and thereafter.<sup>54</sup>

The program applies to both research and development.<sup>55</sup> Under it, an agency determines the categories of R&D projects to be in its SBIR program for the year, and it issues, at least annually, an SBIR solicitation in accordance with a schedule determined cooperatively with the SBA.<sup>56</sup> As a single "general solicitation" is issued for an entire agency, all military service and DOD agency requirements are consolidated in the DOD solicitation. The solicitation is synopsized in the CBD before being issued.<sup>57</sup> The SBA also publishes a presolicitation brochure listing the topics.<sup>58</sup> The solicitation document contains detailed topic descriptions or statements of need, solicitation procedures, and addresses for submitting proposals on each topic.

Each department or agency activity evaluates all the proposals it receives and awards contracts within its available funds. All proposals are judged on a competitive basis. They are initially screened to determine responsiveness. A technical evaluation, by engineers or scientists, or other "peer review" (which may include review outside the agency where appropriate), then determines the most promising technical and scientific approaches.<sup>59</sup> Each proposal is judged on its own merit. An agency is under no obligation to fund any proposal or any number of proposals on any topic.<sup>60</sup>

Awards are to be made primarily on the basis of scientific and technical merit. Secondary considerations may include program balance, critical agency requirements, and whether the proposal indicates potential commercial uses in addition to meeting agency needs.<sup>61</sup>

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The SBIR program consists of three phases. Under Phase I,

<sup>54</sup>15 U.S.C. § 638(f)(1) (Supp. III 1985).

<sup>55</sup>*Id.* § 638(e)(5).

<sup>56</sup>*Id.* § 638(g).

<sup>57</sup>SBIR Directive, *supra* note 52, at 5.

<sup>58</sup>*Id.* at 13-14.

<sup>59</sup>*Id.* at 31 and 16.

<sup>60</sup>*Id.* at 31.

<sup>61</sup>*Id.* at 11.



awards typically will be \$50,000 (or 1/2 man-year) or less. This phase is to determine, so far as possible, the scientific or technical merit and feasibility of ideas or concepts submitted.<sup>62</sup>

Phase II awards will be made on the basis of Phase I results and the technical merits of a Phase II proposal. Special consideration will be given to proposals that identify a follow-on Phase III funding commitment from nonfederal sources. Phase II awards will typically be \$500,000 or less. The number of Phase II contracts will depend on the success of Phase I and availability of funds. Phase II covers the principal R&D effort and requires a more comprehensive proposal than Phase I.<sup>63</sup>

Phase III is intended to involve private-sector investment and support to bring about commercial application. It may also involve non-SBIR federal funded follow-on contracts for production or processes.<sup>64</sup>

The SBIR Program has been increasing yearly in DOD at a rate sufficient to meet the R&D percentage rates required by the statute. The yearly awards for DOD have been: \$20.6 million for fiscal 1983, \$44.6 million for 1984, and \$78.2 million for 1985. The estimated amounts for subsequent years were: \$160 million for fiscal 1986, \$204 million for 1987, and \$262 million for 1988.<sup>65</sup>

### C. COMPARISON AND EVALUATION

The BAA and SBIR programs are both general solicitation procedures, and both are recognized as competitive<sup>66</sup>—so that the Competition in Contracting Act certification, justification, and approval requirements for noncompetitive procurement are inapplicable. There is no obligation to fund any specific topic or number of topics with either procedure. Rather, all submissions under each compete with each other against the full range of identified needs. Chiefly because they are not subject to the burdensome requirements for noncompetitive procurement, the BAA and SBIR procedures are generally more efficient and expeditious than the unsolicited proposal and RFP processes.

The SBIR procedure applies to both research and development,

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<sup>62</sup>*Id.* at 10-11 and 19.

<sup>63</sup>*Id.* at 11 and 19.

<sup>64</sup>*Id.* at 11; 15 U.S.C. § 638(e)(4)(C) (Supp. III 1985).

<sup>65</sup>DOD Office of Small and Disadvantaged Business Utilization, FACT SHEET—Department of Defense (DOD) SBIR Program (Oct. 10, 1986).

<sup>66</sup>See *supra* text accompanying notes 27-29, which describes the BAA. Set-asides for small business, including those under the SBIR program, are authorized. FAR § 6.203(a).

while the BAA is limited to "basic research." The SBIR program, however, is generally more restricted in its application because: it is more rigidly defined, detailed and limited—with three clearly specified phases; it has the \$50,000 and \$500,000 usual limitations in phases I and II; only one solicitation a year is issued for the entire agency; and it applies solely to small business.

The BAA process recognizes that the selection of "basic research" contractors is primarily a technical decision with very low-risk business aspects. Most of these projects consist predominantly of labor costs with the decision chiefly one of what technical approach and personnel to fund. The amount of contracting officer involvement will normally be less than in most other types of procurement.

While a BAA-type procedure has been used in the past by the Defense Advanced Research Project Agency (DARPA) and some of the military services research offices, it has not been used by the other service procurement activities that also have R&D mission responsibilities. Because of the increased workability and expedition of the BAA procedure, however, it is likely that they will use it widely to contract for research work in the future.

With this increased use of the BAA, it is appropriate to consider its limitations—to avoid possible misuse. The BAA procedure is very similar to the unsolicited proposal process and is subject to similar possible misuse. Senator Cohen in his article, *The Competition in Contracting Act*,<sup>67</sup> pointed out the congressional concern "that unsolicited proposals often actually are solicited by the agencies"<sup>68</sup> and thus often are not competitive. This concern could also apply to a BAA, where the solicitation only describes a general category of research interest, but agency personnel inform one prospective offeror of specific research (in the general category) that is desired. This would give that prospective offeror an unfair competitive advantage. The BAA should describe the research goals in as much detail as possible—to fully inform all prospective offerors on an equal competitive basis.

A proposal that is not within a category set out in the BAA should not receive an award under the BAA. An award in this case would not be competitive or fair, as others did not have the opportunity to submit proposals in the area. Such a proposal would in fact be an "unsolicited proposal" and should be so treated.

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<sup>67</sup>Cohen, *supra* note 12.

<sup>68</sup>*Id.* at 30; see *supra* note 25.

There is also the question of whether a proposal that is submitted as an unsolicited proposal, but is within a category of a BAA, may be considered for award under the BAA. In this case, if the proposal meets all the requirements of the BAA, there is no reason why it should not be competitively considered under the BAA. There is no unfair competitive advantage in this instance. The BAA procedure is, in practical effect, the process for competitively considering what would otherwise be unsolicited proposals.

The BAA procedure should not be used when a competitive request for proposals is more appropriate. A BAA is appropriate when there are general areas of interest and no award for a specific requirement is intended. A request for proposals is appropriate only when there is a known specific requirement for which a contract award is intended. Nevertheless a BAA may also be appropriate in some instances for known specific requirements; the draft FAR amendments on the BAA indicate it may be used "for an individual program requirement" as well as for "broadly defined areas of interest."<sup>69</sup> The questionable area then is where there is a known specific requirement.

In considering such instances, the differences between the BAA and competitive RFP processes should be recognized. Under an RFP there is head-to-head competition among the offerors for a requirement—with a specific evaluation criteria applied to all offerors under each procurement to determine who receives the award.<sup>70</sup> With the BAA, there is only a general criteria that applies to all proposers, and all proposers (regardless of category) compete against each other; there is not an individual competition for an individual requirement. Under an RFP, the agency "negotiates" with offerors: with discussions, clarification of offers, and notification of deficiencies before offerors submit "best and final offers."<sup>71</sup>

The BAA should be used for research procurements when it would be impossible to draft an adequate RFP without restraining technical responses.<sup>72</sup> This indicates that the RFP process should be used for specific known requirements unless it is not possible to prepare an adequate RFP (and particularly the statement of work) without restraining possible technical responses—and thereby restricting competition. It also appears that the more

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<sup>69</sup>Proposed addition to FAR § 35.016(b)(1), *supra* note 23.

<sup>70</sup>FAR § 15.605.

<sup>71</sup>FAR §§ 15.609-611.

<sup>72</sup>See *supra* text accompanying note 34.

specific a known requirement is, the less likely it is to be appropriate for use of a BAA.

In summary, the BAA procedure is efficient and highly workable. It should and will be widely used. It and the other general solicitation procedure, the SBIR, will simplify and expedite research contracting, but they must be used appropriately.

In many instances, however, the more appropriate procurement method is a competitive RFP. In the next section we will consider two modifications to that process.

#### IV. VARIATIONS ON THE COMPETITIVE PROPOSAL PROCESS

If neither of the general solicitation procedures is appropriate, an agency may contract by: sealed bidding, or competitive proposals—also known as negotiation. Sealed bidding applies where award is made on the basis of price only, and it is not necessary to conduct discussions with offerors about their proposals. Negotiation is appropriate when either of these conditions does not apply, time does not permit sealed bidding, or there is not a reasonable expectation of receiving more than one proposal.<sup>73</sup> R&D acquisitions are generally accomplished by negotiation rather than sealed bidding, because the precise specifications necessary for sealed bidding are usually not available.<sup>74</sup> Thus discussions with offerors about their proposals are necessary, and factors other than price are considered in making awards.

In this section, we will consider two variations on the standard negotiation procedure. The first, a test procedure, is an effort to expedite the standard process; the second, an established procedure, is for other purposes.

##### A. TEST OF STREAMLINED COMPETITIVE R&D PROCESS

The streamlined competitive R&D process is a two-year test effort to expedite R&D procurement in specified circumstances.<sup>75</sup> It is also intended to obtain data to determine the validity of the procedure. The Office of the Chief of Naval Research (OCNR) developed and is implementing the test,<sup>76</sup> but any Department of Defense procurement activity may use it.

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<sup>73</sup>10 U.S.C. § 2304(a)(2) (Supp. III 1986).

<sup>74</sup>FAR § 35.006(a).

<sup>75</sup>See Streamlined R&D, *supra* note 8, Executive Summary.

<sup>76</sup>*Id.* Discussion at 3.

The purpose of the test is to expedite the procedures (after competitive proposals are received) for evaluation of offers and the conduct of discussions or negotiations. OCNR has estimated that the average processing time for competitive R&D acquisitions is 150-to-220 days,<sup>77</sup> and the average time may be longer for many other procuring activities. Of this time, OCNR estimates that it typically takes 90-120 days to process proposals after they are received. The test procedures may save 30% to 50% of this processing time.<sup>78</sup>

The test procedure applies to R&D procurements that are: (1) competitive, (2) anticipated to be awarded on a cost reimbursement basis, and (3) expected to involve proposals that "primarily consist of" labor and labor-related costs.<sup>79</sup> "Primarily consist of" means 75% or more.<sup>80</sup>

There are two types of changes under the test procedures: those in general oversight controls, and those in specific evaluation and negotiation procedures. Concerning the first, agencies conducting the test are to examine their regulations and procedures at all levels and identify those that they can eliminate, reduce or modify to process procurements under the test more quickly.<sup>81</sup> While oversight systems should assure adequate quality, they should also accommodate streamlining appropriate to the low risk procurements involved here.

The chief specific change in the evaluation and negotiation procedures under the test concerns the "competitive range" determination. The Armed Services Procurement Act requires "written or oral discussions with all responsible sources who submit proposals within the competitive range" before award of a contract using competitive proposals.<sup>82</sup> The FAR specifies that the competitive range "shall include all proposals that have a reasonable chance of being selected for award."<sup>83</sup>

The test applies this criterion more literally—to limit the "competitive range" to those offers that are actually considered to have a "reasonable chance" for award. Those conducting the

<sup>77</sup>*Id.* Executive Summary.

<sup>78</sup>*Id.* Discussion at 1-2.

<sup>79</sup>*Id.* Procedure for Testing at 1.

<sup>80</sup>*Id.*

<sup>81</sup>*Id.*

<sup>82</sup>10 U.S.C. § 2305(b)(4)(B) (1982).

<sup>83</sup>FAR § 15.609(a).

test feel this will save considerable time and effort by eliminating many of those offerors currently placed in the competitive range who have no reasonable chance for award.<sup>84</sup>

Under the current procedure, most agencies include in the competitive range all proposals that are judged as "acceptable," or as "capable of being made acceptable."<sup>85</sup> In making these determinations, the technical evaluators generally do not consider cost proposals. Under the test, the technical evaluators will consider cost as well as technical proposals, and will evaluate the chances for award of all proposals other than the proposal(s) that is (are) the strongest—recommending which should be in the "competitive range." The contracting officer will then make the final "competitive range" determination.<sup>86</sup>

This procedure will reduce the number of offerors in the competitive range. It will save time and effort by eliminating protracted discussions with noncompetitive offerors, the need for such offerors to prepare revisions and best and final offers, and the need for the government to reevaluate such revisions. Under the test, the extent of discussions should be limited, because the proposal(s) retained in the competitive range should have little need for improvement. Discussions, if necessary at all, could be by telephone or other informal procedures.<sup>87</sup>

The test procedure will face questions and challenges, as it will reduce the number in the competitive range<sup>88</sup>—often to one or two.<sup>89</sup> Some may view this as reducing competition when the emphasis is on increasing it. The General Accounting Office has pointed out that it will closely scrutinize determinations to leave only one proposal in the competitive range.<sup>90</sup>

The test procedure is available for use throughout DOD during the test period. It appears workable and appropriate if limited to its intended use—for cost reimbursement, labor intensive, competitive R&D contracting.

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<sup>84</sup>See Streamlined R&D, *supra* note 8, at Executive Summary.

<sup>85</sup>*Id.* Procedure for Testing at 1-2.

<sup>86</sup>*Id.* at 2-3.

<sup>87</sup>*Id.* at 3.

<sup>88</sup>For a discussion of the rules and decisions concerning the competitive range, see J. Cibinic & R. Nash, *Formation of Government Contracts* 374-79 (1982), and A. Gallagher, *The Law of Federal Negotiated Contract Formation*, ch. 6 (1981).

<sup>89</sup>Streamlined R&D, *supra* note 8, at the Executive Summary, where it states that "[i]n most cases, only one or two offerors meet the criteria" of having submitted the strongest proposals and have a reasonable chance for award.

<sup>90</sup>See J. Cibinic & R. Nash, *supra* note 88, at 376; A. Gallagher, *supra* note 88, at 184-85.

The test procedure is based largely on the proposition that the limited negotiable areas in such R&D procurements leave little room for weaker proposals to overcome those initially rated the strongest—so that relative positions rarely change during competitive range negotiations.<sup>91</sup> While this proposition appears correct, the acceptance of the test procedure will depend largely on the data developed to support it.<sup>92</sup>

### ***B. "FOUR STEP" SOURCE SELECTION PROCEDURE***

The "Four Step" source selection procedure is an optional procedure in DOD, designed not to expedite the procurement process but to avoid other problems.<sup>93</sup> While the procedure may not be more expeditious in every case than the regular competitive proposal process, it usually is somewhat quicker and requires less involvement by government personnel.

The procedure seeks to maintain the integrity of each offeror's proposal by avoiding "technical transfusion" and "technical leveling." It would be unfair to transfuse one offeror's technical solution to other offerors or to help an offeror, through successive rounds of discussions, to upgrade its inadequate technical proposal to the level of other, adequate proposals. The procedure also reduces the opportunity for buy-ins and for the use of auctioning techniques.<sup>94</sup>

The "Four-Step" procedure may be used at the discretion of the

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<sup>91</sup>Streamlined R&D, *supra* note 8, Discussion at 2, where it states:

In these types of procurement, the real competition exists in evaluation of the technical portion of the proposal and identification of the strongest proposal(s). Rarely do subsequent discussions result in degradation of the proposal(s) ... identified initially as the strongest. Also, rarely is there improvement of other proposals so as to overcome those initially determined strongest. Yet, currently agencies often attempt to include in the competitive range for negotiation all those proposals which are not found technically unacceptable. By not using sound judgment to establish a realistic competitive range, many contractors which have no reasonable chance for award, are carried throughout the competition to the disadvantage of the government and industry.

<sup>92</sup>The test procedure calls for the collection and submission of substantial data, such as that on the number of actions involved, number of offerors submitting proposals, number of proposals selected into the competitive range, frequency of award to the offeror who initially submitted the proposal rated highest, and the point spread between those receiving award (who were not initially rated the strongest) and those who originally rated the strongest. *Id.* Procedure for Testing at 3-4.

<sup>93</sup>The procedure is detailed at DFARS § 15.613.

<sup>94</sup>DFARS § 15.613(a)(3).

contracting officer to competitively negotiate R&D acquisitions with an estimated value of \$2 million or more.<sup>95</sup> Use of the procedure is most appropriate when government evaluation of initial proposals, without discussion of proposal deficiencies, will be sufficient to determine the best overall offer to the government; the procedure should not be used for procurements where the necessity to conduct extensive negotiations is anticipated.<sup>96</sup>

The four steps in the procedure are: submission and evaluation of technical proposals, submission and evaluation of cost proposals, establishment of the competitive range and selection of the apparent successful offeror, and negotiation of a definitive contract.<sup>97</sup>

The conventional competitive proposal process differs in that: (a) offerors' technical and cost proposals are submitted and evaluated simultaneously, and (b) the agency negotiates definitive contracts with all offerors in the competitive range before selecting one as the winner.<sup>98</sup> The main difference, however, between the two processes involves discussion of proposal deficiencies. In the conventional process, protracted discussions may evolve around proposal deficiencies. Under the Four-Step procedure, offerors are not advised of deficiencies in their proposals, but only of areas in which the intent or meaning is unclear or which require additional substantiating data for evaluation.<sup>99</sup> It is only in the final negotiations with the selected offeror that there is disclosure and resolution of all technical deficiencies and all unsubstantiated areas of cost.<sup>100</sup>

The nondisclosure of deficiencies does preclude technical transfusion, technical leveling, and auctioning.<sup>101</sup> The Four-Step procedure also avoids the need to reevaluate proposals that are changed after each round of discussions. Finally, it may improve the quality of initial contractor proposals,<sup>102</sup> as offerors will know there is no chance of technical transfusion of their proposals nor of improving their proposals through government advice of deficiencies.

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<sup>95</sup>*Id.* § 15.613(b). DFARS §§ 15.613(e)-(i) describe these steps in detail.

<sup>96</sup>*Id.* § 15.613(b) and (c).

<sup>97</sup>*Id.* § 15.613(a)(1).

<sup>98</sup>*Id.* § 15.613(a)(2).

<sup>99</sup>*Id.*

<sup>100</sup>*Id.* § 15.613(i).

<sup>101</sup>Smith, *The New "Four Step" Source Selection Procedure: Is the Solution Worse than the Problem?*, 11 Pub. Cont. L.J. 322, 325, 335 (1980).

<sup>102</sup>*Id.* at 336.



The Four-Step procedure should be used for the purposes intended<sup>103</sup>—and not to expedite the procedure process. Nevertheless, it may have the side effect of being faster. The Four-Step procedure appears more expeditious in general because it reduces discussion of deficiencies, negotiation of final contract terms, and reevaluation of changed proposals. It may be less expeditious in some instances because technical and cost proposals are submitted and evaluated separately, while they are submitted and evaluated together under the conventional process.

## V. OTHER APPROACHES

The following discussion covers other approaches of use in specific, limited circumstances. The first two concern types of contracting procedures. The third is about an exception to the competitive contracting requirements of particular applicability to R&D procurement. The last is about a type of contract format of use in certain research contracting.

### A. MULTIPLE CONTRACT OR ORDER ARRANGEMENTS

The FAR sections on R&D contracting refer to use of one multiple contract type of arrangement. FAR § 35.015(b) states—in regard to contracting for research with educational institutions and nonprofit organizations—that agencies should negotiate a basic agreement if the number of contracts warrants such an agreement. The DOD FAR Supplement specifies that the responsibility for negotiating basic agreements for the Department of Defense in these instances is assigned to the Office of Naval Research.<sup>104</sup>

A basic agreement is of little effect, however, in expediting the procurement process. A basic agreement is a written instrument of understanding that contains contract clauses applying to future contracts between the parties, and contemplates separate future contracts (which will incorporate by reference the clauses agreed to in the basic agreement).<sup>105</sup> A basic agreement only establishes agreed clauses for future contracts. Because each of the individual future contracts must comply with the competitive contracting

<sup>103</sup>For a detailed examination of the Four-Step procedure see Smith, *supra* note 100. See also J. Cibinic and R. Nash, *supra* note 88, at 392-93; A. Gallagher, *supra* note 88, at 214-15.

<sup>104</sup>DFARS § 35.015(b)(2).

<sup>105</sup>FAR § 16.702(a).

requirements, the procedure does little to expedite the contracting process.

There are, of course, contract types under which multiple orders are issued where only the initial contract action must conform to the competitive contracting requirements. This is because competition in the initial contract action covers all of the subsequent orders. Examples of these arrangements are requirements contracts,<sup>106</sup> and indefinite quantity contracts, where all responsible sources may compete in the initial action for the requirements in all the orders.<sup>107</sup>

Multiple R&D requirements are not usually appropriate for inclusion under a single contract arrangement of this type. Individual R&D requirements should ordinarily be procured separately, because the best capability must be obtained to perform each R&D requirement. This means seeking the best scientific and technological source in each instance (consistent with demands for the best mix of cost, performance, and schedule). It also means continuing efforts to increase the number of qualified sources.<sup>108</sup> The inclusion of disparate R&D requirements under a single contract arrangement would not facilitate accomplishment of these objectives.

There are, however, some multiple order contract arrangements for scientific or engineering/technical services that are available for appropriate use on a relatively expeditious basis.<sup>109</sup> Those

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<sup>106</sup>This type of contract is covered at FAR § 16.503. FAR § 6.001(d) states that the competition requirements (of FAR part 6) do not apply to orders placed under requirements contracts.

<sup>107</sup>Indefinite quantity contracts are covered at FAR § 16.504. FAR § 6.001(e)(1) specifies that the competition requirements do not apply to orders under indefinite quantity contracts when all responsible sources were permitted to compete for the requirements in the orders.

<sup>108</sup>DFARS § 35.007(a) states:

Through its research and development programs, the Department of Defense must seek the most advanced scientific knowledge attainable and the best possible equipment, weapons, and weapon systems that can be devised and produced. This means two things. First, it means seeking the best scientific and technological sources consistent with the demands of the proposed acquisition for the best mix of cost, performances and schedules. Second, it means continuing efforts to increase the number of qualified sources, and to encourage participation by small business concerns, as well as others, in Defense research and development.

<sup>109</sup>The Army has its Scientific Service Program, which is made up of five general categories: Short-Term Analysis Services, Laboratory Research Cooperative Program, Summer Faculty Research and Engineering Program, Summer Associateship Program for High School Science and Mathematics Faculty, and Conference and Symposia. The program is described in Army Research Office, Scientific Services

requiring such services should contact their agency's research office for details.<sup>110</sup>

### ***B. 8(a) CONTRACTS***

Section 8(a) of the Small Business Act<sup>111</sup> established the 8(a) program. It authorizes the Small Business Administration (SBA) to enter into contracts (including those for R&D) with other agencies and to let subcontracts for performing those contracts to small and disadvantaged business firms.<sup>112</sup>

8(a) contracting procedures are performed as an exception to the competition requirements. The Competition in Contracting Act provides an exception where a statute expressly authorizes or requires a procurement to be made through another agency.<sup>113</sup> This is the case with the 8(a) program. It is not necessary to prepare any written justifications or obtain any approvals (for noncompetitive procurement) when contracting under the 8(a) program.<sup>114</sup>

Procuring agencies must review their requirements to determine those appropriate for 8(a) contracting, and there are goals established for the 8(a) program. Moreover, the 8(a) procedure—though it is governed by extensive rules and procedures<sup>115</sup>—is generally much more expeditious than the competitive negotiation process. Further, though 8(a) contracts are with the SBA (and SBA subcontracts with the individual contractor), the SBA will usually permit the procuring agency to work directly with the individual contractor.

### ***C. COMPETITION EXCEPTION FOR R&D***

This subsection deals with the third exception to the competitive requirements in the Competition in Contracting Act.<sup>116</sup> The second part of the exception states that competition need not be provided when it is necessary to award a contract to a particular source in order—(a) to establish or maintain an essential engineering, research, or development capability (b) by an educational or

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Program (Oct. 1984) (Brochure).

<sup>110</sup>Those interested in the Army's Scientific Services Program can contact the Army Research Office, P.O. Box 12211, Research Triangle Park, North Carolina 27709-2211.

<sup>111</sup>15 U.S.C. § 637(a) (1982).

<sup>112</sup>FAR § 19.801.

<sup>113</sup>10 U.S.C. § 2304(c)(5) (Supp. III 1985); FAR § 6.302-5(a)(2).

<sup>114</sup>FAR § 6.302-5(c)(2).

<sup>115</sup>See FAR Subpart 19.8 for contracting rules under the program.

<sup>116</sup>10 U.S.C. § 2304(c)(3) (Supp. III 1985); FAR § 6.302-3.

other nonprofit institution or a federally funded research and development center.<sup>117</sup> Thus, a sole source award to an educational or nonprofit institution, or to a Federal Contract Research Center (FCRC), is permissible where it is necessary in order to establish or maintain an essential research or development (or engineering) capability by the institution.

The first part of the exception also has some applicability to R&D. It permits a sole source award when necessary to maintain a facility or producer available for furnishing supplies or services in case of a national emergency or to achieve industrial mobilization.<sup>118</sup> One of the examples given in the FAR indicates that use of this authority may be appropriate when necessary to "maintain active engineering, research, or development work."<sup>119</sup> Thus, a sole source award (to any type contractor—not just an educational or nonprofit institution or an FCRC, as with the other part of the exception) is permissible when necessary to maintain critical R&D work for a national emergency or to achieve industrial mobilization.

#### ***D. SHORT FORM RESEARCH CONTRACT***

The Short Form Research Contract is a DOD contract format—not a contracting procedure—for use in certain limited circumstances. It may be used when the basis for award is an unsolicited proposal or a broad agency announcement; the principal purpose is the acquisition of research from an educational institution or a nonprofit organization; the work is to be accomplished on a cost-reimbursement basis; and the contract requires the delivery of designs, drawings, or reports as end items.<sup>120</sup>

The Short Form Research Contract is a shortened contract format intended to reduce administrative burden and expedite the contracting process. It works in part through incorporation by reference of the applicable clauses in effect on the date of the contractor's proposal. The contract format and the applicable procedures are described in detail in Subpart 35.70 of the DOD FAR Supplement.

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<sup>117</sup>10 U.S.C. § 2304(c)(3)(B) (Supp. III 1985); FAR § 6.302-3(a)(2)(ii).

<sup>118</sup>10 U.S.C. § 2304(c)(3)(A) (Supp. III 1985); FAR § 6.302-3(a)(2)(i).

<sup>119</sup>FAR § 6.302-3(b)(1)(ii).

<sup>120</sup>DFARS § 35.7002.

## VI. CONCLUSION

There is a need for expeditious R&D contracting procedures—and there are such procedures available. They must, however, be recognized and applied correctly.

Chief among them are the broad agency announcement (BAA) and the SBIR procedures, which have been discussed in detail. They were compared with each other, as well as with the unsolicited proposal process. The BAA and SBIR procedures are more expeditious than the unsolicited proposal process largely because they are competitive procedures—so that the time consuming sole source requirements do not apply.

The BAA will likely supplant the unsolicited proposal process for procurement of research. The SBIR is also very useful, but it is more restricted in its application. The BAA should only be used where it is applicable, and not where a competitive negotiation is more appropriate.

The streamlined competitive R&D test procedure also shows promise for expediting the conventional negotiation process for cost reimbursement, labor intensive procurements. This procedure is presently available throughout DOD on a test basis. It speeds the process by limiting the competitive range to those that actually have a "reasonable chance" for award.

Though the chief purpose of the Four-Step source selection procedure is to avoid "technical transfusion," it may have the side effect of being more expeditious. Finally, certain other procedures can speed the procurement process in appropriate circumstances. These include: 8(a) contracting, the short form research contract, and the competition exception for essential R&D capability.

If appropriately used, the available procedures do provide sufficient means and authority to accomplish R&D contracting in a timely manner.



# COMMENT: GRIFFEN V. GRIFFISS AIR FORCE BASE: QUALIFIED IMMUNITY AND THE COMMANDER'S LIABILITY FOR OPEN HOUSES ON MILITARY BASES

by Lieutenant Commander E. Roy Hawkens\*

An "open house" on a military base is an activity through which a base commander promotes favorable relations between his military base and the local community. During the open house, the general public is invited to visit the base to gain a better understanding of military life generally and the base mission specifically. Air Force base commanders are encouraged, by express regulations, to hold open houses at least annually to "show the mission, equipment, facilities, people, skills, and professionalism required to operate the Air Force."<sup>1</sup>

An important constitutional question arises, however, for commanders who hold open houses; namely, what is the first amendment consequence of inviting the general public onto a military base to view the equipment, facilities, and professionalism of our nation's military personnel. The commander who neglects to consider this question, or who answers it incorrectly, may well find that he is a defendant in a *Bivens*<sup>2</sup> suit in which a plaintiff seeks to hold him personally liable for substantial compensatory and punitive damages for alleged constitutional

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\*United States Naval Reserve. Commander Hawkens is an attorney at the United States Department of Justice, Civil Division, Appellate Staff, and is also an active reservist with COMSUBLANT Detachment 106, Washington, D.C. He served on active duty with the United States Navy from 1975 to 1980 and, after completing law school, clerked for Judge Edward A. Tamm of the United States Court of Appeals for the District of Columbia Circuit. J.D., Marshall-Wythe School of Law, College of William & Mary, 1983; B.S., United States Naval Academy, 1975. Author of *The Effect of Shaffer v. Heitner on the Jurisdictional Standard in Ex Parte Divorces*, 18 Fam. L. Q. 311 (1984); *Virginia's Domestic Relations Long-Arm Legislation: Does Its Reach Exceed Its Due Process Grasp?*, 24 Wm. & Mary L. Rev. 229 (1983). Member of the bars of the Commonwealth of Virginia and the United States Courts of Appeals for the District of Columbia Circuit, the Third Circuit, the Fourth Circuit, the Fifth Circuit, the Sixth Circuit, the Seventh Circuit, and the Ninth Circuit. The views expressed herein are those of the author and do not necessarily reflect those of the Justice Department, the Department of Defense, or any other government agency.

<sup>1</sup>Dep't of Air Force, Reg. No. 190-1, Public Affairs—Public Affairs Policies and Procedures, para. 4-29 (16 Feb. 1982) [hereinafter AFR 190-1]. The relevant part of this regulation is set out *infra* note 6.

<sup>2</sup>*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (holding that government employees may be sued in their personal capacities for constitutional violations pursuant to an implied cause of action arising from the Constitution).

violations. Indeed, this is the situation in which an Air Force commander currently finds himself following an open house in 1984 at Griffiss Air Force Base in Rome, New York.<sup>3</sup> Although the commander at Griffiss Air Force Base actually considered beforehand the possible legal consequences of the open house and even solicited the advice of Air Force attorneys and a local United States attorney's office to ensure no constitutional infractions would occur, he nevertheless is being sued by civilian plaintiffs who claim they suffered first amendment injuries when they were prevented from engaging in expressive political activity on the base during the open house.

This article will review the factual and judicial history of the still-pending *Griffiss Air Force Base* case, and it will then examine whether the district court correctly concluded that the military defendants were not entitled to summary judgment based on their qualified immunity. This article concludes that the court erred in failing to grant defendants qualified immunity.

As a result of the district court's decision in *Griffiss Air Force Base*, military commanders now face an incredible dilemma. They may comply with military regulations and hold periodic open houses, but only at the cost of surrendering their historic and constitutionally permissible authority to prohibit on-base political expression they perceive as threats to security or inconsistent with the military mission. Or, they may preserve their authority by disregarding military regulations and never holding open houses.<sup>4</sup> This is an unacceptable predicament in which to place our military officials, and it cannot be gainsaid that the necessary steps speedily should be taken to eradicate this judicially created Hobson's choice.<sup>5</sup>

## I. GRIFFEN v. GRIFFISS AIR FORCE BASE: FACTUAL BACKGROUND AND JUDICIAL PROCEEDINGS

### A. FACTUAL BACKGROUND

In 1984, the commander of Griffiss Air Force Base, in compliance with Air Force regulations that urge commanders "to

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<sup>3</sup>Griffen v. Griffiss Air Force Base, No. 85-CV-365 (N.D.N.Y.).

<sup>4</sup>Cf. *Flower v. United States*, 407 U.S. 197, 201 (1972) (Rehnquist, J., dissenting).

<sup>5</sup>The term "Hobson's choice" is derived from the practice of Thomas Hobson (1544-1631) of Cambridge, England, who rented horses and gave his customers only one choice, that of the horse nearest the stable door. Webster's Biographical Dictionary 716 (1972).



hold at least one open house each year,"<sup>6</sup> ordered that a portion of his normally closed base be opened to the public on September 8, 1984.<sup>7</sup> Because Griffiss Air Force Base is a large, active military installation that houses substantial government property (including military aircraft and live ordinance) and employs over seven thousand personnel, the commander ordered that appropriate steps be taken to ensure proper security. The commander was especially concerned with security because Griffiss Air Force Base recently had experienced several disruptive protests. In one case, demonstrators had damaged between \$50,000 and \$125,000 of government property. In another, demonstrators had blocked access to and exit from the base by standing, sitting, or lying across roadways that entered the base.<sup>8</sup>

In an effort to deter similar disruptive incidents during the open house, the commander decided, based on advice he received from the legal staff at his base and the United States Attorney's office in Syracuse, New York, to prohibit all political activities or statements on Griffiss Air Force Base during the open house.<sup>9</sup> Outside organizations that wanted to display exhibits during the open house submitted their plans for prior approval by Griffiss

<sup>6</sup>AFR 190-1 provides in relevant part:

Open houses show the mission, equipment, facilities, people, skills, and professionalism required to operate the Air Force. Open houses should not be (or convey the image of) a fair, carnival, circus, civilian air show, or display of commercial products. They should highlight the base mission and Air Force life. Opening dining halls, dormitories, maintenance shops, classrooms, flight simulators, and other unclassified facilities for public inspection is encouraged when possible. Commanders may hold open houses when considered in the best interest of their community relations programs. Each commander is urged to hold at least one open house each year. The annual open house is a major activity. . . . The [Public Affairs Officer] must work closely with the [open house] project officer to ensure public awareness and attendance at the open house. The [Public Affairs Officer] will provide the comprehensive guidelines . . . for the project officer's use in planning the open house . . . .

AFR 190-1, para. 4-29; see also *id.* paras. 1-1 through 4-28.

<sup>7</sup>Griffiss Air Force Base normally is a closed base—that is, the general public normally does not have access to the base. The base perimeter is enclosed by a fence, and armed guards at each gate check the identification of each person entering the base. A sign at each gate warns that entry is unlawful without the base commander's permission. See *Griffen v. Griffiss Air Force Base*, No. 85-CV-365 (N.D.N.Y.) [hereinafter *Griffiss record*] (affidavit of the staff judge advocate dated Apr. 29, 1985). Citations are to the exhibits filed in support of Defendant's Motion to Dismiss and Plaintiff's Motions for Summary Judgment and for Preliminary Injunction.

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*; see also *id.* at 28-29 (affidavit of assistant staff judge advocate dated Mar. 26, 1985).

Air Force Base officials. The plans were examined to ensure they were consistent with the goals of the open house and were devoid of political content.

At the open house, no defense contractors had displays, and no civilian commercial organizations had displays. Indeed, with one exception, only organizations affiliated with Griffiss Air Force Base were allowed to have displays.<sup>10</sup> The exception was the Confederate Air Force, an aviation organization which routinely is permitted to show historical aviation displays during open houses.<sup>11</sup> In this instance, the Confederate Air Force permitted the public to take self-guided tours in a refurbished B-29 aircraft.

On the morning of the open house, a member of the legal staff at Griffiss Air Force Base examined the exhibits to ensure that, in conformance with the commander's directive, nothing was displayed that amounted to a political statement.<sup>12</sup> Additionally, to ensure that the general public would be aware that their presence on the base was subject to certain restraints on their expressive activity, some 16,000 letters of welcome were distributed that explicitly "prohibit[ed] any political activity and any other action detrimental to good order and discipline."<sup>13</sup>

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<sup>10</sup>*Id.* (affidavit of the staff judge advocate). Examples of the organizations that were permitted to have displays included the Boy Scouts, a Black Heritage organization, a model airplane club, the Civil Air Patrol, and recruiters from the other military branches. See *id.* (Sep. 7, 1984 issue of the *Mohawk Flyer*, an unofficial newspaper at Griffiss Air Force Base, at 10).

<sup>11</sup>*Id.* (affidavit of staff judge advocate).

<sup>12</sup>*Id.* (affidavit of assistant staff judge advocate). Examples of the special events that were provided or permitted by the Air Force included a Weapons Systems Trainer Tour, an Army helicopter rappelling demonstration, an F-106 weapons loading demonstration, a Thunderbirds air show, a fire suppression demonstration, and a model aircraft flying demonstration. *Id.* (*Mohawk Flyer* at 10).

<sup>13</sup>The letter of welcome provided in pertinent part:

Dear Guest:

I am pleased to welcome you to Griffiss Air Force Base today as our guest. I invite you to enjoy the Air Force's precision flying team, the Thunderbirds, with us. I also want you to see how we are carrying out the missions assigned to us by the President and Congress. Because I am also charged with maintaining security and order on Griffiss, I must prohibit any political activity and any other action detrimental to good order and discipline. I must also require that you stay within the boundaries outlined on the map below and that you follow the directions of the Security Police.

*Id.* (Open House Letter of Welcome dated Sep. 8, 1984).

Prior to the open house, the commanding officer had decided that persons who passively wore T-shirts with slogans would not be deemed as making impermissible political statements. Thus, persons were permitted to wear T-shirts with messages such as "Peace Through Strength" or "Save the Humans" so long as they did not cause a disturbance. *Id.* (affidavit of staff judge advocate).

Plaintiffs, five New York residents, attended the open house "to demonstrate their opposition to current military policies of the United States, and the promotion of militarism, that the open house represents."<sup>14</sup> They intended to accomplish their purpose, they stated, by "displaying signs and banners, wearing and giving away buttons with peace-oriented messages, and leafleting."<sup>15</sup> Plaintiffs, unlike the other organizations that exhibited displays at the open house, neither sought nor received prior approval from Griffiss Air Force Base officials to participate in the open house.

Shortly after arriving, plaintiffs began displaying large cardboard posters that bore the words "FREE PEACE BUTTONS" and to which were attached buttons containing various political messages. Plaintiffs also carried leaflets that they intended to distribute. Air Force security officers approached plaintiffs and informed them that political activity was not permitted during the open house. The security officers further advised plaintiffs that they must either surrender their political material or leave the base.<sup>16</sup> Plaintiffs opined that they had a right to make political statements during the open house. They asserted that other organizations were engaging in activity that plaintiffs perceived as being pro-military. Accordingly, said plaintiffs, they had a constitutional right to express an opposing viewpoint.<sup>17</sup> The security officers responded that plaintiffs would have to comply with the commander's order and refrain from political activity, or leave the base. Plaintiffs chose to remain on the base. The security officers therefore confiscated plaintiffs' posters, buttons, and leaflets, and returned them after the open house.<sup>18</sup>

## B. JUDICIAL PROCEEDINGS

On March 15, 1985, plaintiffs filed a *Bivens* action in which they alleged that four Air Force officials had violated plaintiffs' first amendment rights to free speech and association, their fourth

<sup>14</sup>*Id.* (Amended Complaint, filed June 24, 1985, at 4). One of the plaintiffs previously had been barred from entry to Griffiss Air Force Base as a consequence of trespass and disorderly conduct. He requested and received, however, an exemption from the barment during the 1984 open house in exchange for his "agree[ment] to abide by the standard rules for an open house [and to refrain from any] disruptive activity." *Id.*; see also *id.* (affidavit of William Griffen dated July 12, 1985).

<sup>15</sup>*Id.* (Plaintiffs' Statements of Undisputed Material Facts, dated July 12, 1985, para. 11)

<sup>16</sup>*Id.*; see also *id.* (Amended Complaint at 4-9).

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

amendment rights to be free from unreasonable searches and seizures, and their fifth amendment rights to due process of law.<sup>19</sup> Plaintiffs asserted that the base commander "had promulgated and/or [was] enforcing a policy that prohibited . . . political activities, and had ordered [military personnel] . . . to prevent such activities, and to seize any materials used for such activities."<sup>20</sup> Plaintiffs therefore sought compensatory damages of \$50,000 and unspecified punitive damages from defendants personally.<sup>21</sup>

Defendants moved for summary judgment on the basis of qualified immunity.<sup>22</sup> Defendants stated that, consistent with the military's historically unquestioned right to regulate on-base expression, they had taken tangible steps to prohibit political activity inconsistent with the military mission of the open house and that may have posed a threat to base security. Because Griffiss Air Force Base was not automatically transformed into a public forum during the open house, defendants argued that plaintiffs had no clearly established constitutional right to make political statements in contravention both of the base commander's orders and of the military mission of the open house.

The district court denied defendants' motion.<sup>23</sup> The court acknowledged that, at the time of the 1984 open house, the law was unsettled regarding whether holding an open house transformed a military base into a public forum. Curiously, however, the court concluded that this did not end the qualified immunity inquiry. Relying on the Supreme Court's decision in *Flower v. United States*,<sup>24</sup> the district court observed that a military base can become a public forum if military officials abandon their interest in restricting expression. In the present case, stated the court, a material issue of fact existed as to whether defendants abandoned their interest in restricting expression and thereby created a public forum:

[P]laintiffs have submitted affidavits stating that defendants allowed blatant political activity by others with a

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<sup>19</sup>*Id.* (Complaint filed March 15, 1985, at 11).

<sup>20</sup>*Id.* (Amended Complaint at 10).

<sup>21</sup>Plaintiffs also sought damages from the United States and from defendants in their official capacities, as well as declaratory and injunctive relief declaring Griffiss Air Force Base a public forum during future open houses. *See id.* (Amended Complaint at 13). On August 12, 1985, the district court denied plaintiffs' request for preliminary injunctive relief. *See id.* (district court order filed Aug. 14, 1985).

<sup>22</sup>*Id.* (Defendants' Memorandum in Support of Their Motion to Dismiss, or, in the Alternative, for Summary Judgment, dated July 11, 1985 and May 28, 1985).

<sup>23</sup>*Id.* (district court order filed Dec. 19, 1985).

<sup>24</sup>407 U.S. 197 (1972) (per curiam).

pro-military message. For example, one . . . display allegedly featured a picture of "the United States Capitol Building with the flag of the Soviet Union flying over it, and the message, 'Do you want this?' or words to that effect, and other language conveying the general message that strict secrecy is necessary to prevent what the picture portrays." According to plaintiffs, people at the open house were also allowed to wear [T-shirts with political messages], and a private organization known as the "Confederate Air Force" had displays "lauding the bombing of Hiroshima and Nagasaki." A material question of fact therefore exists as to whether defendants had abandoned their interest in regulating expression and created a temporary public forum. If a public forum was created, a material question of fact also exists whether defendants' restriction of plaintiffs' speech was reasonable . . . Accordingly, summary judgment is not appropriate. . . .<sup>25</sup>

Defendants filed a timely notice of appeal from the district court's denial of qualified immunity.<sup>26</sup> Plaintiffs moved to dismiss defendants' interlocutory appeal on the grounds that the court of appeals lacked jurisdiction and that, in any event, interlocutory appellate review of a decision denying qualified immunity was not appropriate when outstanding claims for injunctive relief remained to be adjudicated.<sup>27</sup>

The court of appeals, acting on motions and without opinion, granted plaintiffs' motion and dismissed the appeal.<sup>28</sup>

<sup>25</sup>*Griffiss record, supra* note 7 (transcript of district court decision of July 23, 1985, at 4-5); see also *id.* (transcript of district court decision of Nov. 12, 1985, at 10-14).

<sup>26</sup>Although a district court's denial of qualified immunity is an interlocutory decision, the Supreme Court, in *Mitchell v. Forsyth*, 105 S. Ct. 2806, 2812 (1985), stated that such a decision was immediately appealable so long as the district court's decision turned on a question of law.

<sup>27</sup>Plaintiffs grounded their motion for dismissal on the district court's finding that "a material question of fact . . . exists as to whether defendants had abandoned their interest in regulating expression and created a temporary forum." See *supra* text accompanying note 25. Because the district court's denial of immunity turned on an issue of fact, asserted plaintiffs, the court of appeals lacked jurisdiction pursuant to *Mitchell v. Forsyth*, 105 S. Ct. 2806, 2812 (1985). Alternatively, plaintiffs urged the Second Circuit to adopt the Fourth Circuit's rationale in *Bever v. Gilbertson*, 724 F.2d 1083 (4th Cir.), *cert. denied*, 469 U.S. 948 (1984), which held that a district court's denial of qualified immunity is not appealable, where, as here, outstanding claims for injunctive relief remain to be litigated. See *supra* note 21.

<sup>28</sup>*Griffen v. Griffiss Air Force Base*, No. 86-6029 (2d Cir. Apr. 1, 1986), *petition for reh. denied*, (2d Cir. June 5, 1986).

## II. THE QUALIFIED IMMUNITY ANALYSIS AND ITS PROPER APPLICATION TO THE GRIFFISS AIR FORCE BASE DEFENDANTS

### A. THE QUALIFIED IMMUNITY ANALYSIS

Pursuant to the qualified immunity analysis in *Harlow v. Fitzgerald*<sup>29</sup> and its progeny, government officials are entitled to qualified immunity for discretionary actions taken within the scope of their official duties if those actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."<sup>30</sup> The principle underlying the qualified immunity doctrine is that government officials "[can not] reasonably be expected to anticipate subsequent legal developments, nor [can they] fairly be said to 'know' that the law forbade conduct not previously identified as unlawful."<sup>31</sup> Implicit in the qualified immunity doctrine is the recognition that "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'"<sup>32</sup> In short, where an official reasonably deems that he must take an action which, in his judgment, is in the public's interest, the Supreme Court has stated that "it is better to [act and thereby] risk some error and possible injury from such error than not to act at all."<sup>33</sup>

<sup>29</sup>457 U.S. 800 (1982).

<sup>30</sup>*Mitchell v. Forsyth*, 105 S. Ct. 2806, 2814 (1985) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

<sup>31</sup>*Harlow*, 457 U.S. at 818. The "clearly established" standard may actually protect officials even after some courts have explicitly held certain conduct to be illegal, so long as those holdings have not "clearly settled" the issue. Thus, in *Zweibon v. Mitchell*, 720 F.2d 162, 171 (D.C. Cir. 1983), cert. denied, 469 U.S. 880 (1984), the District of Columbia Circuit held that, despite some district court decisions holding that warrantless national security wiretaps were contrary to law, the attorney general "could reasonably have relied on other lower court decisions" in which such conduct was upheld. The "clearly established" test, indicated the court, was not equivalent to a "clearly foreshadowed" test. See *id.* at 172-73; accord *Capoeman v. Reed*, 764 F.2d 1512, 1515 (9th Cir. 1985).

<sup>32</sup>*Mitchell*, 105 S. Ct. at 2815 (quoting *Harlow*, 457 U.S. at 819).

<sup>33</sup>*Scheuer v. Rhodes*, 416 U.S. 232, 242 (1974). As the Supreme Court has stated, "[t]he imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious [official] from exercising his judgment independently, forcefully, and in a manner best serving" the public interest. *Wood v. Strickland*, 420 U.S. 308, 319-20 (1975); see also *Procunier v. Navarette*, 434 U.S. 555, 562 (1978); *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

Significantly, qualified immunity is an entitlement to be free not only from trial, but also to be free from pretrial matters such as discovery. Subjecting government officials to the burdens of broad-reaching discovery is as disruptive to effective government as subjecting officials to the burdens of trial. In both cases, officials will be distracted from their governmental duties and inhibited in the performance of their discretionary responsibilities. Equally important, the threat of such suits acts as a deterrence to public service.<sup>34</sup> Accordingly, in determining whether qualified immunity applies, the court must determine

not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed.<sup>35</sup>

### ***B. APPLICATION OF THE QUALIFIED IMMUNITY ANALYSIS TO THE INSTANT CASE***

The district court in *Griffiss Air Force Base* correctly concluded that no clearly established right exists to make political statements on a military base simply because the base is holding an open house.<sup>36</sup> Arguably, the court should have granted defendants

<sup>34</sup>*Mitchell*, 105 S. Ct. at 2815; see also *Harlow*, 457 U.S. at 816.

<sup>35</sup>*Harlow*, 457 U.S. at 818; see also *Mitchell*, 105 S. Ct. at 2816 ("[u]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery). Moreover, the policy underlying qualified immunity imposes "heightened pleading standards" on complaints: "[T]he plaintiff must plead specific facts with sufficient particularity to meet all the elements to lay a foundation for recovery, including those necessary to negative the defense of qualified immunity." *Brown v. Texas A & M University*, 804 F.2d 327, 333 (5th Cir. 1986); see also *Martin v. D.C. Metropolitan Police Dep't*, 812 F.2d 1425, 1430 (D.C. Cir. 1987). As the Fifth Circuit stated in *Morrison v. City of Baton Rouge*, 761 F.2d 242, 244 (5th Cir. 1985): "[L]iberal notions of notice pleading must ultimately give way to immunity doctrines that protect us from having the work of our public officials chilled or disrupted by participation in the trial or the pretrial development of civil lawsuits." See also *Elliot v. Perez*, 751 F.2d 1472, 1479-82 (5th Cir. 1985).

<sup>36</sup>The district court accurately stated: "Defendants are correct in that the law on whether holding an open house transforms a military base into a public forum was unsettled at the time of the present incident. . . . Indeed, the question is still unsettled because the Supreme Court never reached the issue in [*United States v. Albertini*, 105 S. Ct. 2897 (1985)]." *Griffiss record, supra* note 7 (transcript of

qualified immunity on this basis alone, because "[i]f the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful."<sup>37</sup>

The district court nevertheless declined to grant defendants immunity because, according to the court, "a material issue of fact exists as to whether defendants . . . abandoned their interest in restricting expression thereby creating a public forum."<sup>38</sup> In pursuing this line of inquiry, the district court was especially influenced by the Supreme Court's 1972 per curiam decision in *Flower v. United States*,<sup>39</sup> in which the Court found that the government had abandoned its interest in regulating expression on a part of a military base. The district court failed to realize, however, that in the fifteen years since *Flower* was decided, the Supreme Court on two occasions explicitly has limited *Flower* to its peculiar facts.<sup>40</sup> The district court's blind reliance on *Flower*, a

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district court decision of Nov. 12, 1985, at 10-11).

<sup>37</sup>*Harlow*, 457 U.S. at 818; see *supra* notes 29-35 and accompanying text.

<sup>38</sup>*Griffas record*, *supra* note 7 (transcript of district court decision of July 23, 1985, at 5). The district court further stated:

If [defendants abandoned their interest in restricting expression], and a public forum was created, defendants' conduct would have violated plaintiffs' clearly established constitutional rights unless defendants' restrictions constituted a reasonable time, place and manner restriction. This latter question also raises a material issue of fact making summary judgment on defendants' qualified immunity defense inappropriate at this time.

*Id.* (transcript of district court decision of Nov. 12, 1985, at 11).

<sup>39</sup>407 U.S. 197 (1972) (per curiam). In *Flower*, the Court, without the benefit of full briefing or oral argument, reversed a conviction for distributing anti-war leaflets on a particular street on an Army base. The Court's decision was grounded on its conclusion that the street was indistinguishable from a public street:

[H]ere the fort commander chose not to exclude the public from the street where petitioner was arrested. . . . Under such circumstances the military has abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue. The base commander can no more order petitioner off this public street because he was distributing leaflets than could the city police order any leafleteer off any public street.

*Id.* at 198. Not surprisingly, the Court's summary treatment of *Flower*, as well as its facile resolution of the merits, drew sharp dissent. See *id.* at 199-202 (Burger, C.J., Blackmun, Rhenquist, JJ., dissenting).

<sup>40</sup>*United States v. Albertini*, 105 S. Ct. 2897, 2905 (1985) ("the significance of the per curiam opinion in *Flower* is limited by [its] unusual facts"); *Greer v. Spock*, 424 U.S. 828, 837 (1976) (same). Although *Flower* has never explicitly been overruled, its precedential value is de minimus. See Maizel & Maizel, *Does an Open House Turn a Military Installation Into a Public Forum?* *United States v. Albertini and the First Amendment*, *The Army Lawyer*, Aug. 1986, at 11, 14 & n.37.



decision that did not even involve the qualified immunity issue, was therefore inappropriate. To resolve the qualified immunity issue here, the district court should have decided whether the law is clearly established that an open house held on a normally closed base pursuant to guidelines established in military regulations can result in a public forum.

As this article will now demonstrate, the above issue must be resolved in the negative. No court has ever held that a public forum is created on a normally closed base during an open house that conforms with military regulations. Moreover, the Eighth Circuit, on facts substantially identical to those in *Griffiss Air Force Base*, actually has held that an open house on a normally closed military base does *not* create a public forum.<sup>41</sup> Accordingly, the district court's denial of qualified immunity was error.

Although the Supreme Court has not expressly addressed whether an open house on a normally closed military base could create a temporary public forum, it has stated that military bases do *not* become public forums merely because the public is permitted freely to visit, or because the base is used to communicate ideas or information during an open house.<sup>42</sup> These statements, though dicta, fortify a conclusion that a legitimate question exists as to whether an open house held pursuant to regulations on a normally closed military base can ever create a temporary public forum. This being so, defendants in *Griffiss Air Force Base* were entitled to immunity as a matter of law.<sup>43</sup>

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<sup>41</sup>*Persons for Free Speech at SAC v. United States Air Force*, 675 F.2d 1010 (8th Cir.) (en banc), cert. denied, 459 U.S. 1092 (1982).

<sup>42</sup>In *Albertini*, the Supreme Court stated:

Military bases generally are not public fora, and *Greer* expressly rejected the suggestion that "whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment." Nor did Hickam [Air Force Base] become a public forum merely because the base was used to communicate ideas or information during the open house.

105 S. Ct. at 2905 (citations omitted); see also *Greer v. Spock*, 424 U.S. at 836.

<sup>43</sup>Because the defendants here were entitled to qualified immunity as a matter of law, the district court's erroneous denial of immunity should have been immediately appealable. As the Supreme Court stated in *Forsyth*:

An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions . . .

Significantly, in a strikingly similar factual situation, the Eighth Circuit, in an en banc decision, held that an open house on a normally closed military base does not create a temporary public forum. In *Persons For Free Speech At SAC v. United States Air Force*,<sup>44</sup> plaintiffs, a group of peace activists, raised various challenges to a district court decision which held that the United States Air Force constitutionally could prohibit plaintiffs from participating in an open house. Plaintiffs contended that the expression permitted by the Air Force base during the open house created a public forum, and that they therefore had a first amendment right "to present an alternative to the extremely dangerous and costly arms race" by, inter alia, leafleting and providing peace literature.<sup>45</sup> Plaintiffs also argued that the Air Force violated their right to equal protection by allowing other civilian organizations to participate in the open house while denying plaintiffs' request to participate.<sup>46</sup>

The Eighth Circuit rejected plaintiffs' claims. First, the court held that an open house is within the range of traditional military activities, and that no public forum was created.<sup>47</sup> The fact that

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105 S. Ct. at 2816. The Second Circuit's summary dismissal of defendant's appeal in *Griffiss Air Force Base* was thus error. *Supra* note 28.

<sup>44</sup>675 F.2d 1010 (8th Cir.) (en banc), cert. denied, 459 U.S. 1092 (1982).

<sup>45</sup>*Id.* at 1012. The expressive activities at the open house in *Persons for Free Speech at SAC* included recruiting booths by other branches of the military, as well as exhibits by nonmilitary organizations such as defense contractors, local public service organizations, and public safety concerns. Included among the participating nonmilitary organizations were the Chamber of Commerce, Explorer Scouts, Big Brothers/Big Sisters, Volunteers in Diversion and Advocacy (a youthful offenders program), and a Black Awareness Program. *See id.* at 1012, 1014. The existence of these expressive activities, argued plaintiffs, created a public forum:

A public forum is created, [plaintiffs] argue, by inviting the public [onto the normally closed base] and conveying to them a message that [plaintiffs] find objectionable, i.e., here is our mission, as a community you should like and appreciate us. Thus, [plaintiffs] believe that the Air Force must "risk" a response to the message in the forum. Due to the Air Force's alleged "speech," [plaintiffs] assert that there has been an abandonment of both the Air Force's primary mission and its claimed neutrality on ideological issues resulting in abandonment of a normally nonpublic forum.

*Id.* at 1015.

<sup>46</sup>*Id.* at 1018.

<sup>47</sup>*See id.* at 1015-18. The Eighth Circuit stated that it was guided in its decision by the Supreme Court's decision in *Greer v. Spock*, 424 U.S. 828 (1976):

The fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not of itself serve to convert Fort Dix into a public forum or to confer upon political candidates a First or Fifth Amendment right to conduct their campaigns there. The decision of the military authorities that a

plaintiffs thought the Air Force was expressing an "ideological message" during the open house did not, stated the court, transform the military base into a public forum. To conclude otherwise would be to ignore the role of the military under the Constitution:

The military base [is] "lawfully dedicated" to carrying out the decisions of our civilian government. The argument that the military has abandoned its ideological neutrality is based on the false premise that the military itself can pick and choose under our Constitution the "ideology" it wishes to carry out. No public forum can arise from the "ideological" reflection of the current state of the military because historically, traditionally and constitutionally this "reflection" is mandated by the civilian sector.<sup>45</sup>

The Eighth Circuit also rejected plaintiffs' equal protection claim. At the outset, the court recognized that judicial deference must be accorded to military decisions that implicate the military mission.<sup>46</sup> The court then distinguished the civilian groups that participated in the open house (whose participation was consistent with the military mission of the open house) from plaintiffs (whose participation was inconsistent with the military mission of the open house). The court concluded that "the base commander may limit access to those groups whose 'subject matter' is consistent with the purposes of the open house."<sup>47</sup>

The decision in *Persons For Free Speech at SAC* demonstrates that plaintiffs in *Griffiss Air Force Base* had no clearly established right to engage in activity that was inconsistent with the military mission of the open house simply because other organizations engaged in activity that was consistent with the military mission. Even assuming that defendants permitted activities during the open house that plaintiffs perceived as "pro-military

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civilian lecture on drug abuse, or religious service by a visiting preacher at the base chapel, or a rock musical concert would be supportive of the military mission of Fort Dix surely did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever.

675 F.2d at 1016 (quoting *Greer v. Spock*, 424 U.S. at 838 n.10).

<sup>45</sup>675 F.2d at 1017.

<sup>46</sup>*Id.* at 1018.

<sup>47</sup>*Id.* at 1020 (emphasis added). In rejecting plaintiffs' equal protection claim, the Eighth Circuit also found significant the base commander's concern that he would have difficulty ensuring the safety and security of on-base personnel had he permitted plaintiffs to participate. *See id.* In this regard, the court "[held] that the base commander's reasonable beliefs are sufficient to deny [plaintiffs'] request to participate . . . in the open house . . ." *Id.* at 1020 n.9.

speech," defendants were not thereby prohibited from preventing political expression that entangled (or might be perceived as entangling) the military in nonmilitary ideological movements inimical to the military mission. As the Eighth Circuit stated:

[T]here is a vast difference between allowing the military to "speak" in an effort to foster base/community relations and allowing the military to throw the weight of its resources behind a nonmilitary ideological movement. The "entanglement" rationale [i.e., the desire of the military on constitutional grounds to stay free of "entanglement" with ideological issues] we believe is still viable when dealing with military endorsement or support of nonmilitary ideological movements. . . . [T]he rationale of *Greer v. Spock* regarding noninvolvement of the military in partisan politics is also applicable to noninvolvement of the military in civilian ideological movements.<sup>51</sup>

It should be emphasized at this point that the district court in *Griffiss Air Force Base* was simply wrong in concluding that the record raised a genuine issue of fact as to whether a public forum was created. This conclusion apparently resulted from the court's superficial reading of the record.

The district court stated that the following three contentions made by plaintiffs raised a factual issue as to whether a public forum was created: the public was permitted to wear T-shirts with political slogans; the Confederate Air Force made a pro-military statement with its B-29 display; and a political poster was shown in an Air Force display.<sup>52</sup> An examination of the record reveals, however, that these examples of alleged political expression, when viewed either individually or collectively, cannot be construed as creating a public forum. First, the fact that persons were permitted to wear T-shirts with slogans at the open house did not create a public forum. As shown earlier, Griffiss Base officials decided in advance that "clothing messages" would not be regarded as impermissible political statements.<sup>53</sup> This decision was consistent with guidance provided in *Persons For Free Speech At SAC*, where the Eighth Circuit expressed doubts about the military's authority constitutionally to regulate "clothing messages" during an open house.<sup>54</sup> Second, contrary to

<sup>51</sup>*Id.* at 1021.

<sup>52</sup>*Supra* text accompanying note 25.

<sup>53</sup>*Supra* note 13.

<sup>54</sup>See 675 F.2d at 1020 n.9. Significantly, however, the Eighth Circuit also observed that "facts which might reasonably have led [the base commander] to

plaintiffs' characterization, the B-29 display by the Confederate Air Force was not a political statement "lauding the bombing of Hiroshima and Nagasaki."<sup>55</sup> In the pamphlet the Confederate Air Force provided to persons who took a self-guided tour of the B-29, the Confederate Air Force expressly eschewed political affiliations, and its aircraft display was strictly historical in nature.<sup>56</sup> Finally, the poster of the U.S. Capitol with a Soviet flag flying over it was not a political statement, but was a regular, everyday part of the "Communications Security" program at Griffiss Air Force Base.<sup>57</sup> The poster served as a graphic reminder to base personnel always to guard against unauthorized disclosure of classified information. The poster appeared in many buildings at Griffiss Air Force Base and, consistent with the military mission of the open house, served to show the public an important aspect of military life.

In short, the record did not create a genuine issue of fact regarding the creation of a public forum. Rather, the record showed that the expressive activity allowed on Griffiss Base during the open house was ideologically neutral and consistent with guidelines established in military regulations.

Indeed, plaintiffs did not dispute that the displays at the open house were consistent with the military mission of the open house. Rather they contended that those displays constituted a form of political speech that opened the door for *all* forms of political speech. This contention, in addition to being unsupported by any case law, is simply untenable.<sup>58</sup>

forecast substantial disruption of or material interference with [the open house] activities' would give to him the discretion 'to deny [an individual's] form of expression.'" *Id.* (quoting *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 514 (1969)). Thus, if a base commander reasonably believes that clothing messages will substantially disrupt or materially interfere with the open house, he may prohibit such messages. As a practical matter, however, it seems that base commanders would rarely need to enforce such prohibitions.

<sup>55</sup>*Supra* note 13.

<sup>56</sup>*Griffiss record, supra* note 7 (Confederate Air Force pamphlet describing B-29 bomber). The pamphlet provided by the Confederate Air Force to those persons who took self-guided tours of the B-29 consisted of two pages. The first page stated that the aircraft on display "does not glorify war, but reminds us of those men and machines who won the peace." *Id.* The first page also listed the specifications of the B-29, such as speed, tail height, range, wing span, and length. *Id.* The second page of the pamphlet provided a one-paragraph history of the B-29, and a description of the B-29 interior to which the public could refer during the self-guided tour. *Id.*

<sup>57</sup>*See id.* (affidavit of assistant staff judge advocate).

<sup>58</sup>"It is well settled that the first amendment does not confer an unfettered right to propagandize protests or views . . . whenever and however and wherever [a person] please[s]." *Greer v. Spock*, 424 U.S. 828, 836 (1976) (quoting *Adderley v. Florida*, 385 U.S. 39, 48 (1966)). "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which

First, it ignores the American constitutional tradition of a politically neutral military establishment. Military commanders have the duty to insulate their commands "from both the reality and the appearance of acting as a handmaiden for partisan political causes. . . ."<sup>60</sup> Indeed, military commanders have the historically unquestioned prerogative to keep official military activities "wholly free" of actual or apparent entanglement with political activities.<sup>60</sup> In *Griffiss Air Force Base*, as in *Persons For Free Speech At SAC*, military officials permitted displays showing the current and historical state of the Air Force in terms of weapons systems and aircraft. While these displays may well have constituted "speech," they reflected a message that was "developed and controlled under our Constitution by civilians;" these displays did not indicate "that the military [had] abandoned its ideological neutrality. . . ."<sup>61</sup>

Second, the argument ignores that military commanders necessarily have the authority to prohibit activities that are inconsistent with the military mission. The military officials at Griffiss Air Force Base, in compliance with Air Force regulations, held an open house to increase public awareness of military policies and programs, maintain a reputation as a good neighbor as well as a professional organization responsible for national security, and inspire patriotism and encourage young people to serve in the military.<sup>62</sup> As the district court acknowledged, these goals are supportive of the military mission.<sup>63</sup> By contrast, plaintiffs' conceded purpose in attending the open house was not consistent with the military mission of the open house; rather, they attended the open house "to demonstrate their opposition to current

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it is lawfully dedicated." *Id.* (quoting *Adderley*, 385 U.S. at 47).

<sup>60</sup>*Greer v. Spock*, 424 U.S. at 839.

<sup>61</sup>*See id.* & n.12; *see also id.* at 844-47 (Powell, J., concurring); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 893 (1961) ("the power of a military commandant over a reservation is necessarily extensive and practically exclusive").

<sup>62</sup>*Persons for Free Speech at SAC*, 675 F.2d at 1021. As the Eighth Circuit stated, although "the military itself may 'speak' through its community relations activities [i.e., such speech] does not destroy the governmental interest served in forbidding the military from becoming entangled with nonmilitary 'ideological movements.'" *Id.* Pursuant to the Constitution, civilians make the "ideological" decisions for the military. Although these decisions may give rise to controversy, "the debate on such controversies is for civilian forums not military bases." *Id.* at 1017.

<sup>63</sup>*See* AFR 190-1 para. 4-2; *supra* note 6.

<sup>64</sup>*Griffiss record*, *supra* note 7 (transcript of district court decision of July 23, 1965, at 3-4) ("the reasons for holding open houses to promote community relations and the military are within the 'military mission' of an Air Force Base"); *see also Persons for Free Speech at SAC*, 675 F.2d at 1016.

*military policies of the United States...*"<sup>64</sup> It is beyond cavil that a commander who pursues a military goal need not permit activity that he or she reasonably believes may jeopardize the military mission.

Finally, the argument disregards that the base commander's prohibition of plaintiffs' activity was grounded in large part on his concern for ensuring the security of personnel and property during an open house attended by approximately 45,000 people. That decision is entitled to substantial deference.<sup>65</sup> Indeed, the base commander's "reasonable belief" that plaintiffs' activities would be inconsistent with the purpose of the open house and pose a potential security problem is sufficient to prohibit plaintiffs' activities.<sup>66</sup>

In sum, in light of the relevant case law, plaintiffs had no clearly established right, in contravention of the base commander's orders, to make ideological political statements that were inconsistent with the military mission of the open house and that the base commander reasonably believed could pose a security threat. Even assuming that the base commander's conduct was not clearly authorized by law, that conduct plainly was not clearly proscribed. At the very least, a legitimate question existed as to the constitutionality of defendants' conduct, so that "it cannot be said that... [such conduct] violates clearly established law."<sup>67</sup> The district court therefore erred in refusing to grant qualified immunity.

<sup>64</sup>*Griffiss record, supra* note 7 (amended complaint at 4). Plaintiffs' express goals, as articulated in leaflets they intended to distribute, included halting and reversing deployment of Cruise and Pershing missiles, converting Griffiss Air Force Base to peaceful use, stopping U.S. intervention in Central America, and stopping Cruise missile production and testing in Canada. *See id.* (plaintiffs' leaflet, the *Mohawk Peace Flyer*, Spring 1984, at 3). Because plaintiffs' goals were inconsistent with, if not inimical to, the military mission of the open house, defendants acted within their authority in restricting plaintiffs' activities. After all, nothing in the Constitution disables a military commander from acting to avert what he perceives as being a material interference with the military mission. *See United States v. Albertini*, 105 S. Ct. 2897, 2907 (1985); *Greer v. Spock*, 424 U.S. 828, 840 (1976); *Persons for Free Speech at SAC*, 675 F.2d at 1020-21.

<sup>65</sup>*Persons for Free Speech at SAC*, 675 F.2d at 1018-20.

<sup>66</sup>*Id.* at 1020 & n.9; *see also* *Student Coalition for Peace v. Lower Merion School District*, 776 F.2d 431, 437 (3d Cir. 1985).

<sup>67</sup>*Mitchell v. Forsyth*, 105 S. Ct. 2806, 2820 n.12 (1985). The "clearly established" standard requires a court, in the absence of binding precedent, to look at all available decisional law to determine whether the law was clearly established and whether the defendant acted in an objectively reasonable manner. *See supra* text accompanying notes 29-35. The district court therefore should have inquired whether the base commander, in restricting expressive activity during the open house, acted reasonably in complying with the legal advice of several government attorneys who provided counsel that was consistent with the Eighth Circuit's decision in *Persons for Free Speech at SAC*. To ask the question is to answer it.

The Second Circuit similarly erred in dismissing the appeal. To the extent the court relied upon plaintiffs' assertion that there existed a material question of fact as to whether the base commander had abandoned any interest in regulating expression, it was plainly wrong. There was no dispute over what happened—the reason for holding the open house, the procedures for evaluating outside displays, and the "pro-military activity" that, according to plaintiffs, created a public forum were all in the record. The issue was a matter of law—whether the legal effect of permitting certain displays made the base a public forum. In light of cases such as *Albertini*, *Greer v. Spock*, and *Persons for Free Speech at SAC*, the Second Circuit should have had little trouble in concluding that plaintiffs had no "clearly-established" constitutional right to demonstrate on Griffiss Air Force Base during the open house.<sup>68</sup>

If the Second Circuit dismissed the appeal because a claim for injunctive relief remained outstanding, the court also erred.<sup>69</sup> Qualified immunity is a special legal entitlement not to stand trial on a damages claim, and the fact that an official might be involved in future injunctive proceedings is irrelevant:

[T]he fear of being sued and held personally liable for damages is a far cry from a suit for . . . injunctive relief, which public officials face regularly in the course of performing their duties. . . . [T]he threat of personal liability could deter all but the most resolute or irresponsible from discharging their duties, or even being willing to serve in public office.<sup>70</sup>

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When, as here, no decisional law proscribes a government official's conduct, and the only decisional law on point (albeit outside the circuit) actually authorizes the conduct, that constitutes a per se instance of the law remaining sufficiently undefined that the official is entitled to qualified immunity.

<sup>68</sup>See Maizel & Maizel, *supra* note 40, for a discussion of the present state of the law. See also Rosenow, *Open House or Open Forum: When Commanders Invite the Public on Base*, 24 A.F.L. Rev. 260 (1984); Cruden & Lederer, *The First Amendment and Military Installations*, 1984 Det. C.L. Rev. 845; Zillman & Imwinkelreid, *The Legacy of Greer v. Spock: The Public Forum Doctrine and the Principle of the Military's Political Neutrality*, 65 Geo. L.J. 773 (1977); Note, *Persons for Free Speech at SAC v. United States Air Force: Military Installations as a Public Forum*, 16 Creighton L. Rev. 960 (1983); Note, *Civilian Speech on Military Bases: Judicial Deference to Military Authority*, 71 Geo. L.J. 1253 (1983).

<sup>69</sup>See *supra* note 27.

<sup>70</sup>*Bever v. Gilbertson*, 724 F.2d 1083, 1091-92 n.4 (4th Cir.) (Hall, J., dissenting), cert. denied, 105 S. Ct. 349 (1984); see *Tubbesing v. Arnold*, 742 F.2d 401, 404 (8th Cir. 1984) (rejecting rationale in *Bever*).



Moreover, if the courts permit a claim for injunctive relief to defeat an otherwise valid summary judgment motion based on qualified immunity, this could "easily lead to the pernicious practice of tacking on a claim for injunctive relief in order to avoid summary judgment and force officials to go to trial on meritless damage actions."<sup>71</sup>

### III. CONCLUSION

At this time, *Griffiss Air Force Base* remains interlocutory. The issue that the district intends to examine is whether the government completely abandoned any claim of special interest in regulating expression.<sup>72</sup> The district should resolve this issue in the negative because the record reveals that the defendants went to great lengths to preserve their historic and constitutionally permissible right to regulate on-base expression during the open house.

For example, organizations that desired to participate in the open house submitted their plans for approval, and base officials approved only those plans that were consistent with the mission of the open house.<sup>73</sup> Additionally, here, as in *Persons For Free Speech At SAC*, the "detailed operations plan for the [open house] and the concerns it reflects for security, traffic flow and personnel are inconsistent with a one-day abandonment."<sup>74</sup> Moreover, to minimize the possibility of security threats, personal injuries, and property damage during the open house, the base commander decided to prohibit all political activity. This decision, which was based on advice from Air Force attorneys as well as the United States Attorney's office,<sup>75</sup> was promulgated by way of 16,000 letters of welcome in which the base commander informed attendees that their presence on the base was conditioned on their compliance with certain restraints on their expressive activity.<sup>76</sup> Specifically, the base commander "prohibit[ed] any political activity and any other action detrimental to good order and discipline."<sup>77</sup> Additionally, on the morning of the open house, military

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<sup>71</sup>*Bever*, 724 F.2d at 1091 (Hall, J., dissenting).

<sup>72</sup>*Supra* text accompanying notes 24-25.

<sup>73</sup>*Griffiss record*, *supra* note 7 (affidavit of staff judge advocate).

<sup>74</sup>*Persons for Free Speech at SAC*, 675 F.2d at 1015-16. The operations order for the Griffiss Air Force Base open house, like the operations plan in *Persons for Free Speech at SAC*, provided for security, traffic flow, and personnel safety. See *Griffiss record*, *supra* note 7 (Griffiss Air Force Base, Operations Order 3-84, 1 Apr. 1984, at 2 through 3).

<sup>75</sup>*Supra* note 9.

<sup>76</sup>*Supra* note 13.

<sup>77</sup>*Id.*

officials inspected the displays to ensure they were devoid of political statements.<sup>78</sup>

Indeed, the complaint and plaintiffs' affidavits themselves show that the base commander did not, either subjectively or objectively, abandon his interest in regulating political expression. Plaintiffs stated that shortly after their arrival at the open house (and repeatedly thereafter), they were notified of the base commander's prohibition of political activity.<sup>79</sup> Plaintiffs also stated that base officials enforced the prohibition each time plaintiffs violated it.<sup>80</sup> Indeed, plaintiffs concede that the base commander "had promulgated and/or [was] enforcing a policy that prohibited . . . political activities, and had ordered . . . Air Force personnel to prevent such activities, and to seize any materials used for such activities."<sup>81</sup> It is difficult to imagine a more forceful concession that base officials made every reasonable effort not to abandon their interest in regulating political expression during the open house. Accordingly, plaintiffs' *Bivens* claim should ultimately be rejected on the merits.

Unfortunately, the expectation that plaintiffs' *Bivens* claim will be unsuccessful is small solace to defendants who unnecessarily face the burdensome rigors of discovery and trial. Moreover, the court's qualified immunity decision in this case no doubt will affect the decisions of other military commanders who wish to comply with regulations and hold open houses, but who also wish to retain their prerogative to regulate on-base expressive activity. These commanders understandably will be reluctant to expose themselves and their subordinates to *Bivens* suits. Accordingly, a predictable result of the court's decision may be a marked decrease in open houses. Such a result not only undercuts the military mission, but also adversely affects the public interest. After all, but for the opportunity presented by open houses, most civilians would never be able to visit various military installations and observe our military men as they perform their mission.

It can only be hoped that other federal courts, when presented with the qualified immunity issue in a context similar to *Griffiss Air Force Base*, will properly apply the qualified immunity analysis. Specifically, a court must keep in mind that the Supreme Court repeatedly has stated that (1) constitutional principles are applied differently in the military context than in the civilian

<sup>78</sup>*Griffiss record*, supra note 7 (affidavit of assistant staff judge advocate).

<sup>79</sup>*Id.* (amended complaint at 4).

<sup>80</sup>*Id.* (amended complaint at 6-9).

<sup>81</sup>*Id.* (amended complaint at 10).

context;<sup>62</sup> and (2) military bases do not become public forums merely because the public is permitted freely to visit or because the base is used to communicate ideas or information during an open house.<sup>63</sup> So long as a military commander ensures that his open house complies with military regulations in that it highlights the mission, equipment, facilities, people, skill, and professionalism required to operate the military, and so long as a military commander takes reasonable steps to ensure that members of the public do not engage in potentially entangling political or ideological activities during the open house,<sup>64</sup> that commander, in litigation similar to *Griffiss Air Force Base*, should be entitled to immunity at the outset of any *Bivens* suit.<sup>65</sup>

<sup>62</sup>See, e.g., *Goldman v. Weinberger*, 106 S. Ct. 1320 (1986); *Brown v. Glines*, 444 U.S. 348 (1980); *Greer v. Spock*, 424 U.S. 828 (1976); *Parker v. Levy*, 417 U.S. 733 (1974).

<sup>63</sup>*Supra* note 42; see also *supra* note 47.

<sup>64</sup>*Supra* notes 51 & 59-61 and accompanying text.

<sup>65</sup>Other factors that may influence a court's decision as to the appropriateness of a finding of qualified immunity include: whether the base commander took reasonable, objective steps to demonstrate that the open house would not create a public forum, see *supra* notes 9-13, 70-78, and accompanying text; whether the base commander reasonably concluded that the proscribed activity was inconsistent with the military mission of the open house, see *supra* notes 14-15 and accompanying text; and whether the base commander reasonably concluded that the proscribed activity might pose a security problem, see *supra* notes 8, 65-66, and accompanying text. See *Anderson v. Creighton*, 107 S. Ct. 3034 (1987).

In *Anderson* the plaintiffs claimed that an FBI agent had violated their fourth amendment rights by conducting a warrantless search of their home. The circuit court had ruled the agent was not entitled to qualified immunity because the constitutional right involved—the right to be free from unreasonable searches and seizures—had been “clearly established” at the time of the search. The Court held that the circuit court had improperly applied *Harlow*, and that the question was not whether the constitutional right identified by a plaintiff was “clearly established,” but rather was whether it was clear that defendant's actions violated that constitutional right:

[T]he right the official is alleged to have violated must have been “clearly established” in a more particularized . . . sense. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right . . . [I]n light of preexisting law the unlawfulness must be apparent.’

*Id.* at 3039. *Anderson* makes clear that the district court in *Griffiss* erred in its qualified immunity analysis. In *Griffiss* the relevant question is whether the military officials reasonably could have believed that they could lawfully restrict expressive activity on the military base during an open house. See *id.* at 3040. As this article shows, the answer is “yes” and the military officials should have been accorded immunity.



## BOOK REVIEWS

### SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (2d Edition)\*

reviewed by Major Wayne E. Anderson\*\*

The second edition of *Search and Seizure: A Treatise on the Fourth Amendment* by Professor Wayne LaFave is now available through West Publishing Company. The new edition consists of four separate volumes with over 2,800 pages of text. I approached the review from two directions. The more formal system I employed was to pick areas in which there have been significant changes and areas in which there have few changes in the law since 1979. Then, with the first edition opened to the corresponding page, I read these sections and compared them with the original materials. My other approach, less methodical but more enjoyable, was to simply take one of the four books home and read a section that piqued my interest.

As with the first edition, Professor LaFave's stated purpose is to "report in a systematic and orderly fashion the current state of Fourth Amendment law" and also "to present a *critical* assessment of how the Supreme Court and lower courts have fared in their ongoing and challenging enterprise of giving content and meaning to the Fourth Amendment."

Professor LaFave points to the constant flow of decisions from the Supreme Court as well as lower appellate courts as necessitating a "substantially revised and expanded" second edition. He counts 90 decisions by the Supreme Court that have affected his treatise. All of the cases are discussed in the second edition. Notwithstanding the significant expansion, Professor LaFave added only two new sections to his treatise: § 1.3 The *Leon* "Good Faith" Exception and § 1.4 The *Scott* "Bad Faith" Doctrine.

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\*LaFave, Wayne R., *Search and Seizure: A Treatise on the Fourth Amendment*. Saint Paul, Minnesota: West Publishing Company, 1986. Four volumes. Index, table of cases, table of statutes, table of rules and regulations. Price: \$240.00. Publisher's Address: West Publishing Company, 50 W. Kellogg Boulevard, Saint Paul, Minnesota 55165.

\*\*Judge Advocate General's Corps, United States Army. Major Anderson is an instructor in the Criminal Law Division, The Judge Advocate General's School, Charlottesville, Virginia.

While the second edition does *expand* substantially on the original edition, there are few *revisions*. That is to say, most of the original edition is faithfully reproduced in the second with new material interspersed between and tacked on the end of original paragraphs. This observation is certainly not a condemnation; indeed, the first edition has enjoyed widespread and well-earned acclaim for its scholarship and comprehension. Nevertheless, there are a few instances in which the old text has been preserved notwithstanding new developments that render it tedious, if not superfluous. For example, in his discussion of "Searches Directed at Students," Professor LaFave reproduces in its entirety the original discussion of the doctrine of *in loco parentis*. This doctrine, at least in the context of school searches, was unceremoniously rejected by the Supreme Court in *New Jersey v. T.L.O.*<sup>1</sup> as Professor LaFave himself points out. Of course, in many instances the "old" law is still relevant in that states may apply a more rigorous standard. Moreover, in many instances the old rules have historical value. Nevertheless, for the benefit of the researcher, Professor LaFave should have wielded the axe more liberally.

Professor LaFave's "system" for reporting fourth amendment law in a "systematic" manner can best be described as "item analysis." A casual perusal of the table of contents best demonstrates the point; it reads like a menu. For example, the reader will discover chapters on consent searches and automobile searches. There are sections on airport searches, border searches, prisoner searches and the nature of probable cause. The list goes on and on. The advantage of this "item analysis" approach is that, in most cases, it clearly highlights specific subject areas for the researcher. The disadvantage of the "item analysis" approach is that underlying fourth amendment concepts are never woven together and presented in a methodical fashion. For example, when governmental activities are minimally intrusive of individual privacy and liberty interests or where there is not an expectation of privacy that society is willing to recognize as reasonable, then no fourth amendment interests are implicated. To this writer, discussion of the concept of fourth amendment coverage with specific references to the plain view doctrine, unobtrusive police interaction with citizens, prison cells, etc. provides a more cohesive focus for analysis. These numerous search and seizure issues of similar conceptual ilk should be addressed as a separate and conceptually distinctive topic. With Professor LaFave's "item

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<sup>1</sup>469 U.S. 925 (1985).

analysis," however, issues relating to fourth amendment coverage are spread throughout the treatise. A discussion of the *Katz* definition of a "search," and use of devices to enhance the senses is found in Chapter Two; plain view is discussed in Chapter Seven which is entitled "Search and Seizure of Vehicles;" fourth amendment coverage of a prison cell is discussed in Chapter Ten; and nonapplicability of the fourth amendment to minimal restrictions on liberty is discussed in Chapter Nine. By way of further example, the exclusionary rule appears initially in Chapter One and again in Chapter Eleven. In Chapter One, Professor LaFave discusses the "Good Faith" exception to the exclusionary rule (among many other things) and discusses the "Inevitable Discovery" doctrine in Chapter Eleven. The two exceptions to the exclusionary rule have many kindred issues, such as the purpose of the exclusionary rule, the societal costs of exclusion, and the impact of exclusion on police behavior. It is unclear what purpose is served by separating them by 2,000 pages.

Most of Professor LaFave's efforts in updating his treatise were directed toward decisions made in the last eight terms of the Supreme Court. As indicated, Professor LaFave "critically" assessed some 90 new Supreme Court decisions. The Supreme Court even got a few right. Not so in *United States v. Leon*.<sup>2</sup> Professor LaFave sides strongly with the dissent in *Leon*. He challenges the majority's unsupported and overstated assertion that the costs of exclusion are too high and the benefits of exclusion are too low. Illustrative of Professor LaFave's take-no-prisoners attack is the following passage: "The third and final point to be made about the *Leon* majority's treatment of the cost factor is that the Court appears to have embraced the kind of cockeyed characterizations which heretofore had been found almost exclusively in the least sophisticated anti-exclusionary rule diatribes."

The second new section, "The *Scott* 'Bad Faith' Doctrine," is an expansion on an area that was originally included in supplements to the first edition. Professor LaFave applauds and eloquently defends the Supreme Court for its decision in the *Scott*<sup>3</sup> case. Under the "Bad Faith" doctrine the law enforcement official's subjective belief or motive concerning a search or seizure is irrelevant. Thus, if an officer, believing he has no probable cause, nevertheless arrests and searches a suspect, the arrest and search will be upheld if the facts *objectively* supported probable cause notwithstanding the law enforcement officer's belief that they did

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<sup>2</sup>468 U.S. 897 (1984).

<sup>3</sup>*Scott v. United States*, 436 U.S. 128 (1978).

not. "Underlying the *Scott* rule . . . is the sound notion . . . that 'sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.' "

What are the primary virtues of *Search and Seizure*? First and foremost it provides a comprehensive study of the fourth amendment and, for that reason, is an invaluable research source. Second, the treatise is *much* more than an organized collection of cases on the fourth amendment. In the treatise one sees the mind of a brilliant constitutional scholar zealously advocating his position and fairly representing the opposing position. Reading the words of Professor LaFave opens new doors of understanding for the constitutional student and provides the litigator with the tools to present his case more forcefully and persuasively. Certainly every law school should, and probably will, have this set. In the military, the appellate divisions and offices with an active criminal justice practice should have it.



## MILITARY MOTIONS\*

reviewed by Major James F. Nagle\*\*

Knowing what motions to make and how to make them is indispensable to the military practitioner. As Chief Judge Robinson O. Everett of the U.S. Court Of Military Appeals emphasizes in his preface to this book, motions are not only more prevalent than ever before; they are more complex. For a brief time, failure to make a motion was not necessarily fatal, even for matters traditionally classified as waivable. The theory was that the judge also had a responsibility to raise all possible issues. So if the counsel failed to raise an issue, the judge had to or the matter was still appealable. The decline of that doctrine has put the onus back on the counsel.

The Military Law Committee of the American Bar Association's General Practice Section has published a handbook on motions to aid trial practitioners. As the editors readily acknowledge, this text is not an exhaustive treatment of military motions. Experienced practitioners who expect it to be a citation-laden tome that eliminates the need for researching briefs will be disappointed. As a gateway to an ever-expanding practice, it is designed as a handy reference tool for easy insertion into the Manual For Courts-Martial.<sup>1</sup>

After briefly discussing the role of the military judge and court members and the subject of motions in general, the book reviews when various motions must be made to avoid waiver; the burden of proof; and the decision process. The book then examines thirty-one types of motions from the familiar (motion to dismiss for lack of jurisdiction) to the relatively unknown (motion to view the scene of the crime). These motions are divided into Motions to Dismiss, Motions for Appropriate Relief, Motions to Suppress, Motions in Limine, and motions requesting specific forms of declaratory relief. For each motion, the editors cite the main cases or the appropriate Military Rule of Evidence<sup>2</sup> or Rule for Courts-

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\*Military Law Committee, American Bar Association General Practice Section, *Military Motions*. Chicago, Illinois, ABA Press, 1986. Price: \$14.95. Pages: 27. Publisher's address: ABA Press, 750 North Lake Shore Drive, Chicago, Illinois 60611.

\*\*Judge Advocate General's Corps, United States Army. Major Nagle is assigned to Office of the Staff Judge Advocate, Headquarters, Forces Command, Fort McPherson, Georgia.

<sup>1</sup>Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984]

<sup>2</sup>*Id.* part III

Martial.<sup>3</sup> One criticism is that the book cites only cases and rules. At various times a citation to a pertinent treatise or law review article would have referred the reader to more in-depth research. Two prime examples are the *Military Rules of Evidence Manual*<sup>4</sup> and McAtamney, *Multiplicity: A Fundamental Analysis*.<sup>5</sup> This minor point of disagreement notwithstanding, the book is a worthwhile project. Used faithfully, it will enhance and facilitate the court martial practice skills of both trial and defense counsel.

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<sup>3</sup>*Id.* part II

<sup>4</sup>S. Saltzburg & L. Schinasi, *Military Rules of Evidence Manual* (2d ed. 1986).

<sup>5</sup>106 *Mil. L. Rev.* 115 (1984).

## BIOLOGICAL AND TOXIN WEAPONS TODAY\*

reviewed by Major Thomas J. Romig\*\*

Much has been written recently about the development and use of biological and toxin weapons. There have been numerous reports of the use of these weapons by the Soviets or their client states in Southeast Asia and Afghanistan. Although a 1972 treaty outlaws their use, development, or stockpiling, the tremendous potential they present for military uses makes them, in the minds of some people, an ideal weapon. They have been described as the "poor man's atomic bomb" because of the ease with which a third world country could develop such agents.

Today, because of advances in genetic engineering, it is possible to develop and field "designer genes" tailored to specific military needs. The possibilities range from tailoring agents for specific geographic and climatological areas; to specific susceptibility in certain ethnic and racial groups; and specific physiological effects, such as attacking specific organs of the body, to name just a few. Symptoms can be made to mimic natural illness, leaving those attacked unsure of whether there was an actual attack or a natural epidemic. Additionally, it is possible to make the fact of the attack even more difficult to detect by creating a delayed effect.

Biological warfare weapons or agents are living organisms, including viruses and infectious materials derived from them, that cause death or disease in humans, animals, and plants. The primary effect of biological agents is their ability to multiply rapidly in the organism attacked. Biological warfare agents are much more potent, weight for weight, than traditional chemical weapons as a result of their ability to multiply in the host. In some cases, a single microscopic biological agent will induce the particular disease, if inhaled.

Toxin weapons or agents are poisonous substances produced by living organisms, including those produced by chemical synthesis or genetic engineering. Toxins depend on their direct toxicity for

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\**Biological and Toxin Weapons Today*, ed. Erhard Geisler. New York: Oxford University Press, 1986. Pages: xii, 207. Glossary, references, index. Price: \$38.00. Publisher's address: Oxford University Press, 200 Madison Avenue, New York, New York 10016.

\*\*Judge Advocate General's Corps, United States Army. Major Romig is a student at the Armed Forces Staff College, Norfolk, Virginia.

their primary effect. Because they are inanimate, they are incapable of multiplying, unlike the biological weapons. Toxins can be produced by a wide variety of living organisms and offer advantages over biological agents because of their availability, potentially high toxicity, and their stability. Toxins are also faster acting than biological agents.

Although there is frequently much confusion surrounding the use of the terms, due in part to the similarity of their production processes, both biological and toxin weapons represent tremendous military potential and risks for the battlefield of the future. This potential exists not only because of the ease with which these systems can be developed, but also because of the difficulty posed in identifying a particular agent and developing a vaccine or antidote. Genetic engineering offers the possibility of creating endlessly varied symptoms and characteristics of diseases or toxic agents, thus tremendously complicating the task of those who must counter them.

*Biological and Toxin Weapons Today* is a primer on the development and potential of biological and toxin weapons. It was written in anticipation of the Second Review Conference of the Biological Weapons Convention of 1972, held in September, 1986, in Geneva, Switzerland.

The stated purpose of the book is to identify ways by which confidence in the Convention might be increased. Although this stated purpose is laudable, it is immediately evident that the authors' review of the development of biological and toxin weapons is markedly biased, leaving the reader with the impression that the United States is the major researcher and developer of biological and toxin weapons. Indeed, this work presents the view that the United States represents the major threat to world peace in all areas of chemical warfare. An entire chapter is devoted to "US Military and Chemical and Biological Weapons," a note being made in a parenthetical reference at the beginning of the book that such comprehensive treatment of U.S. activities results because, "[a]s usual, we know something about what is going on in the US, but hardly anything about what is going on in the Soviet Union." This statement is then followed by several very brief references to unsubstantiated allegations of Soviet use of chemical, biological, and toxin weapons in various parts of the world.

This approach damages the credibility of this work and brings into question the impartiality of the authors. Information does

exist that could have given the reader insight into the Soviet program. As the editor and six of the twenty contributors are scientists from Warsaw Pact countries, it would seem as if they would have had access to this information (unless, of course, their agenda is essentially one of a political nature). In the chapter on U.S. chemical and biological capabilities, the authors discuss U.S. military doctrine. A similar discussion should have focused on Soviet doctrine, as this information is available in the literature and is taught in U.S. service schools. The fact that the Soviets have the largest military offensive and defensive chemical capability (and, therefore, potential for biological and toxin weapons) is not discussed.

The authors do not speak to the testimony of victims of biological and toxin attacks in Southeast Asia and Afghanistan. Laboratory tests results indicating the presence of toxins in these areas, which have been reported by Canadian and U.S. scientists, received no mention. The anthrax epidemic in Sverdlovsk near a Soviet biological warfare facility is mentioned only briefly, and the Soviet explanation that this epidemic occurred as the result of contaminated meat is readily accepted. There is no mention of the reports that most of the cases indicated symptoms of pulmonary anthrax, a disorder that results from inhaling, not eating, anthrax spores. There is also no mention of the reports that the Soviet Army took charge of the cleanup operations and that earthmoving equipment was used to remove contaminated topsoil.

Although the book offers substantial information concerning biological and toxin weapons (in a sometimes fairly technical manner), it is unfortunate that the authors fail to take an evenhanded approach toward the analysis of superpower developments in this area. The book does, however, very effectively point out the difficulties and problem areas surrounding the 1972 Convention and makes recommendations for strengthening this Convention.

The book's appendices are of particular value to anyone interested in conducting research in this area. These include the most significant treaties in this area and the States party to them, and several technical discussions of genetic engineering and the development and production of vaccines. *Biological and Toxin Weapons Today* is not light reading. It does, however, provide a good introduction to and discussion of technical information concerning its subject for the person interested in this topic. As noted above, however, it is disappointing that the reader is not

provided a more evenhanded analysis of the research and development of these potential weapons currently being conducted by both the U.S. and the Soviet Union.

## THE TAX REFORM ACT OF 1986\*

reviewed by Captain Bernard P. Ingold\*\*

Writing an easy to read, quick reference guide to the Tax Reform Act of 1986 is a formidable task. Yet the authors of *The Tax Reform Act of 1986*, nine members and associates of the New York law firm, Nixon, Hargrave, Devans & Doyle, succeed in their collaborative effort to explain clearly and concisely the significant changes contained in the sweeping and, at times, difficult to comprehend 1986 Act.

The book is logically organized into 15 chapters that track the major sections of the 1986 Act. This organization, coupled with an extensive index, enables the reader to quickly locate areas of interest, and makes this book an extremely valuable ready-reference source.

As is made clear in the preface, *The Tax Reform Act of 1986* is not intended to be a comprehensive, technical analysis of the 1986 tax legislation. The book is also limited in that it does not offer detailed tax planning advice based on the 1986 changes to the Internal Revenue Code. Consequently, readers looking for a source to research complex tax issues or a tool to devise strategies to take full advantage of the benefits available under the new legislation should look elsewhere.

What this book does offer, however, is a good, general survey of the 1986 Tax Reform Act. Every major part of the Act, from taxation of individuals and corporations to deductions for agricultural and timber activities, is discussed in simple, easy to read language, comprehensible even to attorneys with limited tax experience. The authors have thoughtfully included a brief explanation of the old law affected by the 1986 Act and a short, but generally insightful, discussion of the likely impact of some of the more significant provisions of the new law.

Practitioners, particularly those with little time to invest, should find this work to be an excellent source to learn about the general

\*Nixon, Hargrave, Devans & Doyle, *The Tax Reform Act Of 1986*, American Law Institute-American Bar Association Committee On Continuing Professional Education, 1986. Pages: xix, 279, Table Of Cases, Statutes, Rules, and Regulations, Index. Cost \$30.00 (Plus \$2.50 for shipping and handling.). Identify book as order number B-573. Publisher's address: American Law Institute-American Bar Association Committee On Continuing Professional Education, 4025 Chestnut Street, Philadelphia, Pennsylvania, 19104.

\*\*Judge Advocate General's Corps, U.S. Army. Captain Ingold is an instructor in the Administrative and Civil Law Division. The Judge Advocate General's School, Charlottesville, Virginia.

nature, scope, and impact of the 1986 revisions to the Internal Revenue Code. I also recommend this book to attorneys looking for a quick, first-time reference source for the 1986 Tax Reform Act.



## FUNDAMENTALS OF BANKRUPTCY LAW\*

reviewed by Major L. Sue Hayn\*\*

I have never been motivated to study bankruptcy. The topic has always seemed as dry as crackling November leaves and as logical as the theory of special relativity (which includes the tenet that the shortest distance between two points is a curved line). It never made much sense to me that those who earned too little and spent too much should be forgiven their debts while the responsible among us lived on budgets and brown rice. I was, consequently, determined to despise the *Fundamentals of Bankruptcy*. I failed.

My initial impression of the previously dreaded book was comforting. The inclusion of relevant statutory provisions (which appear on the otherwise blank left-hand, even-numbered pages to facilitate review along with the related text on the facing pages) permitted me to consider both the technical statutory guidance and the practical application of these provisions as an integrated unit. As a result of this exercise, I will feel comfortable starting my research in bankruptcy law by reviewing the statute, rather than resisting its use because it is unfamiliar.

The second aspect of the book that captured my attention was the authors' care in choosing and limiting the number of cited cases (around 130 cases are cited), including only those that illustrate critical conceptual points rather than inundating the reader with the trivial. Because many of the cited cases are thoroughly discussed, they serve as an anchor to keep the reader focused on the proper point in the analytical framework.

In addition, the organization of the book makes it very easy to read and will guarantee its inclusion in my research when questions in this area arise. Following a clear and concise discussion of the origins and evolution of bankruptcy law, the

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\*Treister, George M.; Trost, Ronald J.; Forman, Leon S.; Klee, Kenneth N.; & Levin, Richard B., *Fundamentals of Bankruptcy Law*. Philadelphia, Pennsylvania: American Law Institute-American Bar Association, 1986. Pages: x, 456. Index; table of statutes, rules, and regulations. Price: \$85.00. Publisher's Address: American Law Institute-American Bar Association, Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, Pennsylvania 19104.

\*\*Judge Advocate General's Corps, United States Army. Major Hayn is an instructor in the Administrative and Civil Law Division, The Judge Advocate General's School, Charlottesville, Virginia.

authors explain the structure and mechanics of the current bankruptcy system, including the parties involved in the system, the limits of the bankruptcy court's jurisdiction, and the appellate process. The authors then explain how to obtain relief under the bankruptcy code, noting the distinction between voluntary and involuntary petitions and explaining the ramifications of dismissal and of conversion of a case to another type of bankruptcy proceeding. Subsequent chapters delineate the types of property that pass through bankruptcy, administration of the proceeding, distribution of the estate, and tax issues.

While the book also addresses partnerships and Chapter 11 business reorganizations, the most useful chapter in the book for military attorneys is the one that focuses on cases involving individual debtors. This chapter discusses both the debtor's protections and the creditor's rights in clear language, identifying the types of debts that are and are not dischargeable under various circumstances. It also carefully delineates the distinctions between liquidation under Chapter 7 and the voluntary Chapter 13 plan. If called upon to advise a client regarding the requirements and ramifications of filing a petition in bankruptcy, I would certainly turn to this chapter first and be quite surprised if I had to look elsewhere.

No doubt I will continue to eat brown rice at the end of every pay period. At least now, having read and enjoyed *Fundamentals of Bankruptcy*, I understand why some choose or are forced to file bankruptcy petitions, the mechanics of the bankruptcy system, and the ramifications of a discharge in bankruptcy. Now if I could just find a book on budgeting . . .

By Order of the Secretary of the Army:

CARL E. VUONO  
General, United States Army  
Chief of Staff

Official:

R. L. DILWORTH  
Brigadier General, United States Army  
The Adjutant General

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